Hello and thank you for your interest.

I want to provide you with information about my legal background.

I have been practicing law in state and federal trial and appellate courts since 1988. Although my interests and experience run a wide range, my primary areas of focus center around civil rights work, employment and labor issues, and protecting the rights of individuals whose rights have even violated by others, typically governmental actors and large private employers. I have extensive trial experience in these types of cases, and I invite you to look up the numerous reported cases that I have handled. A sample of several of the cases I have handled is attached, and these cases involve various civil, employment and commercial matters, including constitutional rights, discrimination, employment law and sundry types of commercial disputes, such as antitrust, securities, and contract cases.

If you have any questions, please do not hesitate to contact me.

Thank you.

# Airday v. City of New York

406 F. Supp. 3d 313 (S.D.N.Y. 2019)
Decided Sep 13, 2019

14-CV-8065 (VEC)

09-13-2019

George AIRDAY, Plaintiff, v. The CITY OF NEW YORK and Keith Schwam, Defendants.

Nathaniel B. Smith, Law Office of Nathaniel B. Smith, New York, NY, for Plaintiff. Christopher Aaron Seacord, Jeremy Laurence Jorgensen, William Andrew Grey, Paul Frederick Marks, Don Hanh Nguyen, New York City Law Depart. Office of the Corporation Counsel, New York, NY, Garrett Scott Kamen, Fisher & Phillips LLP, Ft. Lauderdale, FL, for Defendants.

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VALERIE CAPRONI, United States District Judge

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Nathaniel B. Smith, Law Office of Nathaniel B. Smith, New York, NY, for Plaintiff.

Christopher Aaron Seacord, Jeremy Laurence Jorgensen, William Andrew Grey, Paul Frederick Marks, Don Hanh Nguyen, New York City Law Depart. Office of the Corporation Counsel, New York, NY, Garrett Scott Kamen, Fisher & Phillips LLP, Ft. Lauderdale, FL, for Defendants.

OPINION AND ORDER

VALERIE CAPRONI, United States District Judge:

Plaintiff George Airday brought this action under 42 U.S.C. § 1983 against the City of New York and Keith Schwam, a former assistant commissioner for the New York City Department of Investigations and former director of the Department's Marshal's Bureau, for a variety of alleged constitutional violations relating to the termination of Plaintiff's tenure as a New York City Marshal. *See* Dkt. 34 (Am. Compl.). Following Judge Sweet's resolution of a motion to dismiss and a motion for summary judgment, *see* Dkts. 31, 92, and after the case's reassignment to the undersigned, only two of Plaintiff's claims remained: one for deprivation of property without due process of law in violation of the Fourteenth Amendment's Due Process Clause, and the other for selective enforcement in violation of the Fourteenth Amendment's Equal Protection Clause. *See* Dkt. 92 (Order & Op. on MSJ) at 46-68. The Court assumes familiarity with the facts and history of this case but recounts details pertinent to these motions.

The Court separated Plaintiff's claims for trial under Fed. R. Civ. P. 42(b), *see* Dkt. 132, and, beginning on May 6, 2019, Plaintiff's due-process claim was tried to a jury. The jury returned a verdict on May 10, 2019, finding (1) that Plaintiff had proven that he had a constitutionally protected property right[1] to continue in his position

317 *317 as a city marshal after his term expired in December 2013, either in holdover status or as a formally

reappointed marshal; (2) that Plaintiff had proven that the City of New York deprived Plaintiff of that constitutionally protected property right without due process of law; (3) that Plaintiff had failed to prove that Defendant Schwam deprived him of his constitutionally protected property right without due process of law; and (4) that Plaintiff had failed to prove any entitlement to compensatory damages for the deprivation. *See* Dkt. 153 (verdict sheet). The jury awarded Plaintiff $1.00 in nominal damages. *Id.*

[1] Although both the Due Process Clause and the case law interpreting it speak of "property" rights, *see, e.g.* , *Ezekwo v. N.Y.C. Health & Hosps. Corp.* , 940 F.2d 775, 782-83 (2d Cir. 1991), at Plaintiff's request, the Court substituted the term "contract right" for "property right" in the final jury charge and on the verdict sheet to minimize the possibility of jury confusion. *See* Dkt. 161 (5/8/19 tr.) at 421-24, 441-42. In keeping with the case law, the Court uses the term "property right" throughout this opinion, but it means to refer to the "contract right" that the jury found Plaintiff had—specifically, a right found in an implied contract with the City of New York to continue in his position as a city marshal after his term expired in December 2013, either in holdover status or as a formally reappointed marshal.

Both sides have made post-trial motions. Defendants have renewed their mid-trial motion for judgment as a matter of law, arguing that, as a matter of law: (a) Plaintiff failed to prove the existence of an implied contract with the City of New York; (b) any such contract would be barred by New York's statute of frauds; (c) Plaintiff failed to prove the City's liability under *Monell v. Department of Social Services* , 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) ; and (d) Plaintiff's due-process claim fails because Plaintiff could have brought a proceeding under Article 78 of the New York Civil Practice Law and Rules. *See* Dkts. 174-76. Plaintiff has also renewed his own mid-trial motion for judgment as a matter of law, arguing that, as a matter of law: (a) Defendant Schwam deprived him of his property right; and (b) he is entitled to compensatory damages. *See* Dkts. 169-70. Plaintiff further requests an order reinstating him to his position as a New York City Marshal and a new trial to determine the amount of his compensatory damages. *See* Dkt. 170 (Mem. in Supp. of Pl.'s Post-Trial Mots.) at 1-2. In the alternative to judgment as a matter of law, Plaintiff requests a new trial on Defendant Schwam's liability. *Id.* at 2.

For the following reasons, Defendants' renewed motion for judgment as a matter of law is GRANTED, and Plaintiff's motions are DENIED.

## STANDARD

Fed. R. Civ. P. 50(b) permits a court to set aside a jury verdict and "direct the entry of judgment as a matter of law" in a movant's favor where, "viewed in the light most favorable to the nonmoving party, 'the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable persons could have reached.' " *Lewis v. Am. Sugar Refining, Inc.* , 325 F. Supp. 3d 321, 347-48 (S.D.N.Y. 2018) (brackets omitted) (quoting *Samuels v. Air Transp. Local 504* , 992 F.2d 12, 13 (2d Cir. 1993) ). A Rule 50(b) motion can be granted "only when there is 'such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or ... such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded jurors could not arrive at a verdict against him." *Id.* (brackets omitted) (quoting *Mattivi v. S. African Marine Corp.* , 618 F.2d 163, 168 (2d Cir. 1980) ). "The court will credit evidence favorable to the moving party 'that is uncontradicted and unimpeached,' " but it must " 'disregard' evidence
318 that the jury is not required to believe, but which is favorable to the moving *318 party." *Id.* (quoting *Reeves v. Sanderson Plumbing Prods.* , 530 U.S. 133, 151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) ).

Fed. R. Civ. P. 59(a)(1) permits a Court to "grant a new trial on all or some of the issues" to any party. Unlike a Rule 50 motion for judgment as a matter of law, "a new trial may be granted even if there is substantial evidence supporting the jury's verdict." *Lewis* , 325 F. Supp. 3d at 332 (quoting *DLC Mgmt. Corp. v. Town of Hyde Park* , 163 F.3d 124, 134 (2d Cir. 1998) ). "Although the trial judge possesses large authority to grant or deny Rule 59(a) motions, ... the 'court ordinarily should not grant a new trial unless it is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.' " *Id.* at 332-33 (some internal quotation marks omitted) (quoting *Smith v. Lightning Bolt Prods., Inc.* , 861 F.2d 363, 370 (2d Cir. 1988) ).

# DISCUSSION

## I. Defendants' Renewed Motion for Judgment as a Matter of Law

To prevail on a Section 1983 claim for deprivation of property without due process, a plaintiff must prove that he had "a property interest, created by state law, in the employment or the benefit that was removed." *Bernheim v. Litt* , 79 F.3d 318, 322 (2d Cir. 1996) ; *see also, e.g.* , *White Plains Towing Corp. v. Patterson* , 991 F.2d 1049, 1061-62 (2d Cir. 1993) ("In order to succeed on a claim of deprivation of procedural due process, a plaintiff must establish that state action deprived him of a protected property or liberty interest."). In "determining which interests are afforded ... protection" under the Fourteenth Amendment's Due Process Clause, "a court must look to whether the interest involved would be protected under state law." *Ezekwo v. N.Y.C. Health & Hosps. Corp.* , 940 F.2d 775, 783 (2d Cir. 1991). If it would not be protected under state law, then the plaintiff's due-process claim fails as a matter of law. *Perry v. Sindermann* , 408 U.S. 593, 602 n.7, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).[2]

> [2] These principles foreclosed Plaintiff's insistence at the final charge conference that the jury did not "need[ ] to hear all of the elements of a traditional contract claim and the elements of a contract" and that the elements of an implied contract under New York law were "misleading and not necessarily applicable" to the jury's determination of the existence of a property right. Dkt. 161 (5/8/19 tr.) at 416-18, 421-25. To determine whether Plaintiff's alleged implied contract with the City of New York "would be protected under state law," *Ezekwo* , 940 F.2d at 783, the jury needed to be instructed in and then apply New York law governing the formation of implied contracts.
>
> The Court notes that when asked directly by the Court, Plaintiff could not identify any case in which a court has found a Fourteenth Amendment Due Process Clause-protected property interest that sprung from a source other than state positive or common law. *See* Dkt. 158 (5/7/19 tr.) at 273-77. (As the Court explained, *see id.* , *Ezekwo* was not such a case: it held, as a matter of law, that the parties, through their conduct, had entered into a contract that "would be protected under state law." *Ezekwo* , 940 F.2d at 783.)

In denying summary judgment on Plaintiff's due-process claim, Judge Sweet held—and this Court proceeded to trial on the basis—that "a factual issue exist[ed] as to whether an implied contract" between Plaintiff and the City of New York "was created as a result of the past practices of holding over City Marshals for reappointment following the expiration of their statutory term." Dkt. 92 at 53. It was Plaintiff's burden, therefore, to prove at trial that he had an implied contract with the City of New York and that one of the terms of that contract was that he would remain in his office after his term expired in December 2013, either in holdover status or as a
319 formally reappointed marshal. *319 If Plaintiff failed to prove that such a contract existed, then his due-process claim fails as a matter of law.

Although the jury found that Plaintiff had proven the existence of such an implied contract, it is apparent that there was no legally sufficient basis for the jury to find for Plaintiff on that issue, Fed. R. Civ. P. 50(a)(1), and that the jury's finding "could only have been the result of sheer surmise and conjecture," *Lewis* , 325 F. Supp.

3d at 347-48 ; *see also id.* at 348 ("The standard of review is the same whether the motion for judgment as a matter of law is submitted prior to the verdict being issued [under Rule 50(a)(1) ], or post-trial [under Rule 50(b) ]."). 

To make a long story short, Plaintiff failed to marshal *any* evidence that any official with whom he allegedly contracted was authorized by New York State or City law to bind the City to an implied contract. Beyond the ordinary common-law elements of an implied contract, New York law "impose[s] additional requirements on municipal contracting 'to protect the public from corrupt or ill-considered actions by municipal officials.' " *NRP Holdings LLC v. City of Buffalo* , 916 F.3d 177, 200 (2d Cir. 2019) (brackets omitted) (quoting *Henry Modell & Co. v. N.Y.C.* , 159 A.D.2d 354, 552 N.Y.S.2d 632, 634 (App. Div. 1st Dep't 1990) ). "Municipal contracts which violate express statutory provisions are invalid" and unenforceable, "even if the purported contracts bear the hallmarks of mutual assent." *Id.* (internal quotation marks omitted); *see also, e.g.* , *Casa Wales Hous. Dev. Fund Corp. v. N.Y.C.,* 129 A.D.3d 451, 11 N.Y.S.3d 31, 32 (App. Div. 1st Dep't 2015) ("It is well settled that where there is a lack of authority on the part of agents of a municipal corporation to create a liability, except by compliance with well-established regulations, no liability can result unless the prescribed procedure is complied with and followed.... The courts of this state have long held that no implied contract to pay for benefits furnished by a person under an agreement which is invalid because it fails to comply with statutory restrictions and inhibitions can create an obligation or liability of the city." (citations omitted)). This principle extends to purported contracts that fail to comply with city charters, *see NRP* , 916 F.3d at 200 ; *Casa,* 129 A.D.3d 451, 11 N.Y.S.3d at 32, as well as to implied contracts, *see, e.g.* , *Parsa v. State of New York* , 64 N.Y.2d 143, 485 N.Y.S.2d 27, 474 N.E.2d 235, 237 (1984) (holding that "a contract implied in fact" is "a true contract based upon an implied promise" and therefore is subject to statutes governing governmental liability on contracts); *Infrastructure Mgmt. Sys. v. Cty. of Nassau* , 2 A.D.3d 784, 770 N.Y.S.2d 119, 121 (App. Div. 2d Dep't 2003) ("Where a statute or local law provides that a contract may be made only by specified officers or boards and in specified manner, no implied contract to pay for benefits furnished by a person under an agreement which is invalid because it fails to comply with statutory restrictions and inhibitions can create an obligation or liability of the municipality.") (brackets omitted) (citing *Seif v. City of Long Beach* , 286 N.Y. 382, 36 N.E.2d 630, 632 (1941) ). "[I]n contracting with a municipality, a party is chargeable with knowledge of the statutes which regulate [the municipality's] contracting powers and is bound by them," and "it is solely at his peril that [he] presumes that the persons with whom he is dealing are acting within the scope of their authority and, since the extent of that authority is a matter of public record, there is a conclusive presumption that he is aware of it." *Walentas v. N.Y.C. Dep't of Ports* , 167 A.D.2d 211, 561 N.Y.S.2d 718, 719 (App. Div. 1st Dep't 1990 (citations omitted)); *see also Garrison Protective Servs, Inc. v. Office of Comptroller* , 92 N.Y.2d 732, 685 N.Y.S.2d 921, 708 N.E.2d 994, 997 (1999) ("This Court *320 has long held that acceptance of services performed under an unauthorized contract does not estop a municipality from asserting the invalidity of the contract.").

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As a matter of law, no New York City official could have bound the City to any implied contract with Plaintiff, and certainly not through "[f]orty years of practices and an established and consistent course of dealings," as Plaintiff contends, Dkt. 180 (Mem. in Opp. to Defs.' Post-Trial Mot.) at 4. The New York City Charter requires that "all contracts" entered into by the City be "approve[d] as to form" by the City's corporation counsel. N.Y.C. Charter § 394(b). It further provides that "[n]o contract or agreement executed pursuant to this charter or other law shall be implemented until," among other requirements, "a copy has been filed with the comptroller." *Id.* § 328(a). Any contract not approved consistent with these procedures is unenforceable as a matter of state law. *JFK Holding Co. v. N.Y.C.* , 68 A.D.3d 477, 891 N.Y.S.2d 32, 33-34 (App. Div. 1st Dep't 2009) ("[E]ven if such agreement had been made it would have been invalid and unenforceable since, pursuant to N.Y. City Charter §§

394(b) and 328(a), any enforceable agreement with the City must be in writing, approved as to form by the Corporation Counsel, and registered with the Comptroller."). At trial, Plaintiff failed to introduce any evidence that any agreement between him and the City of New York regarding any right to continue in his office after the expiration of his term was ever approved by the City's corporation counsel or filed with the City's comptroller. And it was his burden to do so. *See, e.g.* , *Henry Modell & Co.* , 552 N.Y.S.2d at 634 (placing burden on plaintiff to plead and prove that contract with City of New York was authorized consistent with City Charter and Administrative Code). Given this evidentiary failure, no reasonable jury could have had "a legally sufficient basis to find for [Plaintiff] on th[is] issue," Fed. R. Civ. P. 50(a)(1) : any implied contract between him and the City of New York was unenforceable as a matter of state law and therefore was not a property interest protected by the Fourteenth Amendment's Due Process Clause. *See Perry* , 408 U.S. at 602 n.7, 92 S.Ct. 2694 ; *Ezekwo* , 940 F.2d at 782 ; *A.F.C. Enters. v. N.Y.C. Sch. Constr. Auth.* , No. 98-CV-4534, 1999 WL 1417210, at *8-9 (E.D.N.Y. June 29, 1999) (holding that general contractor could not "show a protected property interest" in New York City construction contracts "[b]ecause these contracts were not registered and not binding upon the city" and thus were unenforceable under state law); *see also, e.g.* , *NRP* , 916 F.3d at 200 ("Even though a promise ... may be spelled out from the parties' conduct, a contract between them may not be implied to provide 'rough justice' and fasten liability on the [City] when applicable statutes expressly prohibit
321 it." (quoting *Parsa* , 485 N.Y.S.2d 27, 474 N.E.2d at 237 )).[3] *321 Setting aside lack of compliance with the City Charter, Plaintiff also failed to introduce sufficient evidence for the jury to have reasonably concluded—without engaging in rank speculation or conjecture—that any City official mutually assented to an implied contract that bound the City to permit Plaintiff to continue in his office indefinitely after his term expired. There is no doubt that a substantial bureaucratic infrastructure—a Mayor's Committee on City Marshals, a procedure for the suspension or removal of marshals during their appointed terms of office, and so on—has built up around the New York City Marshals program. *See* Dkt. 180 (Mem. in Opp. to Defs.' Post-Trial Br.) at 5-7. Nor is there any serious dispute that Plaintiff remained in his position as a marshal for many years across several mayoral administrations in both regular and holdover status; that the removal of city marshals was rare (if not unheard of) during that period; that Plaintiff invested significant resources into maintaining his office throughout that time; and that he genuinely, subjectively expected to continue in his office after his term expired in December 2013. *See id.* at 7-9. But Plaintiff introduced no evidence that any New York City official (or officials), through words or conduct, specifically agreed that Plaintiff would be allowed to continue in his office *indefinitely* until he unilaterally elected to retire or was removed from office consistent with City Civil Court Act § 1610—the critical purported contractual term upon which Plaintiff based his demand at trial for damages equivalent to five years' income following his December 2013 termination.[4] *See* Dkt. 158 (5/7/19 tr.) at 179-80. Because "definiteness as to material matters is of the very essence of [New York] contract law," *Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp.* , 93 N.Y.2d 584, 693 N.Y.S.2d 857, 715 N.E.2d 1050, 1053 (1999) (citation omitted), New York law would not recognize any contract, let alone an implied one, on these facts. The jury's finding to the contrary "could only have been the result of sheer surmise and conjecture." *Lewis* , 325 F. Supp. 3d at 347-48. Because Plaintiff bore the burden of proving a property right enforceable under state law, *White Plains Towing Corp.* , 991 F.2d at 1061-62, this evidentiary failure is independently fatal to his due-process claim.

3 Indeed, given the "implicit" nature of the agreement Plaintiff alleges, Dkt. 180 (Mem. in Opp. to Defs.' Post-Trial Br.) at 4, Plaintiff could *never* have proved that he entered into any enforceable implied contract with the City: implicit in Sections 328(a) and 394(b)'s registration and approval requirements is a requirement that the purported contract be in writing. *See JFK Holding Co.* , 891 N.Y.S.2d at 33-34 ; *cf. NRP* , 916 F.3d at 200 (holding, with respect to City of Buffalo charter, that although the "Charter does not expressly direct that municipal contracts be in writing," "that expectation is unmistakably conveyed through the concurrent requirements that city contracts be 'executed' and

'signed' by certain officials.").

In this vein, the Court notes that there was no evidence at trial that any of the authorities that Plaintiff identifies in his opposition to Defendants' motions, *see* Dkt. 180 (Mem. in Opp. to Defs.' Post-Trial Br.) at 4, 11, permitted any City official to enter into a contract binding on the City without complying with the City Charter.

4 Indeed, the only two City officials who testified at trial—Defendant Schwam and Caroline Tang-Alejandro, the current director of the Marshal's Bureau—both testified that they neither took any actions signaling any agreement to allow Plaintiff to continue in his position indefinitely nor had any subjective intention of doing so. *See* Dkt. 161 (5/8/19 tr.) at 359; Dkt. 158 (5/7/19 tr.) at 125-26. Although the Court would grant judgment as a matter of law even in the absence of this testimony, the Court notes that Plaintiff never introduced a shred of evidence to the contrary. *See Lewis* , 325 F. Supp. 3d at 347-48 ("The court will credit evidence favorable to the moving party that is uncontradicted and unimpeached...." (citation omitted)).

For these reasons, Defendants' renewed motion for judgment as a matter of law is granted; the Court enters judgment as a matter of law in the City's favor on Plaintiff's due-process claim. And because the Court has entered judgment in the City's favor on other grounds, it need not address Defendants' arguments that Plaintiff failed to prove that any purported implied contract was supported by consideration; that any such contract would be barred as a matter of law by New York's statute of frauds or New York Public Officers Law § 5 ; that Plaintiff failed to prove the City's liability under *Monell* , 436 U.S. 658, 98 S.Ct. 2018 ; and that Plaintiff's due-process claim fails as a matter of law because Plaintiff could have brought a proceeding under Article 78.[5] *See*
322 Dkt. 176 (Mem. in Supp. of Defs.' Post-Trial Br.) at 5, 7-12.*322 **II. Plaintiff's Renewed Motions for Judgment as a Matter of Law and Motions for a New Trial and for Reinstatement**

5 Defendants did not accompany their renewed motion for judgment as a matter of law with a joint or alternative motion for a new trial. To the extent that Rule 50(b)(2) permits the Court to state whether it would grant a new trial in the alternative to entering judgment as a matter of law, and to the extent Rule 50(c) requires the Court to so state, the Court notes that, for the same reasons that it grants the City judgment as a matter of law, the Court is "convinced that the jury ... reached a seriously erroneous result" with respect to whether Plaintiff had a protected property right to continue in his office after the expiration of his term. *Lewis* , 325 F. Supp. 3d at 332 (internal quotation marks omitted). The Court would therefore grant a new trial on that question if its judgment in the City's favor is later vacated or reversed.

Because the Court has granted judgment as a matter of law to the City on the issue of whether Plaintiff had a due-process-protected property right to continue in his office after his term expired, Plaintiffs' post-trial motions are moot and are denied on that basis. To supply the parties with as complete a record as possible for appeal, however, the Court makes several observations regarding Plaintiff's motions.

## A. Plaintiff's Renewed Motion and Motion for a New Trial Regarding Defendant Schwam's Liability

Even if the Court had not granted Defendants' renewed motion for judgment as a matter of law, and even if its election to do so is later vacated or reversed, several insuperable defects would bar the Court from granting Plaintiff's motion for a judgment as a matter of law that Defendant Schwam deprived Plaintiff of a protected property right without due process. *See* Dkt. 170 (Mem. in Supp. of Pl.'s Post-Trial Mots.) at 9-11.

First, the Court is not persuaded that Plaintiff introduced any evidence upon which the jury could reasonably have found Defendant Schwam liable for any due-process violation, let alone that Plaintiff introduced such overwhelming evidence favoring liability that he is entitled to judgment as a matter of law on that issue. Accepting that Defendant Schwam wanted Plaintiff terminated, even Plaintiff acknowledges that it was then-Mayor Mike Bloomberg—not Defendant Schwam—who undertook the purportedly property-depriving act in

this case: Mayor Bloomberg "signed the letter that reassigned [Plaintiff's] office and badge to another person," thereby terminating Plaintiff from his office. *See* Dkt. 170 (Mem. in Supp. of Pl.'s Post-Trial Mots.) at 9. Furthermore, as Plaintiff puts it, "Schwam did not discuss the subject of [Plaintiff's] removal or replacement with Mayor Bloomberg, with the Mayor's Committee, or with the DOI Commissioner ... and he had no knowledge about whether his sole contact at the Mayor's Office, John Baxter, was involved in the decision to reassign [Plaintiff's] badge." *Id.* at 10. Given these facts, it was wholly reasonable for the jury to conclude that Defendant Schwam was not personally involved in the alleged constitutional violation at issue: although there was undoubtedly evidence that Defendant Schwam believed Plaintiff was not fit to be a City Marshal and therefore wanted him out of his position and that Schwam took steps toward facilitating an end to Plaintiff's tenure, there was absolutely no evidence—and certainly no *incontrovertible* evidence—that Schwam's conduct had any effect or influence on Mayor Bloomberg's decision to reassign Plaintiff's badge. And *that* was the municipal decision that (a) deprived Plaintiff of his alleged property right and (b) supplies the basis for *Monell* liability in this case.[6] Given this profound evidentiary gap, the jury would have been *323 hard-pressed to find that Defendant Schwam was "personally involved" in the particular alleged constitutional violation about which Plaintiff complains, *Warren v. Pataki* , 823 F.3d 125, 136 (2d Cir. 2016), let alone required by the evidence to make such a finding.

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6 The basis for *Monell* liability in this case has been a mystery throughout. *See* Dkt. 154 (tr. of final pretrial conference) at 21-22, 42-50, 144-47; Dkt. 132 (Apr. 10, 2019 order) at 7-9 (directing parties to submit briefs on "whether Defendant New York City is entitled to judgment as a matter of law on either or both of Plaintiff's claims because ... Defendant Schwam could not have been a 'final policymaker' for *Monell* purposes"); Dkt. 137 (Pl.'s Mem. re: *Monell* ); Dkt. 138 (Defs.' Mem. re: *Monell* ); Dkt. 161 (5/8/19 tr.) at 307, 383-85, 401-05; 454-61. As the Court held at the final-charge conference, Dkt. 161 (5/8/19 tr.) at 454-61, Mayor Bloomberg was the only possible "final policymaking authority" whose conduct could have rendered the City liable to Plaintiff for any due-process violation, *City of St. Louis v. Praprotnik* , 485 U.S. 112, 123, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (plurality opinion) ("[O]nly those municipal officials who have final policymaking authority may by their actions subject the government to § 1983 liability.... [T]he challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business." (internal quotation marks and citations omitted)). Furthermore, as the Court also held at the charge conference, Dkt. 161 (5/8/19 tr.) at 454-61, and as Plaintiff's post-trial admissions confirm, there was no evidence at trial supporting Plaintiff's alternative argument that the City could be liable for Defendant Schwam's conduct under a "cat's paw" theory of *Monell* liability, to the extent such a theory is even cognizable, *see, e.g.* , *Kregler v. N.Y.C.* , 987 F. Supp. 2d 357, 365-67 (S.D.N.Y. 2013) ("The development of Second Circuit case law concerning the cat's paw theory is relatively new and evolving.").

In light of Plaintiff's admissions that Mayor Bloomberg "signed the letter that reassigned [Plaintiff's] office and badge to another person"; that Defendant "Schwam did not discuss the subject of [Plaintiff's] removal or replacement with Mayor Bloomberg, with the Mayor's Committee, or with the DOI Commissioner"; and that Schwam "had no knowledge about whether his sole contact at the Mayor's Office, John Baxter, was involved in the decision to reassign [Plaintiff's] badge," Dkt. 170 (Mem. in Supp. of Pl.'s Post-Trial Mots.) at 9-10, the Court is inclined to conclude that the jury could only reasonably have found that Schwam was either speculating or factually incorrect when he said at trial that he "made sure" that Plaintiff's badge was reassigned, *id.* at 10 (quoting Schwam's trial testimony). There is no evidence in the record that Schwam's machinations (such as they were) had any influence on Mayor Bloomberg's decision to terminate Plaintiff's office, and any finding that they did would have required rank speculation on the jury's part.[7] In any event, however, there was ample evidence to support the jury's verdict that Defendant Schwam was not liable, meaning that judgment as a matter of law under Rule 50(b) would be inappropriate. And because the Court is not convinced that the jury reached a seriously erroneous result or that its verdict constituted a miscarriage of justice, *Lewis* , 325 F. Supp.

3d at 332-33, it would not grant Plaintiff's alternative motion for a new trial on this issue even if its grant of judgment as a matter of law to Defendants on the property-right issue, *see supra* Pt. I, is later reversed. *See* Dkt. 170 (Mem. in Supp. of Pl.'s Post-Trial Mots.) at 11.

[7] It appears that Plaintiff elected not to pursue discovery from either former-Mayor Bloomberg or from John Baxter to fill in this evidentiary void.

Finally, even were the Court inclined to conclude as a matter of law that Defendant Schwam violated Plaintiff's due-process rights, it would not grant judgment against Schwam because he would have qualified immunity. Qualified immunity shields a government official from money damages when his conduct did "not violate
324 clearly established statutory or constitutional *324 rights of which a reasonable person would have known." *City of Escondido v. Emmons* , —— U.S. ——, 139 S. Ct. 500, 503, 202 L.Ed.2d 455 (2019) (per curiam) (quoting *Kisela v. Hughes* , —— U.S. ——, 138 S. Ct. 1148, 1152, 200 L.Ed.2d 449 (2018) (per curiam)); *see also, e.g.* , *Davis v. Scherer* , 468 U.S. 183, 197, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984) ("A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue."). While a plaintiff need not identify "a case directly on point" to demonstrate that an asserted federal right was clearly established at the time a defendant acted, the Supreme Court has instructed time and again that "existing precedent must have placed the statutory or constitutional question *beyond debate.* " *Mullenix v. Luna* , —— U.S. ——, 136 S. Ct. 305, 308, 193 L.Ed.2d 255 (2015) (per curiam) (emphasis added) (citation omitted); *see also, e.g.* , *Emmons* , 139 S. Ct. at 504 ; *District of Columbia v. Wesby* , —— U.S. ——, 138 S. Ct. 577, 589-90, 199 L.Ed.2d 453 (2018) ("The rule must be settled law, ... which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority." (internal quotation marks and citations omitted)); *White v. Pauly* , —— U.S. ——, 137 S. Ct. 548, 551-52, 196 L.Ed.2d 463 (2017) (per curiam) ("[G]eneral statements of the law are not inherently incapable of giving fair and clear warning to officers, ... but in the light of pre-existing law the unlawfulness must be apparent...." (internal quotation marks omitted)). To that end, the Supreme Court has described qualified immunity as a "demanding" doctrine protecting "all but the plainly incompetent or those who knowingly violate the law." *Wesby* , 138 S. Ct. at 589 (quoting *Malley v. Briggs* , 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) ). A defendant has qualified immunity from a due-process claim when it was not clearly established at the time of the alleged deprivation that the purported property or liberty interest of which the plaintiff was deprived was, in fact, protected by the Due Process Clause. *See, e.g.* , *Greenwood v. N.Y. Office of Mental Health* , 163 F.3d 119, 123-24 (2d Cir. 1998) (affirming grant of qualified immunity where liberty interest underlying due-process claim was not clearly established
325 when defendant acted).[8] *325 Because Plaintiff's alleged protected property interest—an implied contract with the City of New York obligating the City to allow a city marshal to remain in his office after his term expires, either in holdover status or as a formally reappointed marshal—was purportedly based on "[f]orty years of practices and an established and consistent course of dealings," to borrow Plaintiff's phrasing, Dkt. 180 (Mem. in Opp. to Defs.' Post-Trial Mot.) at 4, Plaintiff's legal entitlement to keep that property interest—and thus the alleged unlawfulness of Defendant Schwam's conduct vis-à-vis that interest—was not "beyond debate" when Schwam acted. *Mullenix* , 136 S. Ct. at 308 (citation omitted). Besides resting on an amorphous amalgamation of unspoken signals implicit in the conduct of many people over many years: the purported contract failed to comply with the New York City Charter, *see supra* Pt. I; Section 5 of the New York Public Officers Law treated Plaintiff's office as "vacant for the purpose of choosing his successor," N.Y. Pub. Off. § 5 ; and no statute, case, or other authority would have indicated to a reasonable official in Defendant Schwam's position (or even to Plaintiff himself) that Plaintiff had an implied contract with the City of New York entitling him to remain in his

office indefinitely. Under these circumstances, Schwam would be entitled to qualified immunity—and judgment against him or a new trial on his liability would thus be inappropriate—even if the Court's grant of judgment in the City's favor is reversed.

[8] In light of these principles, Plaintiff's assertion during trial that "based on longstanding Supreme Court decisions like the *Perry* case ... notice and opportunity to be heard before an interest in a livelihood is cut short is an established principle of law for which qualified immunity does not apply," Dkt. 161 (5/8/19 tr.) at 406-11, is inadequate. *See Pauly* , 137 S. Ct. at 552 ("[I]t is again necessary to reiterate the longstanding principle that clearly established law should not be defined at a high level of generality.... As this Court explained decades ago, the clearly established law must be particularized to the facts of the case.... Otherwise, plaintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." (internal quotation marks and alterations omitted)). In any event, although the general right against deprivation of property without due process was clearly established long ago, a defendant is still qualifiedly immune from a due-process claim unless at the time of the deprivation it was clearly established that the purported property interest was, in fact, a property interest protected by the due-process clause—that is, one protected under state law. *See, e.g.* , *Greenwood* , 163 F.3d at 123-24 ; *see also, e.g.* , *Perry* , 408 U.S. at 602 n.7, 92 S.Ct. 2694 ; *Ezekwo* , 940 F.2d at 782.

Furthermore, contrary to Plaintiff's contention at trial, *see* Dkt. 161 (5/8/19 tr.) at 406, an officer's entitlement to qualified immunity may be evaluated at any stage of the proceeding, including during and after trial. *See, e.g.* , *Ortiz v. Jordan* , 562 U.S. 180, 184, 131 S.Ct. 884, 178 L.Ed.2d 703 (2011) ("A qualified immunity defense, of course, does not vanish when a district court declines to rule on the plea summarily. The plea remains available to the defending officials at trial; but at that stage, the defense must be evaluated in light of the character and quality of the evidence received in court.").

## B. Plaintiff's Renewed Motion Regarding Compensatory Damages and Motion for a New Trial to Determine Such Damages

Even if the Court had not granted Defendants' renewed motion for judgment as a matter of law, the Court would not grant Plaintiff's motion for a judgment that he is entitled to compensatory damages as a matter of law. *See* Dkt. 170 (Mem. in Supp. of Pl.'s Post-Trial Mots.) at 11-16.

As an initial matter, the Court rejects Plaintiff's renewed argument that he did not bear the burden of proving his entitlement to compensatory damages. *See* Dkt. 170 (Mem. in Supp. of Pl.'s Post-Trial Mots.) at 12. The cases supporting the Court's view and contradicting Plaintiff's from and within the Second Circuit are legion. *See, e.g.* , *Kassim v. City of Schenectady* , 415 F.3d 246, 250 (2d Cir. 2005) ("Having shown no harm or loss attributable to the failure to give him a pre-deprivation hearing, [plaintiff] has shown no reason why the court's
326 restriction on compensatory damages deprived him of any entitlement.").[9] In light of these authorities, *326 the Court cannot accept Plaintiff's contention that the Court "should have shifted the burden to the Defendants to prove that [Plaintiff] would not have continued in his office after the constitutionally-required [*sic* ] hearing." *See* Dkt. 170 (Mem. in Supp. of Pl.'s Post-Trial Mots.) at 12.

[9] *See also, e.g.* , *Patterson v. City of Utica* , 370 F.3d 322, 338 (2d Cir. 2004) ("We have held that the plaintiff has the burden to show that the property or liberty deprivation for which he sought compensation would not have occurred had proper procedure been observed.... [I]n order to award plaintiff compensatory damages, the jury must determine that the injuries plaintiff claims he suffered as a result of the deprivation of his liberty interest would not have occurred if [the defendant] had provided plaintiff with a sufficient name-clearing hearing.... If the jury determines that the plaintiff would not have been reinstated or would have been terminated from subsequent employment regardless of whether or not he received a name-clearing hearing, it cannot award him lost wages.") (internal quotation marks omitted); *Robinson v. Cattaraugus Cty.* , 147 F.3d 153, 162 (2d Cir. 1998) ("If a jury finds that a constitutional violation has been proven but that the plaintiff has not shown injury sufficient to warrant an award of compensatory damages, the plaintiff

is entitled to an award of at least nominal damages as a matter of law."); *LeBlanc-Sternberg v. Fletcher* , 67 F.3d 412, 431 (2d Cir. 1995) ("A plaintiff who has proven a civil rights violation but has not proven actual compensable injury, is entitled to an award of nominal damages."); *Miner v. City of Glens Falls* , 999 F.2d 655, 660 (2d Cir. 1993) ("Absent a showing of causation and actual injury, a plaintiff is entitled only to nominal damages.... In this Circuit, the burden is normally on the plaintiff to prove each element of a § 1983 claim, including those elements relating to damages.... It was therefore [plaintiff's] burden to show that the property or liberty deprivation for which he sought compensation would not have occurred had proper procedure been observed."); *McCann v. Coughlin* , 698 F.2d 112, 126 (2d Cir. 1983) ("It is well established that to collect compensatory damages in an action brought pursuant to 42 U.S.C. § 1983, a plaintiff must prove more than a mere violation of his constitutional rights. He must also demonstrate that the constitutional deprivation caused him some actual injury.... When a plaintiff is unable to prove causation, he may collect only nominal damages."); *Oladokun v. Ryan* , No. 06-CV-2330, 2012 WL 1071228, at *2 (S.D.N.Y. Mar. 30, 2012) ("Compensatory damage awards under § 1983 are ordinarily determined according to common-law tort principles, which require a showing of causation and actual injury.... Although a victim of a due process violation is always entitled to nominal damages, a victim may recover compensatory damages only if there was an actual deprivation of liberty or property caused by the violation.... Contrary to the rule adopted in the majority of circuits, the Second Circuit has consistently held that the plaintiff has the burden of showing that the challenged disciplinary action would not have been taken if he had been afforded procedural due process."); *Razzano v. Cty. of Nassau* , No. 07-CV-3983, 2012 WL 1004900, at *4 (E.D.N.Y. Feb. 27, 2012) ("It is well established that to collect compensatory damages in an action brought pursuant to 42 U.S.C. § 1983, a plaintiff must prove more than a mere violation of his constitutional rights. He must also demonstrate that the constitutional deprivation caused him some actual injury." (internal quotation marks omitted)); *Burka v. N.Y.C. Transit Auth.* , 747 F. Supp. 214, 221 (S.D.N.Y. 1990) ("In the Second Circuit, the burden is on the plaintiff to show that the challenged disciplinary action would not have been taken if he had been afforded procedural due process." (internal quotation marks and alteration omitted)).

*Spinelli v. City of New York* , 579 F.3d 160, 175 (2d Cir. 2009), and *Ezekwo* , 940 F.2d at 786, are not to the contrary. In both cases, the Second Circuit held that a Section 1983 plaintiff had proven a due-process violation as a matter of law and remanded the case with instructions to determine compensatory damages. *Spinelli* , 579 F.3d at 175 ; *Ezekwo* , 940 F.2d at 786. In neither case, however, did the court cite, let alone examine, other Second Circuit precedent squarely holding that the plaintiff bears the burden of proving "that the property or liberty deprivation for which he sought compensation would not have occurred had proper procedure been observed," *Patterson* , 370 F.3d at 338. And in neither case was there a reason to do so. In *Spinelli* , by the time the plaintiff had filed her Section 1983 lawsuit, the City of New York had given her the process she was due and had restored her license to operate a gun store—conclusively demonstrating that, had she been given pre-deprivation process, the license would not have been taken in the first place. *See* 579 F.3d at 165. And in *Ezekwo* , it appears that the court was persuaded that the plaintiff had, in fact, demonstrated that she would have been made chief resident had she been given notice and a bona fide opportunity to be heard: although not explicit, the court of appeals expressed deep skepticism of the district court's finding that the decision to deny the plaintiff the chief resident position was genuinely motivated by academic or interpersonal concerns rather
327 than sexism, *see* 940 F.2d at 784, suggesting that, in the Circuit's view, *327 had the plaintiff been given a fair hearing, she would not have been bypassed for promotion. In any event, to the extent *Spinelli* and *Ezekwo* can properly be read to suggest that a plaintiff asserting a due-process claim does not bear the burden of proving his entitlement to compensatory damages, those cases are contrary to the great weight of decisions by the Second Circuit. Faced with such a lopsided choice, the Court feels compelled to follow the weight of authority cited above.[10]

10 The other cases Plaintiff cites, *see* Dkt. 170 (Mem. in Supp. of Pl.'s Post-Trial Mots.) at 13-14, come from the Sixth, Seventh, and D.C. Circuits, all of which follow a rule contrary to the Second's. *See Thompson v. District of Columbia* , 832 F.3d 339, 347 & n.3 (D.C. Cir. 2016) (collecting cases). With all respect to those courts of appeals, this Court is

bound by Second Circuit precedent.

The Court rejects Plaintiff's contention that the Second Circuit's admonition in *Miner* that "the burden is normally on the plaintiff to prove each element of a § 1983 claim, including those elements relating to damages," 999 F.2d at 660, is "dicta." *See* Dkt. 170 (Mem. in Supp. of Pl.'s Post-Trial Mots.) at 14-16. In that case, the court affirmed the district court's award of lost wages and pension benefits to the plaintiff precisely because he had satisfied his burden of proving his entitlement to compensatory damages, *id.* , meaning that the court's articulation of the burden was very much ratio decidendi, not obiter dictum. In any event, neither Plaintiff's characterization of *Miner* 's language nor his efforts to distinguish that case on its facts, *see* Dkt. 170 (Mem. in Supp. of Pl.'s Post-Trial Mots.) at 15-16, gets him past the raft of other authorities confirming that Plaintiff bore the burden of proving "that the property or liberty deprivation for which he sought compensation would not have occurred had proper procedure been observed," *Patterson* , 370 F.3d at 338.

The governing legal principle having been established, it follows that Plaintiff is not entitled to a judgment that he is entitled to compensatory damages as a matter of law. Plaintiff introduced no evidence, let alone conclusive evidence, that Mayor Bloomberg—the person who reassigned Plaintiff's badge and thereby removed him from office—would not have done so had Plaintiff first been given notice and an opportunity to be heard. Indeed, the jury did not even hear evidence that Mayor Bloomberg would have reached a different conclusion had Defendant Schwam not contacted John Baxter about Plaintiff: as Plaintiff acknowledges, Mayor Bloomberg "signed the letter that reassigned [Plaintiff's] office and badge to another person"; Defendant "Schwam did not discuss the subject of [Plaintiff's] removal or replacement with Mayor Bloomberg, with the Mayor's Committee, or with the DOI Commissioner"; and Schwam "had no knowledge about whether his sole contact at the Mayor's Office, John Baxter, was involved in the decision to reassign [Plaintiff's] badge," Dkt. 170 (Mem. in Supp. of Pl.'s Post-Trial Mots.) at 9-10. Judgment as a matter of law as to entitlement to compensatory damages would, therefore, be inappropriate even if the Court's grant of judgment to the City is reversed. And because the Court is not convinced that the verdict on this point was seriously erroneous or a miscarriage of justice, *Lewis* , 325 F. Supp. 3d at 332-33, granting Plaintiff's alternative motion for a new trial on this issue would not be appropriate. *See* Dkt. 170 (Mem. in Supp. of Pl.'s Post-Trial Mots.) at 16.

Finally, the Court must reject Plaintiff's peculiar analogy to *Patterson v. Coughlin* , 905 F.2d 564, 568-70 (2d Cir. 1990), in which the Second Circuit affirmed that a plaintiff ordinarily bears the burden of proving entitlement to compensatory damages but held that the burden had shifted to the defendant prison officials because, by barring the plaintiff from calling witnesses at his administrative trial and claiming ignorance of the
328 identities and whereabouts of the inmate witnesses that *328 the plaintiff wished to call, the defendants had made it impossible for the plaintiff to carry his burden. Airday is by no means akin to the prison-inmate plaintiff in *Patterson* . There is no indication that Defendants interfered with Plaintiff's ability to support his claim for compensatory damages with evidence from former-Mayor Bloomberg, John Baxter, or other City officials who could shed light on whether Mayor Bloomberg would have reassigned Plaintiff's badge if Plaintiff been given notice and an opportunity to be heard. If such evidence existed, it was out there for Plaintiff's taking. The absence of it at trial "must be laid squarely at the door of the [Plaintiff] and no one else." *Patterson* , 905 F.2d at 569.

* * *

For all these reasons, the Court would deny Plaintiff's post-trial motions even if its grant of judgment as a matter of law to the City of New York is reversed.[11]

11 Because the Court has granted judgment to Defendants on the due-process claim, the question of appropriate remedies for that claim is moot. The Court therefore expresses no opinion on Plaintiff's request for an order reinstating him as a marshal. *See* Dkt. 170 (Mem. in Supp. of Pl.'s Post-Trial Mots.) at 1-2, 4-7.

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## CONCLUSION

For the foregoing reasons, Plaintiff's post-trial motions are DENIED, and Defendants' renewed motion for judgment as a matter of law is GRANTED. Judgment as a matter of law is granted to Defendant the City of New York on Plaintiff's due-process claim.

The parties must appear for a conference on **October 3, 2019, at 2:00 P.M.** The parties must be prepared to discuss next steps on Plaintiff's equal-protection claim. *See* Dkt. 132 at 4-6.

The Court reminds the parties that it is happy to refer them to mediation or to Magistrate Judge Parker for settlement discussions upon a joint request.

Pursuant to Fed. R. Civ. P. 54(b), no judgment shall issue until further order of this Court.

## SO ORDERED.

# Airday v. City of N.Y.

Decided Nov 30, 2018

14 Civ. 8065

11-30-2018

GEORGE AIRDAY, Plaintiff, v. THE CITY OF NEW YORK, KEITH SCHWAM, and DAVID M. FRANKEL, Defendants.

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Sweet, D.J.

## OPINION

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2 Jeremy L. Jorgensen *2 **Sweet**, **D.J.**

Plaintiff George Airday ("Airday") has moved *in limine* to exclude the facts underlying his December 11, 2011 arrest.

Defendants the City of New York ("the City"), Keith Schwam ("Schwam"), and David Frankel ("Frankel") (collectively, the "Defendants") have moved *in limine* (1) to exclude testimony that Plaintiff's damages exceed a nominal amount; (2) to exclude evidence about misconduct by comparators that allegedly occurred before January 1, 2002; and (3) to exclude evidence that Defendants violated Plaintiff's due process rights under the Fourteenth Amendment by removing him from office without notice in December 2013.

Based on the facts and conclusions set forth below, the Plaintiff's motion is granted, and the Defendants' motions are denied.

## I. Prior Proceedings

On October 7, 2014, Plaintiff filed a complaint against Defendants, alleging violations of 42 U.S.C. §§ 1983
3 and 1988, as well as the First, Fifth and Fourteenth Amendments of *3 the United States Constitution. Specifically, Plaintiff alleged that Defendants (1) retaliated against him in violation of his First Amendment right of free speech; (2) violated his Fourteenth Amendment procedural and substantive due process rights; and (3) violated his Fourteenth Amendment right to equal protection. Plaintiff filed an amended complaint on October 8, 2015. ECF No. 34. On January 10, 2018, Defendants filed their motion for summary judgment, ECF No. 74, which this Court granted in part and denied in part, ECF No. 92.

The present motions *in limine* were filed by Plaintiff on August 28, 2018, and by Defendants on August 27, 2018. All motions *in limine* were heard and marked fully submitted on September 26, 2018.

Trial is scheduled to begin on December 17, 2018.

## II. The Facts

On January 24, 1984, Plaintiff was appointed to a five-year term as a New York City Marshal ("City Marshal"). *See* Airday Dep. Tr. at 17:04-05, 20:22-25. On January 22, 2009, Plaintiff was re-appointed by Mayor Michael
4 Bloomberg for a *4 five-year term expiring on December 20, 2013. *See* Kamen Decl. Ex. A, ECF No. 97.

In December 2011, Plaintiff was arrested and charged with assault in the third degree, menacing in the third degree, and harassment in the second degree following an incident with his girlfriend. *See* Kamen Decl. Ex. L., ECF No. 77-2, at 121. Schwam was informed of this arrest, but took no disciplinary action against Airday at that time. *See* Schwam Dep. Tr. at 71:12-85:10. Then, in January 2012, Plaintiff was arrested for unlawful possession of a firearm and violation of a temporary order of protection that was put in place after his December 2011 arrest. *See* Kamen Decl. Ex. L, ECF No. 77-2, at 122. Citing this arrest, Schwam informed Airday that the Department of Investigation would seek his removal and immediate suspension unless he first offered to resign. *See* Pl.'s Br. Ex. 1, ECF No. 100-1. On June 11, 2012, Plaintiff was suspended from serving as a City Marshal. *See* Kamen Decl. Ex. W., ECF No. 77-2, at 195-97. On June 11, 2013, Plaintiff's suspension was lifted. *See* Tang-Alejandro Dep. Tr. at 61:23-62:10.

Later that year, Schwam recommended to the Office of the Mayor that Airday be replaced by a new City
5 Marshal upon expiration of Airday's term on December 20, 2013. *See* Schwam *5 Dep. Tr. at 65:03-67:17. Schwam testified that this decision was based on information revealed by Airday's January 2012 arrest, namely, (1) Airday's possession of an unregistered firearm; and (2) Airday's possession of firearms in violation of the

court order that resulted from the December 2011 arrest. *See id*. at 69:11-70:11. Schwam further testified that the City Marshal position involves "very serious responsibilities" that "call for uncompromised integrity [and] mature judgment," as well as "scrupulous adherence to rules, laws and court orders." *Id*. at 70:13-70:24.

On December 23, 2013, Plaintiff was notified that his term of office had expired, and that his successor had been appointed to that office pursuant to Section 1601 of the New York City Civil Court Act. *See* Defs.' Reply Br. Ex. C, ECF No. 111. Airday contends that this action violated his procedural due process rights because Defendants departed from the long-established practice of continuing the offices of City Marshals after the expiration of their five-year terms. AC ¶¶ 89, 108-10. In addition, Plaintiff claims that Defendants violated his equal protection rights because other City Marshals, who were accused of more serious misconduct, were not
6 similarly disciplined. *See* AC ¶¶ 53-57, 120-22. *6 **III. Plaintiff's Motion to Exclude Evidence Regarding the Facts Underlying His December 21 , 2011 Arrest**

Pursuant to Rules 401(b), 403 and 608 of the Federal Rules of Evidence, Plaintiff has moved to exclude evidence pertaining to the facts giving rise to his arrest on December 21, 2011 arrest.

Specifically, Plaintiff seeks to exclude the following facts:

> 1. That the criminal complaint relating to Airday's December 21, 2011 arrest charged that Airday "'shoved' his fiancée to the ground, 'struck her several times in the face with an open hand,' [] threatened to 'kill' her, and . . . that [P]laintiff's actions caused his fiancée to sustain 'bruising and swelling to her lower back and face and experienced annoyance, alarm and fear for her physical safety.'" *See* Pl.'s Br., ECF No. 100, at 2-3.
> 2. That on "January 10, 2012, the Bronx District Attorney's Office notified the Department of Investigations that the 'injuries [allegedly caused by Plaintiff to the complainant [were] more severe than originally believed and that she had some broken ribs.'" *See id*. at 3.

Evidence is relevant if it has "any tendency to make a [material] fact more or less probable than it would be without the evidence." *United States v. White*, 692 F.3d 235, 246 (2d Cir. 2012), *as amended* (Sept. 28, 2012)
7 (quoting Fed. R. Evid. *7 401). "A material fact is one that would affect the outcome of the suit under the governing law." *Arlio v. Lively*, 474 F.3d 46, 52 (2d Cir. 2007) (citation omitted). Unless an exception applies, all relevant evidence is admissible. Fed. R. Evid. 402. One such exception is the rule that relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Fed. R. Evid. 403. Further, while the standard for relevance is "very low," *United States v. Al-Moayad*, 545 F.3d 139, 176 (2d Cir. 2008), courts have "broad discretion to balance probative value against possible prejudice," *United States v. Bermudez*, 529 F.3d 158, 161 (2d Cir. 2008).

Here, the details of the domestic violence incident meet the relevance standard. Schwam testified that he recommended appointing a new City Marshal upon termination of Airday's term in 2013 because of the "conduct and judgment that was exposed in the aftermath of [Airday's] two arrests in December 2011 and January 2012." *See* Schwam Dep. Tr. at 69:06-69:10. This consideration could have included the facts underlying the arrests. The details of the domestic violence incident, as described above, are thus relevant in
8 light of *8 Plaintiff's claim that Schwam did not take comparable action with respect to other City Marshals who engaged in similar conduct.

Still, the probative value of these facts is limited. Schwam testified that he did not take disciplinary action against Airday immediately after learning of the December 2011 arrest, but rather waited until after the January 2012 arrest. *Id*. at 85:04-10. To be sure, Schwam's testimony referenced Airday's December 2011 arrest in explaining his decisionmaking. *See id*. at 70:25-71:07 ("[T]he fact that the [M]arshal having been arrested once failed to do the things that were required of him . . . and that he had not done those things . . . said to me that we need to replace Marshal Airday."). But Plaintiff does not seek to exclude the ultimate fact of the December 2011 arrest -- merely the specific details, described above, underlying that arrest. Schwam never testified that these details had any impact on his recommendation as to Plaintiff's reappointment. *See id*. at 68:24-71:11.

Accordingly, Plaintiff's motion to exclude evidence regarding the facts underlying his December 2011 arrest is
9 granted. *9

## IV. Defendants' Motion to Exclude Testimony About Alleged Comparators

Defendants have moved to exclude evidence about acts of misconduct by comparators that allegedly occurred before January 1, 2002, the day on which former Mayor Bloomberg assumed office.

Plaintiff has raised a selective treatment claim based on allegations that he was treated differently than similarly situated City Marshals who also engaged in misconduct. A selective treatment claim requires that comparators and the Plaintiff be "similarly situated in all material aspects," including that the Plaintiff and those he maintains were similarly situated "were subject to the same workplace standards." *Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000).

Defendants contend that limiting the scope of comparator evidence to Mayor Bloomberg's administration is reasonable because "compar[ing] workplace standards across administrations would be akin to comparing
10 apples and oranges." Defs.' Br., ECF No. 95, at 4. However, the crux of Plaintiff's *10 selective treatment claim is that Schwam--not Mayor Bloomberg--was the effective decisionmaker and thus the relevant actor.

Accordingly, Defendants' motion to limit evidence of comparators before January 1, 2002 is denied. Plaintiff may present evidence of comparators during Schwam's tenure as Director of the Marshal's Bureau.

## V. Defendants' Motion to Exclude Testimony Regarding A Violation of Plaintiff's Due Process Rights

Defendants have moved to preclude Plaintiff from offering evidence that Defendants violated his due process rights by removing him from office without notice in December 2013.

Defendants contend that the availability of an adequate post-deprivation procedure for reviewing the propriety of the dismissal, namely an Article 78 proceeding, forecloses any viable due process claim.

However, the law in this Circuit makes clear that a state or local government satisfies procedural due process
11 requirements by providing a meaningful post-deprivation remedy *11 only when the conduct in question is "random and unauthorized" such that a pre-deprivation procedure would be impracticable. *Rivera-Powell v. N.Y.C. Bd. of Elections*, 470 F.3d 458, 465 (2d Cir. 2006); *G.I. Home Developing Corp. v. Weis*, 499 F. App'x 87, 88 (2d Cir. 2012) (summary order) ("In assessing a state or local government's compliance with procedural due process, we distinguish between (1) claims based on established governmental procedures, and (2) claims based on random or unauthorized acts by public employees."). "In contrast, when the deprivation is pursuant to an established state procedure, the state can predict when it will occur and is in the position to provide a pre-

deprivation hearing." *Rivera-Powell*, 470 F.3d at 465 (citing *Hellenic Am. Neighborhood Action Comm. v. City of N.Y.*, 101 F.3d 877, 880 (2d Cir. 1996)). Ultimately, whether an official's actions were random and unauthorized or taken pursuant to established state procedures is a fact-specific inquiry. *See id.* at 466.

Because it has not been conclusively established that the allegedly unlawful actions were random or unauthorized, Defendants' motion to preclude Plaintiff from presenting evidence of his due process claim is denied. *12

## VI. Defendants' Motion to Exclude Evidence of Compensatory Damages

Defendants have moved to exclude testimony from Plaintiff showing that his damages exceed a nominal amount.

According to Defendants, Plaintiff cannot prove that he suffered actual injury from his termination because Plaintiff's term as the City Marshal had a known expiration date of December 20, 2013, and Mayor Bloomberg exercised his legal authority to appoint a new City Marshal to that position once Plaintiff's term expired. Defs.' Br., ECF No. 95, at 2-3. Plaintiff, however, alleges that there was an established practice of holding over City Marshals for reappointment following the expiration of their statutory term, and that he suffered actual harm in the form of lost income as a result of Schwam's unilateral removal of Airday from office without notice or an opportunity to be heard. Pl.'s Opp. Br., ECF No. 108, at 1-2, n.1.

If Plaintiff is able to establish at trial that Defendants deprived him of his property interest in his employment without due process of law, he would be entitled to nominal damages based on the deprivation itself, and may, in *13 addition, be entitled to collect compensatory damages if he can prove that he suffered actual injury as a result of the denial of due process. *Patterson v. City of Utica*, 370 F.3d 322, 337 (2d Cir. 2004) (citing *Carey v. Piphus*, 435 U.S. 247, 266 (1978)).

In light of this, Defendants' motion to exclude evidence of compensatory damages is denied.

## VII. Conclusion

For the foregoing reasons, Plaintiff's motion *in limine* is granted; Defendant's motions *in limine* are denied.

It is so ordered. **New York**, **NY**
**November 30**, **2018**

**/s/** _____

**ROBERT W. SWEET**

**U.S.D.J.**

# Mizrahi v. City of N.Y.

Decided Aug 13, 2018

15-CV-6084 (ARR) (LB)

08-13-2018

SHULAMIT MIZRAHI, Plaintiff, v. THE CITY OF NEW YORK, POLICE OFFICER JUN CHEN, POLICE OFFICER JOSEPH CORRADO, THE NEW YORK AND PRESBYTERIAN HOSPITAL (a/k/a NEW YORK PRESBYTERIAN HOSPITAL), NOVLEEN NELSON, and SATISH ABEELUCK, Defendants.

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ROSS, United States District Judge

## OPINION & ORDER

NOT FOR PUBLICATION ROSS, United States District Judge:

Plaintiff, Shulamit Mizrahi, brings this civil rights action under 42 U.S.C. § 1983 and New York state common law against the City of New York, Police Officer Jun Chen, and Police Officer Joseph Corrado (collectively, "City defendants") and New York Presbyterian Hospital ("NYPH"), Emergency Medical Technician (EMT) Novleen Nelson, and EMT Satish Abeeluck (collectively, "EMT defendants") stemming from her interaction with the aforementioned police officers and EMTs on August 10, 2015.[1] Plaintiff alleges that, on that date, the individual defendants unlawfully entered her apartment, seized her, and took her to the hospital against her will in violation of her Fourth Amendment rights. Plaintiff additionally asserts the following state law causes of action: false imprisonment, intentional infliction of emotional distress (IIED), negligent infliction of emotional
2 distress (NIED), and, as against NYPH, negligent *2 hiring, training, and supervision.[2] On January 5, 2018, defendants moved for summary judgment on all of Mizrahi's claims. Mizrahi cross-moved for partial summary judgment, seeking a determination that exigent circumstances did not justify the individual defendants' warrantless entry into her apartment and that the individual defendants did not have probable cause to confine and take her to the hospital against her will.[3]

1 Unless I specify a particular group of defendants, "defendants" refers to both the EMT defendants and the City defendants.

2 In her opposition to the defendants' motions for summary judgment, Mizrahi agreed to drop her negligent misrepresentation, negligent care and treatment, and general negligence claims. *See* Pl.'s Mem. of Law in Opp'n to Defs.' Mots. for Summ J. 2 ("Pl.'s Opp'n"), ECF No. 125.

3 The City defendants argue that plaintiff's motion "is more properly construed as a motion to strike pursuant to Rule 12(f)" and is, therefore, untimely and should be denied. City Defs.' Mem. of Law in Opp'n to Pl.'s Mot. for Partial Summ. J. 22-23 ("City Defs.' Opp'n"), ECF No. 141-2. The City defendants are incorrect. "A party may move for summary judgment, identifying each claim *or defense*—or the part of each claim *or defense*—on which summary judgment is sought." Fed. R. Civ. P. 56(a) (emphasis added). The plain language of the rule clearly allows plaintiff to seek summary judgment on the City defendants' defenses. The 2010 amendments to the rule confirm this interpretation:

"The first sentence [of Rule 56(a)] is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense." Civil Rules Advisory Committee, Notes on 2010 Amendment to Rule 56, Subdivision (a). Accordingly, I reject this argument and construe plaintiff's motion for partial summary judgment as what it is.

For the reasons set forth below, defendants' motions are granted in part and denied in part. Specifically, I deny the individual EMT defendants' motion for summary judgment on plaintiff's unlawful entry and false arrest claims under § 1983, as well as plaintiff's state false imprisonment claim. I also deny their motion for summary judgment on plaintiff's federal claims based on qualified immunity, as their entitlement to qualified immunity under federal law is now foreclosed. I grant their motion for summary judgment on plaintiff's remaining state law claims. Furthermore, I deny NYPH's motion for summary judgment on plaintiff's state false imprisonment claim but grant NYPH's motion as to plaintiff's other state law claims.

As to the City defendants, I deny the defendant police officers' motion for summary judgment on plaintiff's unlawful entry, false arrest, and failure to intervene claims under § 1983, as well as plaintiff's state false imprisonment claim. I grant their motion for summary judgment *3 on plaintiff's remaining state law claims. I deny the City's motion for summary judgment on plaintiff's state false imprisonment claim but grant the City's motion as to plaintiff's other state law claims.

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As to plaintiff, I grant her motion for partial summary judgment dismissing the individual defendants' defense of exigent circumstances for their allegedly unlawful entry into her apartment. I also grant her summary judgment on the defendant police officers' affirmative defense of qualified immunity on this basis. In addition, I grant plaintiff's motion for partial summary judgment dismissing the defendant police officers' defense of probable cause as to her false arrest claim. However, the defendant police officers' defense of qualified immunity on this claim remains open.

## BACKGROUND

The facts described below are taken from the parties' depositions, affidavits, exhibits, Rule 56.1 statements, and responsive Rule 56.1 statements.[4] The facts are undisputed unless otherwise noted. I draw "all factual inferences in favor of the party against whom summary judgment is sought, viewing the factual assertions in [the] materials . . . in the light most favorable to the party opposing the motion." *Rodriguez v. City of New York*, 72 F.3d 1051, 1061 (2d Cir. 1995).

4 *See* City Defs.' Stmt. of Undisputed Facts Pursuant to Local Civil R. 56.1 ("City Defs.' 56.1"), ECF No. 131; EMT Defs.' Stmt. of Undisputed Facts Pursuant to Local Civil R. 56.1 ("EMT Defs.' 56.1"), ECF No. 123; Pl.'s Stmt. of Undisputed Facts Pursuant to Local Civil R. 56.1 ("Pl.'s 56.1"), ECF No. 140-17; Pl.'s Counter Stmt. in Resp. to Defs.' Stmts. of Undisputed Facts Pursuant to Local Civil R. 56.1 ("Pl.'s Resp. 56.1"), ECF No. 126; EMT Defs.' Counter Stmt. in Resp. to Pl.'s Stmt. of Undisputed Facts Pursuant to Local Civil R. 56.1 ("EMT Defs.' Resp. 56.1"), ECF No. 127; City Defs.' Counter Stmt. in Resp. to Pl.'s Stmt. of Undisputed Facts Pursuant to Local Civil R. 56.1 ("City Defs.' Resp. 56.1"), ECF No. 141-1.

On the evening of August 10, 2015, two police officers, defendants Chen and Corrado, and two EMTs, defendants Nelson and Abeeluck, responded to a 911 call from an unidentified *4 though self-described "friend" of the plaintiff's. Pl.'s 56.1 ¶ 9; City Defs.' Resp. 56.1 ¶ 9; EMT Defs.' Resp. 56.1 ¶ 9. The caller, later identified as Asher Adry, told the 911 dispatcher that he thought his "friend" was "going to hurt herself." Decl. of Cherie Brown in Supp. of City Defs.' Summ. J. Mot. ("Brown Decl."), Ex. I, Audio File 911MSG_01 at 00:13-00:17, ECF No. 130-9; City Defs.' 56.1 ¶ 7; Pl.'s Resp. 56.1 p. 4, ¶ 7. In that call, Adry informed the 911 operator that he had spoken with plaintiff a few minutes earlier. City Defs.' 56.1 ¶ 8. He provided the 911

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operator with plaintiff's name—though he misspelled her last name—as well as a general description of plaintiff's address (the "old building" at "East 2nd Street and Avenue P"). Pl.'s 56.1 ¶ 10. He also stated that he thought plaintiff's apartment was "on the third floor . . . 3A or something like that" but, when asked for the plaintiff's exact address, responded "I have no idea." Brown Decl. Ex. I, at 00:40-01:15; City Defs.' 56.1 ¶ 12; Pl's Resp. 56.1 ¶ 12. Adry informed the operator that Mizrahi's name was on the door to the building and offered to meet the police there. City Defs.' 56.1 ¶¶ 13-14. When the 911 dispatcher asked if he believed plaintiff was "suicidal," Adry answered, "obviously yes." *Id*. ¶ 9.

At 8:43 PM, the 911 dispatcher assigned the job of responding to the 911 call to EMTs Nelson and Abeeluck, who were operating an ambulance at the time. *Id*. ¶ 18; EMT Defs.' 56.1 ¶ 6. The 911 dispatcher relayed to the individual EMT defendants the address Adry told her as well as the following information: an unidentified male caller said "friend trying to hurt herself" and "female patient 48[,] suicidal, location old building, possible [a]partment 3A." Decl. of Gregory J. Radomisli in Supp. of EMT Defs.' Summ J. Mot. ("Radomisli Decl."), Ex. H ("Nelson Dep."), at 141:6-142:18, ECF No. 121-8; Pl.'s Resp. 56.1 p. 6, ¶ 19. EMTs Nelson and Abeeluck proceeded to the location that the 911 dispatcher told them to go to but did not see anyone who was in need of
5 assistance. City Defs.' 56.1 ¶ 21; EMT Defs.' 56.1 ¶ 6. EMTs Nelson *5 and Abeeluck called the 911 dispatcher and requested that he or she call back the person who made the initial 911 call to get more information. City Defs.' 56.1 ¶ 22. However, when 911 traced Adry's phone number and called him, the calls went to Adry's voicemail. *Id*. ¶ 23.

At approximately 8:45 PM, 911 dispatch relayed to Officers Chen and Corrado information similar to what the EMTs had received, including that the 911 caller was a male who stated that his friend was "trying to hurt herself." *Id*. ¶¶ 25-26. The two officers then arrived at the location where they were told to go but, after canvassing the intersection, observed no one in distress. *Id*. ¶¶ 28-29. Like the EMTs, they called 911 and asked for more information. *Id*. ¶ 27. Receiving none, Officers Chen and Corrado marked the job "unfounded" at 9:02 PM and proceeded to their next assignment. *Id*. ¶ 29; Radomisli Decl. Ex. J ("Chen Dep."), at 43:11-24, ECF No. 121-10.

Approximately thirty minutes after plaintiff and Adry spoke on the phone, Adry arrived at plaintiff's apartment. City Defs.' 56.1 ¶ 30; Pl.'s Resp. 56.1 p. 9, ¶ 30. Adry informed plaintiff that the police were coming and that he had told them that she was "crazy" and suicidal. EMT Defs.' 56.1 ¶¶ 8-9; Radomisli Decl. Ex. G ("Mizrahi Dep."), at 110:25-111:20, ECF No. 121-7. Plaintiff did not believe Adry and asked him to leave, which he did. City Defs.' 56.1 ¶ 32; Pl.'s Resp. 56.1 p. 9, ¶ 32.

At approximately 9:05 PM, a 911 operator called Adry for more information about plaintiff's address, and Adry provided plaintiff's correct apartment number. Brown Decl. Ex. M, Audio_74105 at 00:24-00:50; Pl.'s Resp. 56.1 p. 9, ¶ 33. The 911 operator relayed this information to EMTs Nelson and Abeeluck, and EMT Nelson responded that they needed plaintiff's exact address, not just the apartment number. Brown Decl. Ex. M, Audio_74107 at 00:10-00:19. The 911 operator again called Adry to ask for plaintiff's exact address and Adry
6 *6 restated that it was "the old building" at the intersection of 2nd Street and Avenue P but that he did not know plaintiff's exact address. Brown Decl. Ex. M, Audio _74108 at 00:24-00:50. The 911 operator conveyed this information to the individual EMT defendants. *Id*. Audio_74109 at 00:05-00:30. After driving their ambulance around the vicinity of East 2nd Street and Avenue P, EMTs Nelson and Abeeluck located a building that matched the 911 caller's description at East 3rd Street and Avenue P. City Defs.' 56.1 ¶ 34. Upon seeing an apartment number that matched the one that the 911 caller had provided, EMT Nelson notified the dispatcher of the correct address and requested police presence. *Id*. ¶¶ 35-36.

Around twenty minutes later, 911 dispatch notified Officers Chen and Corrado that there was an emotionally disturbed person (EDP) at 1679 East 3rd Street, Apartment 302, and the two proceeded to that location. *Id.* ¶ 38. There is no indication that the officers knew that this call related to the earlier call about Mizrahi. *See* Chen Dep. 52:14-20. After the police officers arrived, one of the four defendants rang plaintiff's bell to gain entry into the apartment complex. City Defs.' 56.1 ¶ 39. Presumably over an intercom, plaintiff asked who was there and one of the officers answered, "Police." *Id.* ¶ 40. Plaintiff "buzzed them in," meaning that she unlocked the door electronically, allowing them entry into the building. *Id.* ¶ 41; EMT Defs.' 56.1 ¶ 12. The four defendants then proceeded to plaintiff's apartment on the third floor and Officer Chen knocked on her door. City Defs.' 56.1 ¶ 43; EMT Defs.' 56.1 ¶ 13. Plaintiff asked who was there, and Officer Chen stated, "Police," and EMT Nelson stated, "EMS." City Defs.' 56.1 ¶ 44; EMT Defs.' 56.1 ¶ 14. At some point before the individual defendants entered the apartment, plaintiff set up her cell phone to record the ensuing encounter. City Defs.' 56.1 ¶ 42.

The parties' characterizations of the individual defendants' entry into plaintiff's apartment differs. In her 56.1
7 statement, plaintiff asserts that the EMTs and police officers *7 "pushed their way into her apartment" and EMT Nelson "immediately started yelling orders at Mizrahi to put away her small beagle, who was barking . . . ." Pl.'s 56.1 ¶¶ 12-13. At her 50-h hearing, plaintiff described the individual defendants' actions as an "invasion" and a "kidnapping" but also said she "let them in . . . , I mind my own business and they open my door and take me." Radomisli Decl. Ex. L ("Mizrahi 50-h Tr."), at 51:16-24. When asked at her deposition whether she opened the door to her apartment "voluntarily to allow [the officers] in," Mizrahi Dep. 193:25-194:2, plaintiff responded, "Yes. I—can I—I didn't open. I unlock it. And then she pushed the door in." *Id.* at 194:3-6. She also said, "Ms. Nelson, she burst in with the two males. . . . So they basically barged in. She stormed in. I unlocked the door, but they stormed in." *Id.* at 293:21-24. According to the defendants, plaintiff opened her door and let them in without objection. EMT Defs.' 56.1 ¶ 15; City Defs.' 56.1 ¶¶ 45-46.

Once inside the apartment, EMT Nelson told Mizrahi that a "friend" called 911, saying that Mizrahi wanted to hurt herself. Pl.'s 56.1 ¶ 14; City Defs.' Resp. 56.1 ¶ 14. The plaintiff told EMT Nelson that she did not intend to hurt herself and indicated that this "friend," whom she assumed was Adry, was not a "true friend." Pl.'s 56.1 ¶ 15; Brown Decl. Ex. H, EMS081015 at 01:00-01:15. After plaintiff explained that she told Adry that she had been "down" but "nothing else," Brown Decl. Ex. H, at 01:19-01:25, EMT Nelson asked plaintiff about her medical history. *Id.* at 01:25. Plaintiff responded that she did not take medications and had no medical problems. *Id.* at 01:24-01:35. EMT Nelson then told Mizrahi that the situation was "serious" and that "we can't leave you here." Pl's 56.1 ¶ 16; Brown Decl. Ex. H, at 01:34-01:40. Plaintiff proceeded to tell EMT Nelson that Adry had been lying and that she was "fine, very fine." Brown Decl. Ex. H, at 01:45, 02:07. EMT Nelson asked
8 if plaintiff was alone in her apartment, *8 to which plaintiff responded, "Nobody. . . . I mean, I have my dog, and if you wanna take me, take me. It's ok." *Id.* at 02:37-02:44.

EMT Nelson then asked plaintiff again whether she took any medications. *Id.* at 02:57. Mizrahi responded that she took Diazopam on an as-needed basis to help her sleep. *Id.* at 03:00. EMT Nelson and Officer Chen asked Mizrahi to show EMT Nelson the bottle. *Id.* at 03:04. After looking at the bottle, EMT Nelson said to plaintiff, "Ok baby, can you get dressed?"[5] to which plaintiff responded, "Yeah." *Id.* at 03:58-04:00. Plaintiff then asked, "Why you taking me now?" *Id.* at 04:02. EMT Nelson responded, "Ma'am, we can't leave you here, especially not by yourself." *Id.* at 04:03-04:06. Plaintiff repeated her question. *Id.* at 04:07. EMT Nelson responded that because of the call they received, "you can prove us wrong, prove him wrong" by going to the hospital. *Id.* at 04:17-04:24. After EMT Nelson and Officer Chen told plaintiff that they intended to take her to Coney Island Hospital because it was the closest hospital, plaintiff said, "Can you take me to Maimonides at least?" *Id.* at

04:30-04:32; *see* EMT Defs.' 56.1 ¶ 27. The defendants agreed. Brown Decl. Ex. H, at 04:32. EMT Nelson directed plaintiff to get dressed, and Officer Chen told her not to lock the door. *Id*. at 04:53-05:06. While plaintiff was changing, Officer Chen stated, "I'm not getting myself into a barricade situation" to which Officer Corrado responded, "I know. Fuck that." *Id*. at 05:26-05:30.

[5] Plaintiff argues that EMT Nelson directed her to get dressed, Pl.'s Resp. 56.1 ¶ 51, and defendants characterize the statement as a request, City Defs.' 56.1 ¶ 51.

Once plaintiff was dressed, the officers, EMTs, and plaintiff left plaintiff's apartment, and plaintiff and the individual EMT defendants entered the ambulance. City Defs.' 56.1 ¶ 53; EMT Defs.' 56.1 ¶ 32. Officer Chen asked EMTs Nelson and Abeeluck if they needed a police escort, and they declined. City Defs.' 56.1 ¶ 55. The
9 officers returned to their patrol car, *id*., and *9 EMTs Nelson and Abeeluck took Mizrahi in an ambulance to Maimonides Hospital. EMT Defs.' 56.1 ¶ 32; Pl.'s 56.1 ¶ 20. Mizrahi was released from Maimonides later that night. EMT Defs.' 56.1 ¶ 33; Pl.'s 56.1¶ 21.

On October 19, 2015, plaintiff filed a *pro se* action alleging numerous violations of her civil rights pursuant to 42 U.S.C. § 1983 and corresponding causes of action under New York law. *See* Compl., ECF No. 1. After I dismissed some of the alleged causes of action and granted plaintiff leave to amend her complaint, plaintiff, then represented by counsel, filed the operative complaint on November 4, 2016. Am. Compl., ECF No. 79. In the operative complaint, plaintiff alleged unlawful entry, arrest, and failure to intervene in violation of 42 U.S.C. § 1983 as well as false imprisonment, IIED, NIED, negligent misrepresentation, negligent care and treatment, negligent hiring, training and supervision, and negligence under New York law. *Id*. ¶¶ 51-98. The parties engaged in discovery. On January 5, 2018, the parties cross-moved for summary judgment; specifically, the defendants moved for summary judgment as to all of plaintiff's claims, and plaintiff moved for partial summary judgment as to the individual defendants' affirmative defenses. In her opposition papers, plaintiff agreed to drop the negligent misrepresentation, negligent care and treatment, and general negligence claims. *See* Pl.'s Opp'n 2. The others remain and the parties' motions are ripe for resolution.

## STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute regarding a material fact is genuine if there is sufficient evidence upon which a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 (1986) (finding summary judgment proper only when
10 "there can be but one reasonable *10 conclusion as to the verdict"); *Taggart v. Time, Inc*., 924 F.2d 43, 46 (2d Cir. 1991) ("Only when no reasonable trier of fact could find in favor of the nonmoving party should summary judgment be granted.").

The moving party bears the burden of establishing the absence of any genuine issue of material fact. *Zalaski v. City of Bridgeport Police Dep't*, 613 F.3d 336, 340 (2d Cir. 2010); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record], which it believes demonstrate the absence of a genuine issue of material fact."). If the movant satisfies the initial burden, the burden shifts to the nonmovant to proffer evidence demonstrating that a trial is necessary because a disputed issue of fact exists. *Weg v. Macchiarola*, 995 F.2d 15, 18 (2d Cir. 1993). In attempting to defeat a motion for summary judgment, "the non-moving party may not rely simply on conclusory allegations or speculation to

avoid summary judgment, but instead must offer evidence to show that 'its version of the events is not wholly fanciful.'" *Morris v. Lindau*, 196 F.3d 102, 109 (2d Cir. 1999) (quoting *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998)), *abrogated* on other grounds.

When evaluating the record to determine whether summary judgment is appropriate, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. Therefore, if "there is *any* evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) (emphasis added). Likewise, even where the evidence is undisputed, a court should not grant summary judgment if one could reasonably interpret the evidence in opposing ways. *See*
11 *11 *Schoolcraft v. City of New York*, 103 F. Supp. 3d 465, 506 (S.D.N.Y. 2015); *see also Anderson*, 477 U.S. at 251-52 ("In essence . . . , the inquiry is . . . whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."). At this procedural posture, the court's duty is "carefully limited" to "issue-finding," not "issue-resolution." *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir. 1994); *see also Wilson v. Nw. Mut. Ins. Co.*, 625 F.3d 54, 60 (2d Cir. 2010) ("The role of the court in deciding a motion for summary judgment 'is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried . . . .'") (quoting *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir.1986)).

Finally, when parties cross-move for summary judgment, the court examines each party's motion on its own merits and draws all inferences against the moving party. *See Morales v. Quintei Entertainment, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001). Thus, summary judgment is proper only when reasonable minds could not differ as to the import of the evidence before the court. *See Straube v. Fla. Union Free Sch. Dist.*, 801 F. Supp. 1164, 1174 (S.D.N.Y. 1992).

## DISCUSSION

Plaintiff alleges three federal causes of action under 42 U.S.C. § 1983—warrantless entry, false arrest,[6] and
12 failure to intervene—as well as four state law causes of action—false *12 imprisonment, IIED, NIED, and negligent hiring, training, and supervision. Defendants seek summary judgment on all claims.[7] Plaintiff seeks summary judgment on the individual defendants' affirmative defenses. I will address each claim separately and distinguish between the defendants where relevant.

6 In the amended complaint, plaintiff alleges that the individual defendants violated her rights under the Fourth Amendment in three ways: "(i) by entering her home without a warrant and without exigent circumstances; (ii) by placing her in custody without any basis to believe that she was dangerous to herself or others; and (iii) by falsely arresting, imprisoning and taking Mizrahi to the hospital." Am. Compl. ¶ 56. Because the second and third alleged violations largely hinge on the same facts, and plaintiff, in her opposition brief, writes of only two violations—warrantless entry and illegal seizure—I analyze the second and third claims together. *See Lozada v. Weilminister*, 92 F. Supp. 3d 76, 98 (E.D.N.Y. 2015) ("Because Plaintiff does not allege a search or seizure beyond the actions supporting her false arrest claim, Plaintiff's unlawful seizure claim is subsumed by her other Fourth Amendment claims.") (citing *Lastra v. Barnes & Noble Bookstore*, No. 11-CV-2173, 2012 WL 12876, at *5 (S.D.N.Y. Jan. 3, 2012)). In addition, I refer to the claim as a false arrest claim, rather than a claim for illegal seizure. *See Glass v. Mayas*, 984 F.2d 55, 58 (2d Cir. 1993) (explaining that the "infringement" on liberty associated with being involuntarily confined is "tantamount to the infringement of being arrested"). As further explained below, a mental health seizure must be supported by probable cause. That being so, it is more appropriate to consider plaintiff's claim as one for false arrest, rather than for illegal seizure, which could erroneously suggest that the individual defendants needed only reasonable suspicion to detain the plaintiff. *See Posr v. Doherty*, 944 F.2d 91, 96-99 (2d Cir. 1991). Moreover, all of the parties rely on New York law

pertaining to false arrest and false imprisonment to delineate the standard that they believe the court should apply to its Fourth Amendment analysis, regardless of whether that party refers to the Fourth Amendment claim as being for an "illegal seizure," *see* Pl.'s Opp'n 13, or a "false arrest," *see*, *e.g.*, EMT Defs.' Mem. of Law in Supp. of Their Mot. for Summ. J. 5 ("EMT Defs.' Mem. of Law"), ECF No. 122.

7 City defendants also argue that I should dismiss Officer Corrado from this action for lack of personal involvement. *See* City Defs.' Mem. of Law 9 n.3, 16 n.5. According to the City defendants, plaintiff's amended complaint indicates that Officer Corrado never entered plaintiff's apartment, so he cannot be held liable for either unlawful entry or false arrest. *Id*. As plaintiff argues, however, it is now undisputed that Officer Corrado entered plaintiff's apartment, spoke to the plaintiff inside the apartment, and engaged with the other defendants regarding plaintiff's alleged confinement. *See* Pl.'s Resp. 56.1 ¶ 66; Radomisli Decl. Ex. K ("Corrado Dep."), at 59:24-60:4, 30:24 -31:2; 51:22-52:6, ECF No. 121-11. In light of this evidence, I deny the City defendants' request to dismiss Officer Corrado from this action for lack of personal involvement.

# I. Federal Claims

### A. EMTs Nelson and Abeeluck - State Action

EMTs Nelson and Abeeluck move to dismiss plaintiff's federal claims on the ground that they cannot be held liable under 42 U.S.C. § 1983 because they were neither state actors nor private parties acting under color of state law during their interactions with Mizrahi. *See* EMT Defs.' Mem. of Law 4-5, 8. Plaintiff opposes the individual EMT defendants' motion, arguing that EMTs Nelson and Abeeluck were state actors under the "joint action" test because they acted jointly with the police officers when they entered Mizrahi's apartment and confined her. *See* Pl.'s Opp'n 22-27. Plaintiff also asserts that the individual EMT defendants were state actors under the "public function" test. *Id*. at 26. Although I conclude that EMTs Nelson and Abeeluck were not state
13 actors under the "public function" test, there are disputed issues of fact *13 as to whether they were state actors under the "joint action" test. I therefore deny their motion for summary judgment on this basis.

To prevail on a federal civil rights action under 42 U.S.C. § 1983, a plaintiff must demonstrate: (1) the deprivation of any rights, privileges, or immunities secured by the Constitution and laws; (2) by a person acting under the color of state law. 42 U.S.C. § 1983. "Section 1983 itself creates no substantive rights; it provides only a procedure for redress from the deprivation of rights established elsewhere." *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993).

As a general matter, private citizens and entities are not subject to Section 1983 liability. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999); *Ciambriello v. Cnty. Of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002). Nevertheless, the conduct of a nominally private actor can be attributed to the state when "(1) the entity acts pursuant to the 'coercive power' of the state or is 'controlled' by the state ('the compulsion test'); (2) when the state provides 'significant encouragement' to the entity, the entity is a 'willful participant in joint activity with the [s]tate,' or the entity's functions are 'entwined' with state policies ('the joint action test' or 'close nexus test'); or (3) when the entity 'has been delegated a public function by the [s]tate,' ('the public function test')." *Sybalski v. Indep. Grp. Home Living Program, Inc.*, 546 F.3d 255, 257 (2d Cir. 2008) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296 (2001)). Under all of these tests, the plaintiff bears the burden of proof and must demonstrate that the state was involved "with the activity that caused the injury" giving rise to the action. *See id*. at 257-58. Determining whether a private party qualifies as a state actor is a "fact-specific inquiry," *Logan v. Bennington Coll. Corp.*, 72 F.3d 1017, 1027 (2d Cir. 1995), and there is no "'simple line' that can be used to delineate what is, or what is not, state action," *Forbes v. City of N.Y.*, No. 05-CV-7331 (NRB),

2008 WL 3539936, at *4 (S.D.N.Y. Aug. 12, 2008) (quoting *Brentwood*, 531 U.S. at 295); *see also Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.").

In the instant case, it is undisputed that NYPH and its volunteer EMTs are private parties. *See* Pl.'s Resp. 56.1 p. 20, ¶ 3. The question, therefore, is whether EMTs Nelson and Abeeluck were acting under color of state law when they allegedly entered plaintiff's apartment, confined her, and took her to the hospital. The two tests at issue here are the joint action and public function tests. *See* EMT Defs.' Mem of Law 6; Pl.'s Opp'n 22-27.

**i. Joint Action Test**

Under the "joint action" test, a private actor can be found "to act under the color of state law for § 1983 purposes if . . . [the private party] is a willful participant in joint action with the State or its agents." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). To establish joint action, a plaintiff must show that the private citizen and the state official "shared a common unlawful goal; the true state actor and the jointly acting private party must agree to deprive the plaintiff of rights guaranteed by federal law." *Anilao v. Spota*, 774 F. Supp. 2d 458, 498 (E.D.N.Y. 2011) (quoting *Bang v. Utopia Restaurant*, 923 F. Supp. 46, 49 (S.D.N.Y. 1996)). The plaintiff must demonstrate that "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 264 (2d Cir. 2014) (quoting *Brentwood*, 531 U.S. at 295). While "[t]he touchstone of joint action is often a 'plan, prearrangement, conspiracy, custom or policy' shared by the private actor and the police," *Forbes*, 2008 WL 3539936, at *5 (quoting *Ginsberg v. Healey Car & Truck Leasing, Inc.*, 189 F.3d 268, 272 (2d Cir. 1999)), courts have recognized that state action can occur through "winks and nods," *Brentwood*, 531 U.S. at 301.

When analyzing allegations of state action, a court begins by identifying "the specific conduct of which the plaintiff complains." *Grogan*, 768 F.3d at 264. Here, plaintiff argues that the individual EMT and City defendants jointly entered her apartment, acted together to confine her in the apartment, and jointly escorted her out of her building to the ambulance.

Viewing the evidence in the light most favorable to the plaintiff, I conclude that summary judgment declaring that EMTs Nelson and Abeeluck were not state actors as a matter of law is not appropriate. The record demonstrates that the EMTs and the police officers announced themselves together at plaintiff's door. *See* Pl.'s Resp. 56.1 pp. 11-12, ¶¶ 43-46. After entering the apartment together, both EMT Nelson and Police Officer Chen spoke to plaintiff and directed her to perform certain acts, such as to show EMT Nelson her medication. *See* Brown Decl. Ex. H, at 03:04. In addition, EMT Nelson stated, "we can't leave you here," a sentiment that is, as the EMT defendants acknowledge, ambiguous as to whether it referred to only the two EMTs or to the defendant police officers as well. *See* EMT Defs.' Reply Mem. 4 (noting that plaintiff's counsel never asked EMT Nelson whether her use of the word "we" included the police officers as well, thus implicitly acknowledging that its meaning remains ambiguous). The four individual defendants also escorted Mizrahi out of her building and into the ambulance together. From these facts, a reasonable juror could conclude that the individual EMT defendants were "willful participant[s] in joint action with the State or its agents." *Dennis*, 449 U.S. at 27.

EMTs Nelson and Abeeluck offer a number of arguments to support their contention that they do not qualify as state actors under the joint action test. First, they argue that they cannot be considered state actors because "the police officers did not play any role in plaintiff's confinement or in the decision to take plaintiff to the

hospital." EMT Defs.' Mem. of Law 8. According to the individual EMT defendants, therefore, they did not act jointly with the police in deciding to hospitalize plaintiff and, thus, cannot be said to have acted under color of state law.

Plaintiff, however, strongly disputes this assertion and does so with reason. *See* Pl.'s Opp'n 22-26. Officer Chen stood outside of plaintiff's bedroom while she changed from her pajamas into street clothing and would not allow Mizrahi to lock her door. *See* Brown Decl. Ex. H, at 05:06. As Officer Corrado acknowledged, such an action reasonably could indicate to plaintiff that she was not permitted to leave. *See* Corrado Dep. 55:15-23. Indeed, a reasonable juror could interpret such an action as "participat[ing] in [the individual EMT] defendants' actions that caused the injury." *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 917 F. Supp. 2d 283, 288 (S.D.N.Y. 2013). To explain his behavior, Officer Chen told Officer Corrado that he did not want to get into a "barricade" situation, to which Officer Corrado responded, "I know. Fuck that." Brown Decl. Ex. H, at 05:26-05:30.

Moreover, even if the individual EMT defendants were "in charge" of the situation, EMT Defs.' Mem. of Law 8, that does not necessarily mean that the police officers played *no* role in confining the plaintiff and, therefore, that EMTs Nelson and Abeeluck were not acting under the color of state law. *See Anilao*, 774 F. Supp. 2d at 499 ("When the private actor takes a more active role . . . and jointly engages in action with state actors, he will be found to be a state actor.") (citing *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 942 (1982)). Courts have differentiated between cases where a private party simply supplies information to the police or seeks police
17 assistance and those where private parties actively engage with police to achieve *17 desired ends. *Compare Newman v. Bloomingdale's*, 543 F. Supp. 1029, 1032 (S.D.N.Y. 1982) (finding no state action where police responded to reports of shoplifting and "nothing in the record . . . show[ed] that the police were influenced in their choice of procedures by [the private actors] . . . or that [the private actors] had any control over what procedures the police followed") *with Bacquie v. City of New York*, No. 99CIV.10951 (JSM), 2000 WL 1051904, at *2 (S.D.N.Y. July 31, 2000) (denying a motion to dismiss on state action grounds because the defendants, hotel employees, "did more than just call the police and swear out a complaint" and could, therefore, be held liable as state actors). *Cf Shapiro v. City of Glen Cove*, 236 F. App'x 645, 647 (2d. Cir 2007) (finding no state action where the evidence demonstrated that the public officials "exercised independent judgment rather than act[ed] at [the private entity's] direction"). Indeed, the individual EMT defendants' self-proclaimed leadership role in the incident may work against them. *Cf. Schoolcraft*, 103 F. Supp. 3d at 532 (finding that EMTs were not state actors because the evidence "unambiguously" demonstrated that the police officer, and not the EMTs, declared the plaintiff an EDP).

The individual EMT defendants also argue that "[t]he absence of any evidence that there was communication between the police officers and the EMTs is key" because, without this evidence, "a concerted effort or plan cannot exist." EMT Defs.' Mem. of Law 8. As stated earlier, however, the absence of an explicit conversation about depriving plaintiff of her rights is not dispositive of whether there was joint action. *See Adickes v. Kress & Co.*, 398 U.S. 144, 153-54, 157-58 (1970) (noting that a "meeting of the minds" and a "tacit" agreement to violate plaintiff's rights could suffice to establish state action). This is not a situation where the EMTs and police officers disagreed about how to proceed or where either the police or the EMTs acted under protest. *See*
18 *Hollman v. Cty. of Suffolk*, No. 06-CV-3589 JFB ARL, 2011 WL 2446428, *18 at *8 (E.D.N.Y. June 15, 2011) (finding no state action where it was uncontested that the paramedic defendants "did not *willingly* participate" with the defendant police officers in denying the plaintiff medical treatment). As such, a reasonable juror could find that the individual defendants acted jointly when allegedly confining the plaintiff even if they did not explicitly converse about their intention to deprive plaintiff of her rights.

Finally, the EMT defendants' argument that Officer Chen's "[t]elling the plaintiff she could not lock her door in order to avoid getting into a barricaded EDP situation is not evidence of joint action between the police and the EMTs" is unpersuasive. EMT Defs.' Reply Mem. 4. EMT defendants offer no case law or reasoning to support their assertion that I should effectively ignore this—or any other—fact. I decline to do so.

For these reasons, I find that plaintiff has carried her burden and that EMTs Nelson and Abeeluck cannot show that they were not state actors as a matter of law under the joint action theory. I therefore deny their motion for summary judgment on this ground.

**ii. Public Function Test**

By contrast, EMTs Nelson and Abeeluck are correct that they are not state actors under the public function test. Under this test, "[s]tate action may be found in situations where an activity that has been the exclusive, or near exclusive, function of the State has been contracted out to a private entity." *Grogan*, 768 F.3d at 264-65; *Sybalski*, 546 F.3d at 259 ("[P]rivate actors must be delegated functions that were traditionally under the exclusive authority of the state for the public function test to be satisfied."). The test focuses specifically on whether the activity historically has been "the exclusive prerogative of the sovereign," not on whether governments often assume the responsibility at issue. *Grogan*, 768 F.3d at 265 (collecting cases where courts
19 have found state action, such as in the contexts of medical care for prison inmates, holding *19 primary elections, and operation of a post office). As the Second Circuit conclusively held in *Grogan*, "the provision of emergency medical care and general ambulance services . . . cannot be said [to constitute] 'traditionally exclusive public function[s].'" *Id*. Therefore, plaintiff has not proven that the individual EMT defendants are state actors under the public function test and she cannot make this argument at trial.

**B. Unlawful Entry**

Turning to the heart of this case, the individual EMT and City defendants argue that plaintiff's unlawful entry claim fails as a matter of law because plaintiff consented to the entry or, in the alternative, they had probable cause to enter plaintiff's apartment without a warrant based on the existence of exigent circumstances. *See* City Defs.' Mem. of Law 8-12; EMT Defs.' Mem. of Law 13-17. Plaintiff argues that there are disputed issues of material fact precluding summary judgment on the defendants' defense of consent to entry but argues that the record is undisputed that no exigent circumstances existed. *See* Pl.'s Opp'n 3-10. I agree with plaintiff and, thus, deny the individual defendants' motions for summary judgment on plaintiff's unlawful entry claim on the basis of consent and grant plaintiff's motion for summary judgment on their defense of exigent circumstances.

A warrantless entry into one's home is presumptively unreasonable. *See Payton v. New York*, 445 U.S. 573, 586 (1980). "[T]he Fourth Amendment has drawn a firm line at the entrance to the house." *Id*. at 590. Nevertheless, as "the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). First, a warrantless entry may be justified on the ground of consent because "it is no doubt reasonable for the police to [enter] once they have been permitted to do so." *Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991). Second, law enforcement may be
20 justified in *20 entering one's home without a warrant "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Michigan v. Fisher*, 558 U.S. 45, 47 (2009). Because the defendants invoke both exceptions, I address each in turn.

**i. Consent**

Under the Fourth Amendment's consent exception "warrantless entry . . . [is] permissible if the authorities have obtained the voluntary consent of a person authorized to grant such consent." *United States v. Guerrero*, 813 F.3d 462, 467 (2d Cir. 2016) (quoting *United States v. Elliott*, 50 F.3d 180, 185 (2d Cir. 1995)). To determine whether consent is valid, courts examine the "totality of the circumstances" and assess whether the consent was "a product of that individual's free and unconstrained choice . . . rather than a mere acquiescence in a show of authority." *United States v. Wilson*, 11 F.3d 346, 351 (2d Cir. 1993) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). If an individual's consent is "coerced, by explicit or implicit means, by implied threat or covert force," it is invalid. *Guerrero*, 813 F.3d at 467 (quoting *United States v. Snype*, 441 F.3d 119, 131 (2d Cir. 2006)). The standard for measuring the scope of consent is "'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Jimeno*, 500 U.S. at 251. Although "consent need not be express but may be implied from 'an individual's words, acts or conduct,'" *Seifert v. Rivera*, 933 F. Supp. 2d 307, 316 (D. Conn. 2013) (quoting *Krause v. Penny*, 837 F.2d 595, 597 (2d Cir. 1988)), the government bears the burden of proving that the consent was voluntary, *see Schneckloth*, 412 U.S. at 223; *see also U.S. v. Isiofia*, 370 F.3d 226, 230 (2d Cir. 2004).

Viewing the facts in the light most favorable to Mizrahi, the record does not permit an inference that, as a matter of law, she consented to the individual defendants' entry into her apartment. First, there is conflicting
21 evidence as to whether plaintiff opened the door or she *21 simply unlocked it, after which one or more of the individual defendants pushed it open. While it is true that plaintiff herself offered varying accounts of what happened, her descriptions of what occurred are not so incongruous so as to constitute a "sham issue of fact." City Defs.' Mem of Law 9 n.4; *see also* City Defs.' Reply Mem. 5-7. For example, at her 50-h hearing, Mizrahi said that the defendants knocked on the door and she "let them in" but she made this statement in the context of describing the defendants' entry as an "invasion": "[Y]es, they knocked on the door, I let them in, but I mean, maybe for lack of a better word, I'm using 'invasion' . . . , I mind my own business and *they open my door and take me*; you can call it whatever you want. Kidnapping? Maybe, yeah, 'kidnapping' is better." Mizrahi 50-h Tr. 51:17-24 (emphasis added).[8] Contrary to defendants' assertions, therefore, plaintiff's 50-h hearing testimony is not wholly at odds with her later deposition testimony that she unlocked the door "and then [EMT Nelson] pushed the door in." Mizrahi Dep. 194:5-6. I will not, as the defendant police officers ask me to, *see* City Defs.' Mem. of Law 9, disregard plaintiff's sworn testimony that the EMTs and police officers "barged in" to her apartment or, as she said multiple times, that they "stormed into the hallway" of her apartment, Mizrahi Dep. 293:23-24. To the extent that there are inconsistencies in plaintiff's testimony, it is for a jury to determine whom and what to believe. *See Jeffreys v. City of New York*, 426 F.3d 549, 553-54 (2d Cir. 2005) ("Assessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on
22 summary judgment.") (quoting *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir. 1996)). *22

[8] I also note that plaintiff repudiated the accuracy of the 50-h transcript at her deposition. *See* Mizrahi Dep. 29:3-19.

Moreover, even if it were "undisputed that plaintiff opened her door," City Defs.' Reply Mem. 4, such an action is not dispositive of consent to entry. *See Kentucky v. King*, 563 U.S. 452, 469-70 (2011) ("[E]ven if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time."). In *United States v. Reed*, federal agents knocked on a suspect's door and, after she opened it, entered her home and arrested her. 572 F.2d 412, 423 (2d Cir. 1978); *see also U.S. v. Allen*, 813 F.3d 76, 85 (2d Cir. 2016) (upholding *United States v. Reed*). In a footnote, the Second Circuit noted with approval the government's decision not to argue that the defendant had consented to the entry. "We do not believe that the fact that Reed opened the door to her apartment in response to the knock of three armed federal agents operated in such a way as to eradicate her Fourth Amendment

privacy interest." *Reed*, 572 F.2d at 423 n.9. The court continued, "[t]o hold otherwise would be to present occupants with an unfair dilemma, to say the least[,] either open the door and thereby forfeit cherished privacy interests or refuse to open the door and thereby run the risk of creating the appearance of an 'exigency' sufficient to justify a forcible entry." *Id*. Particularly appropriate here, the Second Circuit added that posing such a dilemma to occupants "would hardly seem fair in situations that present no exigent circumstances in the first place." *Id*.; *see also Breitbard v. Mitchell*, 390 F. Supp. 2d 237, 248 (E.D.N.Y. 2005) (acknowledging that a "great dispute" exists among the federal courts about whether opening one's door in response to a police officer's knock constitutes a surrender of one's privacy interests but concluding, based on Second Circuit precedent, that "[i]t cannot be said as a matter of law that plaintiff abandoned her privacy interest simply by opening the door to her home in response to the defendants' knock"). *23

The EMT defendants argue that the instant case is distinguishable because, here, plaintiff "knew in advance" that the police and EMTs were coming based on Adry's warning that they had been summoned and because the plaintiff allowed the defendants entry into her building when she "buzzed them in" in the first place. EMT Defs.' Mem. of Law 2, 17. According to the EMT defendants, therefore, there is more evidence here to indicate consent than "simply . . . the plaintiff open[ing] the door to her apartment in response to a knock." *Id*. at 17. However, Mizrahi specifically testified that she did not believe Adry when he told her that the police were coming. *See* City Defs.' 56.1 ¶ 32. Even if she did and was thus "on notice" that the EMTs and police officers would arrive imminently, the fact that she allowed the four defendants to enter her building—a common space—does not mean that she consented to their entering her apartment.[9] Unlike other cases where courts have found consent as a matter of law, there is no evidence here that plaintiff waved the parties into her home, *see*, *e.g.*, *Kaminsky v. Schriro*, 243 F. Supp. 3d 221, 228 (D. Conn. 2017), or that she stepped back to allow the defendants to enter, *see Seifert*, 933 F. Supp. 2d at 316. There is also no evidence that the defendant EMTs or police officers asked if they could enter Mizrahi's apartment and that Mizrahi said yes. *See United States* *24 *v. Guzman*, No. 13-CR-6118, 2015 WL 774211, at *9 (W.D.N.Y. Feb. 24, 2015); *see also U.S. v. Bartee*, No. 13 CR. 365 RJS, 2013 WL 6164339, at *9 (S.D.N.Y. Nov. 12, 2013) (finding that consent was voluntarily given where "the record [was] clear that the police asked Davis for her permission to go down from the hallway at the top of the stairs into her apartment . . . ; they did not invite themselves in or simply walk into her apartment without her permission"); *cf. United States v. Taylor*, 279 F. Supp. 2d 242, 245 (S.D.N.Y. 2003) (holding that the government failed to satisfy its burden of proving consent to search where the officer "asked Taylor if he could search the apartment [and] Taylor did not say yes, nod, or otherwise assent affirmatively").

9 Although the standard is objective, I note that the EMT defendants' contention that plaintiff "cannot legitimately argue that she allowed the defendants into her building without expecting them to then knock at her door to go into her apartment," EMT Defs.' Reply Mem. 10, is belied by plaintiff's statement about her intentions:

> Q. When you unlocked the door, was it your intention to invite the people on the other side of the door into your apartment?
>
> . . .
>
> A. Absolutely not.
>
> Q. What was your intention?
>
> A. To discuss with them and clarify and—you know, I thought it's going to take a second for me to clarify from the door, looking at them, and telling them, "everything is fine. Thank you. Have a lovely evening." That was my—my thought, that it's going to be one, two three, and then I'll go to—you know, because I wanted to go to sleep. I was tired.

Mizrahi Dep. 294:17-295:10. More importantly, it is well-established that one can limit the scope of one's consent. *See Jimeno*, 500 U.S. at 252.

The EMT defendants also argue that plaintiff's "deci[sion] to record the encounter even before they entered the apartment" indicates her consent to entry. EMT Defs. Reply Mem. 10. A reasonable jury, however, could find that it indicates the opposite—that plaintiff set up her phone to record *in case* the officers and the EMTs acted contrary to her wishes and in violation of her rights, as she now argues that they did. The fact that plaintiff did not specifically say that she was "opening her door 'under protest,'" *id*., or otherwise verbalize objection to the individual defendants' actions is certainly a fact that defendants may argue at trial but it does not prove as a matter of law that plaintiff voluntarily allowed the officers and EMTs into her home.

Finally, the audio recording that each party argues lends support to its respective position does not resolve the question of whether the plaintiff consented to the individual defendants' entry. *See* City Defs.' Reply Mem. 4; *see also Schoolcraft*, 103 F. Supp. 3d at 506 ("[T]he recordings do not contain video so that evaluation of [plaintiff's] demeanor following the NYPD's warrantless entry is at issue."). From the recording, it is impossible to tell how the door was opened. The City defendants' argument that the entry "happened so unremarkably that it is not possible to tell [from the tape] at which point(s) each defendant ventured inside the
25 apartment" *25 does not actually help their cause. City Defs.' Reply Mem. 4. Assuming all inferences in favor of the plaintiff, as I must, it is possible that Mizrahi unlocked the door from the inside and the officers and EMTs pushed the door open and entered before she could stop them. If found true, the fact that Mizrahi did not shout "no" as the individual defendants crossed the threshold into her apartment does not mean that she consented to their entering.

Because a genuine issue of fact exists as to whether plaintiff consented to the individual defendants' entry into her apartment, defendants' motions for summary judgment as to plaintiff's illegal entry claim on the basis of consent are denied.

**ii. Exigent Circumstances**

Defendants next argue that even if plaintiff had not consented to the individual defendants' entering her apartment, the entry was lawful because the EMTs and police officers reasonably believed that plaintiff posed a danger to herself based upon the information conveyed in the 911 call.[10] City Defs.' Mem. of Law 10-12; EMT Defs.' Mem. of Law 13-15. Plaintiff argues that the 911 call was not reliable and, thus, cannot serve as the basis for a finding of exigent circumstances under *Kerman v. City of New York*, 261 F.3d 229 (2d Cir. 2001). Pl.'s Opp'n at 3-10. Plaintiff seeks summary judgment on this theory. *See* Pl.'s Mem. of Law 8-9.

10 Plaintiff contends that only the City defendants make this argument. *See* Pl.'s Mem. of Law in Supp. of Her Mot. for Partial Summ. J. 1 ("Pl's Mem. of Law"), ECF No. 139. However, the EMT defendants also argue that exigent circumstances justified their entry. *See* EMT Defs.' Mem. of Law 13-15.

Police officers may enter someone's home without a warrant "to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance." *Tierney v. Davison*, 133 F.3d 189, 196 (2d Cir. 1998) (quoting *Root v. Gauper*, 438 F.2d 361, 364 (8th Cir. 1971)). The "essential question" is whether the police had an "'urgent need' to render aid or take action." *United States v. MacDonald*,
26 916 F.2d 766, 769 (2d Cir. 1990) (en banc) *26 (quoting *Dorman v. United States*, 435 F.2d 385, 391 (D.C. Cir. 1970)). "In answering that question, we must be cognizant of the Supreme Court's admonition that 'exceptions

to the warrant requirement are few in number and carefully delineated and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.'" *Loria v. Gorman*, 306 F.3d 1271, 1284-85 (2d Cir. 2002) (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984)).

Exigent circumstances arise when police officers have probable cause to believe "a person is in 'danger.'" *Kerman*, 261 F.3d at 236 (quoting *Tierney*, 133 F.3d at 196-97). The mere "possibility" of danger, however, is not sufficient to justify a warrantless entry. *Hurlman v. Rice*, 927 F.2d 74, 81 (2d Cir. 1991). Whether an officer's belief about the need to render emergency aid was reasonable "must be assessed in light of the particular circumstances confronting the officer at the time." *Kerman*, 261 F.3d at 235 (citing *Graham v. Connor*, 490 U.S. 386, 397 (1989)); *see also U.S. v. Simmons*, 661 F.3d 151, 157 (2d Cir. 2011) ("The core question is whether the facts, as they appeared at the moment of entry, would lead a reasonable, experienced officer, to believe that there was an urgent need to render aid or take action.") (quoting *United States v. Klump*, 536 F.3d 113, 117-18 (2d Cir. 2008)).

As all of the parties recognize, an analysis of *Kerman* is crucial to resolving the question of whether the 911 call in this case was sufficiently reliable to justify the warrantless entry into plaintiff's home. In *Kerman*, police officers forcibly entered the plaintiff's home based on an anonymous 911 call. 261 F.3d at 232-33. The caller gave the 911 operator Kerman's address and telephone number and stated that "a mentally ill man at this location was off his medication and acting crazy and possibly had a gun." *Id.* at 232. The caller did not disclose Kerman's name, her own name, or her relationship to Kerman. *Id*. The caller also did not explain how she knew
27 that *27 Kerman was mentally ill. Under these circumstances, the Second Circuit held that the warrantless entry violated the Fourth Amendment because the "anonymous and uncorroborated 911 call" was insufficient to provide the probable cause necessary to believe there was an urgent need to render aid to a person in distress. *Id*. at 236. Explaining its holding, the court focused specifically on the fact that the defendants had "no corroborating evidence of the alleged danger," *id*., to establish the call's reliability and that the "sanctity of [a] private dwelling" is "ordinarily afforded the most stringent Fourth Amendment protection," *id*. (quoting *Ayeni v. Mottola*, 35 F.3d 680, 685 (2d Cir. 1994)) (alteration in original).

Since *Kerman*, courts in this circuit have further explored what constitutes a reliable 911 call. In *Anthony v. City of New York*, for example, police officers responded to a 911 call "in which a female caller reported that she was being attacked by a man with a knife and a gun." 339 F.3d 129, 131 (2d Cir. 2003). Upon entering the apartment, the police found the caller, a woman with Down Syndrome, alone and saw no evidence of an attack. *Id*. The Second Circuit held that the officers' warrantless entry was justified by exigent circumstances and explained that "[t]he concern we expressed in *Kerman* regarding the reliability of anonymous and uncorroborated calls—that is, calls reporting an emergency at a different location and involving someone other than the caller—is not implicated here, where the caller expressed an immediate risk of harm to herself, and where the address from which the call was placed was verified." *Id*. at 136.

By contrast, in *Fernandez v. Sacco*, the court held that a 911 call was not sufficient to establish probable cause where the caller reported a "loud ruckus upstairs" and "loud voices" that "sounded like an argument." No. 10 CV 1624 ERK RML, 2012 WL 6102136, at *5 (E.D.N.Y. Dec. 10, 2012). The court differentiated this case from *Anthony* because the call was not from the alleged victim or from a person within the victim's residence.
28 *Id*. at *6. In addition, *28 the call was "non-specific" and "could not be corroborated by the responding officers' observations." *Id*.

Finally, in *Sha v. New York City Police Dep't Twentieth Precinct, Detectives, Officers Doe*, the police department received a 911 call from a woman named Marlene Glasser. No. 03 CIV. 5273DABGWG, 2005 WL 877852, at *1 (S.D.N.Y. Apr. 18, 2005). Glasser said she had been talking on the phone with her friend, who had suffered a traumatic brain injury in the past and had a history of seizures, when the friend suddenly stopped talking. *Id*. Glasser told the 911 operator that she had tried to reach Sha for thirty minutes and was unable to do so. *Id*. The 911 operator conveyed all of this information to the responding officers. *Id*. at *2. The court held that the officers' belief that exigent circumstances existed was reasonable because, unlike in *Kerman*, the caller was identified by name, address, and phone number. *Id*. at *5. In addition, the caller had described what she believed was Sha's medical history, thereby lending credence to the idea that the plaintiff was in medical distress. *Id*. at *4 ("Accepting Sha's version of the events as true, the police were faced with a situation where an identified individual had provided a plausible account strongly suggesting that another individual was suffering medical distress.").

Despite defendants' arguments to the contrary, *Kerman* and *Fernandez*—not *Anthony* or *Sha*—readily apply to this case. Here, the individual defendants did not know the identity of the caller, the call was not made by the alleged victim from the location of the alleged emergency, the call was not specific as to the alleged harm, and the caller did not assert—and the individual defendants did not have any reason to believe—that plaintiff had a history of mental illness. Indeed, I agree with plaintiff that the information that the police officers and EMTs
29 possessed *29 before entering plaintiff's apartment was "far less alarming" than that conveyed to the police in *Kerman*, which referred to a weapon, a history of mental illness, and medication.[11] Pl.'s Opp'n 8.

11 Although the EMT defendants argue that "[i]f a potential suicide does not constitute 'exigent circumstances,' very little would," EMT Defs.' Reply Mem. 8, they do not explain how Adry's call is any more worrisome than the call in *Kerman* that a "mentally ill man at this location was off his medication and acting crazy and possibly had a gun." 261 F.3d at 232.

Defendants attempt to distinguish *Kerman* by arguing that the 911 call in this case was neither anonymous nor uncorroborated. City Defs.' Mem. of Law 11; EMT Defs.' Mem of Law 13-14. With respect to anonymity, defendants argue that the 911 call "was not truly 'anonymous,'" City Defs. Mem. of Law 11, because Adry identified himself as plaintiff's "friend," 911 was able to trace his number, he spoke to the 911 operator more than once, and he offered to drive to meet the officers when he could not provide plaintiff's exact address. *See id*; EMT Defs.' Mem. of Law 14.

First, the fact that Adry identified himself as a "friend" of the plaintiff's does not render the call not anonymous or the caller reliable. At best, the descriptor indicates that the caller was motivated by an interest in the plaintiff's wellbeing. At worst, the identifier allowed the caller to cause trouble for plaintiff under the guise of friendship while being protected by the cloak of anonymity. Regardless, it provides no information as to who the caller is, whether one should believe him, or the basis for his concern. *See Fla. v. J.L.*, 529 U.S. 266, 270 (2000) (distinguishing a tip from a "known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated" from an anonymous tip which "seldom demonstrates the informant's basis of knowledge or veracity" (internal citation omitted)); *Illinois v. Gates*, 462 U.S. 213, 230 (1983) ("[A]n informant's 'veracity,' 'reliability' and 'basis of knowledge' are all highly relevant to determining
30 the value of his report."). *30

Second, it is irrelevant that the 911 operator could trace Adry's cell phone number. *See U.S. v. Freeman*, 735 F.3d 92, 98 (2d Cir. 2013) ("The fact that the call was recorded and that the caller's apparent cell phone number is known does not alter the fact that the identity of the caller is still unknown, leaving no way for the police (or

the reviewing court) to determine her credibility and reputation for honesty."). It is similarly irrelevant that Adry spoke to the 911 operator more than once.[12] *See id*. at 99 ("That the caller contacted 911 twice simply means that the content of *both* calls could not be assessed based on the caller's reputation for honesty.").

12 Even if Adry's repeated communication with the 911 dispatcher—instigated by the dispatcher and not Adry, no less—carried some probative weight, the defendant police officers did not know at the time they entered the apartment that the two 911 calls were from the same person. *See* Pl.'s Resp. 56.1 p. 9, ¶ 33; Brown Decl. Ex. M, Audio_74105; Chen Dep. 107:15-22.

Defendants' only somewhat persuasive argument is that Adry offered to meet the individual defendants at plaintiff's apartment. It does not appear, however, that the 911 operator ever conveyed this information to the police officers or the EMTs. Moreover, the promise did not materialize—the record does not suggest that Adry went to plaintiff's apartment while the officers and EMTs were there and, thus, he remained anonymous.

As to corroboration, defendants argue that Adry provided the 911 operator with plaintiff's name—albeit spelled incorrectly—her telephone number, and the information that ultimately led the individual defendants to the correct location. City Defs.' Mem. of Law 11. Defendants also argue that "the plaintiff herself corroborated the identity of the 911 caller when she spoke with Nelson." EMT Defs.' Mem. 14; *see* City Defs.' Mem. 12.

None of these arguments is persuasive. As plaintiff argues, the geographical information that Adry initially provided the 911 operator was incorrect, such that the individual defendants could not locate her for at least
31 forty minutes[13] and the defendant police officers abandoned *31 their efforts. Pl.'s Reply Mem. 4; *see* Chen Dep. 43:9-24. The forty-minute lapse in time between when the EMTs and police officers set out to stop the purported emergency from occurring and when they made contact with the unharmed plaintiff also suggests that even if an exigency existed when the call was made, it had dissipated. *See Fernandez*, 2012 WL 6102136, at *8.

13 Relying on the Prehospital Care Report Summary, plaintiff argues that an hour elapsed between when the individual defendants received their respective calls and when they made contact with Mizrahi. Pl.'s Reply Mem. 4. The parties do not dispute that the Prehospital Care Report Summary so indicates. City Defs.' Resp. 56.1 ¶ 11; EMT Defs.' Resp. 56.1 ¶ 11. Based on the various pieces of evidence presented by the defendants, however, it is possible that only forty minutes elapsed. *See* Brown Decl. Ex. J (Certified Call Log for 911 Call No. 1783), ECF No. 130-10; *Id*. at Ex. K (NYPD's "Event Chronology"). Because the parties do not dispute that at least forty minutes elapsed, I use that figure.

More importantly, even if Adry had provided the 911 operator with plaintiff's correct address—as the caller did in *Kerman*—such information is readily available and does not suggest that Mizrahi was suicidal or otherwise a danger to herself. That is, "defendants had no corroborating evidence of the *alleged danger* to establish reliability." *Kerman*, 261 F.3d at 236 (emphasis added); *see also J.L.*, 529 U.S. at 271-72 ("[A] tip [must] be reliable in its assertion of illegality, not just in its tendency to identify a determinate person [or location]."). Finally, Mizrahi confirmed Adry's identity as the 911 caller only *after* the individual defendants were already inside the apartment—not before. *See* Mizrahi Dep. 116:4-7; *Harris v. O'Hare*, 770 F.3d 224, 235 (2d Cir. 2014) ("The core question is whether the facts, as they *appeared at the moment of entry*, would lead a reasonable, experienced officer, to believe that there was an urgent need to render aid or take action." (quoting *United States v. Simmons*, 661 F.3d 151, 157 (2d Cir. 2011))). This fact is therefore wholly without value for the warrantless entry analysis.

Ultimately, this case does not differ materially from *Kerman*. I agree with plaintiff that the individual defendants erroneously relied on "a wholly conclusory and speculative statement devoid of facts or factual basis" to justify their warrantless entry into her apartment and find that no exigent circumstances existed as a

matter of law. Pl.'s Opp'n 9. *32

**iii. Qualified Immunity**

All individual defendants next argue that, as a matter of law, they are entitled to qualified immunity on plaintiff's warrantless entry claim because, on undisputed facts, it was objectively reasonable for them to believe that plaintiff consented to their entry. City Defs.' Mem of Law 19; EMT Defs.' Mem. of Law 17. The defendant police officers also contend that they are entitled to qualified immunity because, on undisputed facts, it was objectively reasonable for them to believe that a warrantless entry into plaintiff's apartment was justified by exigent circumstances. City Defs.' Mem. of Law 19.

Plaintiff contends that, as a matter of law, the individual EMT defendants are not entitled to raise a qualified immunity defense because they are private parties. Pl.'s Opp'n 10. Thus, plaintiff implicitly seeks summary judgment as against EMTs Nelson and Abeeluck on any defense of qualified immunity. As to the defendant police officers, plaintiff argues that factual disputes preclude granting the officers qualified immunity on their defense of consent to entry. *Id*. at 11. She also implicitly urges entitlement to summary judgment on their qualified immunity defense based on exigent circumstances because the undisputed facts establish the absence of exigent circumstances justifying entry into her apartment.[14] *See id;* Pl.'s Reply Mem. 3-7.

[14] Even if plaintiff had not implicitly made this argument, a court may *sua sponte* grant summary judgment "so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex*, 477 U.S. at 326.

Qualified immunity shields government officials from liability for civil damages "when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (*per curiam*)), or if it was "objectively reasonable for [the officer] to believe that his actions were lawful at the time of the challenged act," *Myers v.* *33 *Patterson*, 819 F.3d 625, 632 (2d Cir. 2016) (alteration in original) (quoting *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995)). Whether a right was clearly established at the relevant time is a question of law. *Kerman v. City of New York*, 374 F.3d 93, 108 (2d Cir. 2004). To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Whether it was objectively reasonable for an officer to believe his acts were lawful is a mixed question of law and fact that "has its principal focus on the particular facts of the case." *Hurlman v. Rice*, 927 F.2d 74, 78-79 (2d Cir. 1991). To assess objective reasonableness, "we look to whether 'officers of reasonable competence could disagree on the legality of the defendant's actions.'" *McGarry v. Pallito*, 687 F.3d 505, 512 (2d Cir. 2012) (quoting *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir.1995)). If they could not disagree, qualified immunity is not available. *See Zalaski*, 2013 WL 3796448, at *4.

**a. EMTs Nelson and Abeeluck**

With regard to EMTs Nelson and Abeeluck, plaintiff is correct that, as private parties, they are not entitled to qualified immunity on her § 1983 claims. *See Toussie v. Powell*, 323 F.3d 178, 180 (2d Cir. 2003) ("[Q]ualified immunity does not protect a private defendant against § 1983 liability where that private defendant is alleged to have conspired with government officials to deprive another of federal rights."); *see also Richardson v. McKnight*, 521 U.S. 399, 412 (1997) ("[Section] 1983 immunity does not automatically follow § 1983 liability."). In addition to the Second Circuit, the majority of circuit courts have rejected qualified immunity for private parties.[15] *See*, *e.g.*, *Rosewood Services*, *Inc. v. Sunflower Diversified Services*, *Inc.*, 413 F.3d 1163, 1169 *34 (10th Cir. 2005); *Jensen v. Lane County*, 222 F.3d 570, 578 (9th Cir. 2000); *Hinson v. Edmond*, 192 F.3d

1342, 1345 (11th Cir. 1999); *see also Bender v. General Services Admin*, 539 F. Supp. 2d 702, 714 (S.D.N.Y. 2008) (collecting additional cases). I, therefore, grant plaintiff summary judgment on the individual EMT defendants' qualified immunity defense.

15 While some courts have granted qualified immunity to private parties, it is typically in situations where the private acts are "isolated, taken at the specific direction of the government, or done without profit or other marketplace incentive." *Bender*, 539 F. Supp. 2d at 714. Because none of these factors weighs in favor of granting the individual EMT defendants qualified immunity, they are not entitled to its protection.

**b. Qualified Immunity Based on Consent**

With respect to consent, the law is clearly established: an officer must reasonably believe he has consent prior to making a warrantless entry into a home. *See Schneckloth*, 412 U.S. at 219, 248; *Snype*, 441 F.3d at 130-31. The question therefore is whether it was objectively reasonable for the defendant police officers to believe that the plaintiff consented to their entry. Because, for the reasons discussed above at pages 19-25, there are facts still in dispute that are material to this determination, their motion for summary judgment based on qualified immunity is denied. *See Kerman*, 261 F.3d at 229 ("[T]he parties' versions of the facts differ . . . and '[s]ummary judgment on qualified immunity grounds is not appropriate when there are facts in dispute that are material to a determination of reasonableness.'") (third alteration in original) (quoting *Thomas v. Roach*, 165 F.3d 137, 143 (2d Cir. 1999)); *Doutel v. City of Norwalk*, No. 3:11-CV-01164 VLB, 2013 WL 3353977, at *13 (D. Conn. July 3, 2013) ("[A] grant of qualified immunity is inappropriate at this stage because the parties' vague and conflicting accounts of what transpired prior to the officers' entry into the . . . household leave genuine issues of material fact which a jury must resolve."); *Mangino v. Incorporated Village of Patchogue*, 739 F. Supp. 2d 205, 243 n.33 (E.D.N.Y. 2010) (holding that "there are still disputed issues of fact regarding whether [the defendant] did consent and, if so, whether the consent was voluntary, that preclude summary
35 judgment on the unlawful entry claim, including on the issue of qualified immunity"). *35

**c. Qualified Immunity Based on Exigent Circumstances**

The law of exigent circumstances is also clearly established—and has been since 2001: "officers may not rely on an anonymous and uncorroborated 911 call to justify a warrantless entry into a private dwelling. . . . [S]uch a call, by itself, [can]not provide the foundation for a reasonable belief that exigent circumstances existed." *Kerman*, 261 F.3d at 238; *see also Fernandez*, 2012 WL 6102136, at *7 ("The law is clearly established that a warrantless entry into a home, even to render assistance to a person in need, requires probable cause."). As discussed above, the defendants cannot persuasively distinguish this case from *Kerman*. Although the qualified immunity standard is "forgiving," *Amore v. Novarro*, 624 F.3d 522, 530 (2d Cir. 2010), the facts of this case—viewed in the light most favorable to the defendant police officers—so closely mirror those in *Kerman* that no reasonable officer could conclude that the defendant police officers' actions were lawful. Even if *Kerman* were not "directly on point, . . . precedent [has] spoken with sufficient clarity to have placed the constitutional question 'beyond debate.'" *Ganek v. Leibowitz*, 874 F.3d 73, 81 (2d Cir. 2017) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

Accordingly, plaintiff is entitled to summary judgment dismissing the defendant police officers' affirmative defense of qualified immunity with respect to the existence of exigent circumstances. The defendant police officers' motion for summary judgment on this basis is, therefore, denied as a matter of law and they may not advance this defense at trial.

**C. False Arrest**

I next address Mizrahi's claim that the individual defendants illegally arrested her and took her to the hospital against her will. EMTs Nelson and Abeeluck move for summary judgment on this claim, arguing that, as a matter of law, plaintiff consented to go to the hospital. *See* EMT Defs.' Mem. of Law 10-11. Officers Chen and
36 Corrado similarly move for summary *36 judgment on the claim, arguing that plaintiff consented to her hospitalization. *See* City Defs.' Mem. of Law 13-14. Unlike the EMTs, the police officers also argue that there was probable cause to detain and arrest plaintiff because they reasonably believed that she posed a danger to herself. *Id*. at 14-17. Further, all of the individual defendants assert that, at minimum, they are entitled to qualified immunity on plaintiff's false arrest claim. *See* City Defs.' Mem. of Law 20-21; EMT Defs.' Mem of Law 11-13. Plaintiff opposes summary judgment on the defense of consent, denying that she consented to go to the hospital. Pl.'s Opp'n 15-19. She also moves for summary judgment against the defendant police officers' defense of probable cause. *Id*. at 13-15; Pl.'s Mem. 7-10.

The Fourth Amendment's protection against unreasonable searches and seizures "adheres whether the seizure is for purposes of law enforcement or due to an individual's mental illness." *Myers v. Patterson*, 819 F.3d 625, 632 (2d Cir. 2016). The elements for a claim of false arrest under § 1983 are substantially the same as those under New York law. *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996). To prevail on a claim for false arrest under New York law, a plaintiff must show: (1) the defendant intended to confine the plaintiff, (2) the plaintiff was aware of the confinement, (3) "the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged." *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995). Only the last two prongs are at issue. I address each in turn.

**i. Consent**

All of the individual defendants argue that they are entitled to summary judgment on the defense of consent because plaintiff willingly went to the hospital. They point to plaintiff's statement, "if you wanna take me, take me, it's all right" as well as plaintiff's request to go to Maimonides Hospital, rather than Coney Island Hospital,
37 as evidence of plaintiff's consent. *37 EMT Defs.' Mem. of Law 10-11; City Defs.' Mem. of Law 13-14. They further argue that plaintiff consented to go to the hospital because she did not refuse to go and because she walked by herself without assistance or force to the ambulance. EMT Defs.' Mem of Law 10-11; City Defs.' Mem. of Law 13-14. Plaintiff argues that whether she consented is a disputed factual issue and that, under the circumstances, a reasonable jury could find that she "had no other choice but to submit to the [d]efendants' demands," Pl.'s Opp'n 2, 15.

When stripped of their context, plaintiff's statements and actions may suggest that she consented to go to the hospital, but, when viewed in their totality, they simply underscore the disputed nature of the facts in this case. For example, the defendant police officers characterize plaintiff's statement "'if you wanna take me, take me,'" as "unprompted" and, thus, evidence that she "offered her consent to be taken to the hospital." City Defs.' Mem. of Law 13. As plaintiff argues, however, she made this statement only after EMT Nelson told her that the officers "can't leave you here." Pl.'s Opp'n 15-16; *see* Brown Decl. Ex. H, at 01:34-01:37, 04:03-04:06. Nelson's statement to Mizrahi in the apartment directly contradicts the individual EMT defendants' argument that "there is simply no evidence . . . that the defendants told Mizrahi that . . . they could not and would not leave without her." EMT Defs.' Reply Mem. 6. Moreover, a reasonable jury could conclude that plaintiff's use of the word "take" indicates that she was not yielding voluntarily. *See* Black's Law Dictionary (defining "take" as "to obtain possession or control, whether legally or illegally" and "to seize with authority; to confiscate or apprehend"). I agree with plaintiff that, given these facts, a reasonable jury could conclude that plaintiff's comment merely demonstrates acquiescence in the individual defendants' perceived authority. *See* Pl.'s Opp'n
38 15. *38

Defendants' argument that plaintiff "requested" to go to Maimonides hospital and, therefore, consented to the arrest is similarly unpersuasive. *See* EMT Defs.' Mem. of Law 10; City Defs.' Mem. of Law 13. After EMT Nelson directed her to get dressed, Mizrahi asked, "why are you taking me now?" to which EMT Nelson responded, "ma'am, we can't leave you here." Brown Decl. Ex. H, at 04:00-04:06. When Mizrahi asked the question again, EMT Nelson said that because of Adry's call "you can prove us wrong, prove him wrong. You go to the hospital, you speak to someone. You tell them, the doctor." *Id*. at 04:10-04:25. Plaintiff then inquired where the individual defendants intended to "take" her. *Id*. at 04:25. After they responded Coney Island Hospital, plaintiff asked, "Can you take me to Maimonides *at least*?" *Id*. at 04:30-04:32 (emphasis added). Contrary to defendants' arguments, this exchange does not prove that, as a matter of law, plaintiff consented to go to the hospital. Rather, it demonstrates that EMT Nelson told plaintiff that she would not be left alone in her apartment, that she would be "go[ing] to the hospital," and that, upon hearing where the individual defendants intended to take her, plaintiff asked "at least" to be taken to Maimonides Hospital. When viewed in context, a reasonable juror could interpret plaintiff's statement not as a request to go to the hospital full stop but, instead, as a plea to go to a hospital that was familiar to her, given the inevitability that she would be going *somewhere*. That is, the exchange provides the basis for reasonable jurors to make different inferences—not for the court to award summary judgment to the defendants.

Defendants' contention that plaintiff's failure to object or refuse to go to the hospital implies consent is not tenable. *See Seifert*, 933 F. Supp. 2d at 317 ("[M]ere silence or the failure to object . . . does not constitute consent unless the totality of circumstances so indicates.") (quoting *United States v. Taylor*, 279 F. Supp. 2d 242, 245 (S.D.N.Y. 2003)). First, it is not clear that plaintiff did *not* object given that she repeatedly told the
39 individual defendants that she was *39 "fine" and that she did not want to speak to "someone." *See* Brown Decl. Ex. H, at 02:05-02:11. As EMT Nelson conceded at her deposition, this may have indicated that plaintiff did not want to go to the hospital. *See* Nelson Dep. 82:7-83:2. Second, there is no evidence that any of the EMTs or police officers ever asked plaintiff if she *wanted* to go to the hospital. *See Real Prop. & Premises Known as 90-23 201st St., Mollis, New York*, 775 F. Supp. 2d 545, 556 (E.D.N.Y. 2011) ("The government bears the burden of proving by a preponderance of the evidence that an individual's consent . . . was voluntary."). Instead, the audio recording of what occurred in the apartment and the individual defendants' depositions demonstrate only that plaintiff did not refuse to go. *See*, *e.g.*, Nelson Dep. 69:15-17, 82:7-12, 174:3-9 ("Okay, the paper did not have her signature to say she [consented], but she did not refuse to go in the ambulance with us to the hospital."). Third, the EMTs and police officers never apprised plaintiff of her right not to go to the hospital.[16] *See U.S. v. Pena Ontiveros*, 547 F. Supp. 2d 323, 331 (2d Cir. 2008) ("[K]knowledge of the right to refuse consent is not a requirement to a finding of voluntariness, though it may be a factor in ascertaining whether the consent was coerced.").

16 It is also worth noting that, had Mizrahi refused, EMT Abeeluck would have seen that as an indication that she was being uncooperative. *See* Abeeluck Dep. 136:3-7.

Citing only cases about consent to entry and to search, *see* City Defs.' Reply Mem. 1-4, defendants assert that courts have found consent in situations "that seem far more threatening than those presented here." City Defs.' Reply 2 n.7 (quoting *Bartee*, 2013 WL 6164336, at *11). However, "whether the arrest was effectuated through . . . use of force[] or display of weaponry" is not the only factor that courts consider in a determination of voluntariness. *Mangino*, 739 F. Supp. 2d at 245. Indeed, "[a]ccount must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who [allegedly] consents." *Id.* at 246
40 *40 (quoting *United States v. Guzman*, 724 F. Supp. 2d 434, 441-42 (S.D.N.Y. 2010)). In light of EMT Nelson's repeated statements that the officers would not leave plaintiff alone, the presence of multiple officers in

plaintiff's home, and Officer Chen's instruction to plaintiff not to lock her bedroom door while changing her clothes, a reasonable jury could conclude that plaintiff did not consent to confinement within her apartment or consent to go to the hospital. *See Bumper v. North Carolina*, 391 U.S. 543, 549 n.14 (1968) ("Orderly submission to law enforcement officers who, in effect, represent to the defendants that they had the authority to enter and search the house, against his will if necessary, was not . . . consent.") (quoting *United States v. Elliott*, 210 F. Supp. 357, 360 (D. Mass. 1962)). The circumstantially distinguishable cases that defendants cite do not alter this conclusion. *See e.g.*, *United States v. Crespo*, 834 F.2d 267, 271-72 (2d Cir. 1987) (affirming a finding of consent to search based, in part, on the district court judge's credibility assessments); *United States v. Pena Ontiveros*, 547 F. Supp. 2d 323, 334 (S.D.N.Y. 2008), *aff'd sub nom. United States v. Rico Beltran*, 409 F. App'x 441 (2d Cir. 2011) (finding that the defendant consented to search where, among other things, he "faced no questioning prior to the consent being given"); *United States v. Ramirez*, 903 F. Supp. 587, 589, 591 (S.D.N.Y. 1995) (finding consent to search where the defendant read and signed a consent to search form).

Because a reasonable jury could interpret plaintiff's comments in her apartment as acquiescence to the seeming authority of the individual defendants, I deny defendants' motions for summary judgment on plaintiff's false arrest claim based on the defense of consent.

**ii. Probable Cause**

The defendant police officers next argue that even if plaintiff did not consent to her confinement, there was probable cause to believe that she posed a danger to herself based on the information they received from 911
41 and "plaintiff's statements to EMT Nelson that she was *41 sad." City Defs.' Mem. of Law 14. They also argue that they were "entitled to rely on the EMTs' determination to detain plaintiff because she was a danger to herself." *Id.* at 15. Plaintiff denies that there was evidence to suggest that she posed a danger to herself and seeks summary judgment on the officers' defense of probable cause. Pl.'s Mem. of Law 9-10; Pl.'s Reply Mem. 7-10.

Under New York State Mental Hygiene Law § 9.41, "any peace officer" has the authority to take an individual into custody if she "appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others." N.Y. Mental Hyg. Law § 9.41. The Mental Hygiene Law defines "likely to result in serious harm," in part, as "a substantial risk of physical harm to the person as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to . . . herself . . . ." N.Y. Mental Hyg. Law § 9.01. To determine whether the confinement is privileged, courts apply the same concepts of probable cause and objective reasonableness as they do in criminal cases. *Greenaway v. Cty. of Nassau*, 97 F. Supp. 3d 225, 233 (E.D.N.Y. 2015); *see also Kerman*, 261 F.3d at 235 n.8 ("We interpret [N.Y. Mental Hyg. Law § 9.41] consistently with the requirements of the Fourth Amendment and therefore assume that the same objective reasonableness standard is applied to police discretion under this section.").

"A warrantless seizure for the purpose of involuntary hospitalization 'may be made only upon probable cause, that is, only if there are reasonable grounds for believing that the person seized' is dangerous to herself or to others." *Anthony v. City of New York*, 339 F.3d 129, 137 (2d Cir. 2003) (quoting *Glass*, 984 F.2d at 58). For a mental health seizure, a showing of probable cause requires "a probability or substantial chan[c]e of dangerous behavior, not an actual showing of such behavior." *Heller v. Bedford Cent. Sch. Dist.*, 144 F. Supp. 3d 596, 622
42 (S.D.N.Y. *42 2015) (quoting *Monday v. Oullette*, 118 F.3d 1099, 1102 (6th Cir. 1997)), *aff'd*, 665 F. App'x 49 (2d Cir. 2016). "Probable cause for involuntary hospitalization may be established from 'information gleaned from informants[,] . . . normally the putative victim or eyewitness, unless the circumstances raise doubt as to

the person's veracity.'" *Sawabini v. McGrath*, No. 315CV692LEKDEP, 2017 WL 3727370, at *8 (N.D.N.Y. Aug. 28, 2017) (quoting *Hicks v. City of New York*, No. 12-CV-5081, 2015 WL 5774575, at *5 (E.D.N.Y. Aug. 27, 2015)). If probable cause exists, the confinement is privileged. *See Weyant*, 101 F.3d at 852; *Jaegly v. Couch*, 439 F.3d 149, 152 (2d Cir. 2006). To determine whether a mental-health seizure is justified, a court "must review the specific observations and information available to the officers at the time of a seizure." *Myers*, 819 F.3d at 633; *see also Bayne v. Provost*, No. 1:04 CV 44, 2005 WL 1871182, at *7 (N.D.N.Y. Aug. 4, 2005) ("[T]he question here is whether the facts and circumstances known to the Troopers at the time they determined to take Plaintiff into custody were sufficient to warrant a person of reasonable caution in the belief that Plaintiff might be 'mentally ill and [ ] conducting himself in a manner [ ] likely to result in serious harm to' himself . . . .") (quoting *Monday*, 118 F.3d at 1102).

The information available to the individual City defendants when they made the decision to confine plaintiff was insufficient to constitute probable cause. First, the 911 call on which the defendant police officers rely cannot provide the basis for a reasonable belief that plaintiff was a danger to herself. *See Kerman*, 261 F.3d at 258. Insufficient as it was for entry, the call provided even less of a reason to seize the plaintiff in light of the additional evidence available to the officers once they made contact with her. *See id*. Even if it had been reasonable for the officers not to question the 911 caller's reliability before entering plaintiff's apartment, once
43 inside, plaintiff's sentiments about her poor relationship with Adry and her repeated descriptions of *43 him as a "liar," Brown Decl. Ex. H., at 01:45, 04:16 & 04:46, should have given the officers pause about trusting the information that he provided. *See Sankar v. City of New York*, 867 F. Supp. 2d 297, 306 (E.D.N.Y. 2012) ("[W]here . . . a bitter prior relationship exists 'and *is known to the arresting officer before the arrest is made*, the complaint alone may not constitute probable cause.'") (third alteration in the original) (quoting *Mistretta v. Prokesch*, 5 F. Supp. 2d 128, 133 (E.D.N.Y. 1998)); *cf. Bayne*, 2005 WL 1871182, at *8 (finding probative as to the existence of probable cause that, in addition to receiving a phone call from the plaintiff's nurse alleging threats of suicide, the defendant police officers spoke to the nurse after their arrival on the scene and confirmed her account of the plaintiff's suicide threat).

Second, even viewing the evidence in the light most favorable to the police officers, nothing that plaintiff said or did in her apartment would lead a reasonable police officer to believe that she was suicidal or that there was "a probability or substantial chance of dangerous behavior." *Heller*, 144 F. Supp. 3d at 622. Plaintiff did not threaten suicide—and denied ever having done so. *See* Brown Decl. Ex. H., at 01:07-01:25; *Rzayeva v. Foster*, 134 F. Supp. 2d 239, 248 (D. Conn. 2001), *aff'd sub nom. Rzayeva v. Santos*, 67 F. App'x 75 (2d Cir. 2003) (finding probable cause to involuntarily commit the plaintiff where, in the presence of the defendant officer, "the plaintiff threatened to cut her wrists and to throw herself out a third floor window"). Her apartment was not in disarray. *See Kerman*, 261 F.3d at 241 ("[T]he police may have been entitled to hospitalize Kerman if . . . the condition of his apartment demonstrated a dangerous mental state."); *see also Roffman v. Knickerbocker Plaza Assocs.*, No. 04 CIV. 3885 (PKC), 2008 WL 919613, at *8 (S.D.N.Y. Mar. 31, 2008) (listing, among others, "the presence of the 'fireload' of stacked papers" and "the burned pot on the hot stove" as factors
44 supporting the court's finding that the defendants had an objectively reasonable basis for their belief that the *44 plaintiff posed a danger to herself). She did not attempt to barricade herself. *See Quon v. Henry*, No. 14-CV-9909 (RJS), 2017 WL 1406279, at *8 (S.D.N.Y. Mar. 27, 2017), *appeal dismissed* (Aug. 8, 2017). And she was not acting in an erratic, agitated, or incoherent manner. *See Glass*, 984 F.2d at 57-58 (holding that probable cause existed to involuntarily hospitalize the plaintiff where he threatened someone with a gun and was acting "strange. . . . hostile, guarded, angry, suspicious, uncooperative, and paranoid"); *Bayne*, 2005 WL 1871182, at

*8 (determining that probable cause existed for involuntary hospitalization where, among other things, the plaintiff had a "clearly agitated mental state"). Despite the City defendants' assertions in their briefing, *see* City Defs.' Reply Mem. 8-9, the individual defendants' depositions provide no evidence to the contrary.[17]

17 For example, when asked whether the plaintiff did or said anything to indicate that she was acting in an aggressive or violent manner, both EMT Nelson and Officer Chen said no. Nelson Dep. 71:15-21; Affirmation of Nathaniel B. Smith in Supp. of Pl.'s Mot. for Partial Summ. J. ("Smith Affirm."), Ex. 13 ("Pl.'s Excerpted Chen Dep."), at 57:13-14, 58:6-7; 78:7-9, ECF No. 140-13; *see also* Abeeluck Dep. 92:9-10. When asked whether the plaintiff did "anything to suggest . . . that she was suicidal" or "that indicated . . . she might want to hurt herself," the defendants again said no. *See, e.g.*, Nelson Dep. 71:22-73:3. According to EMT Nelson, plaintiff was "in her right mind," "alert," "oriented," "speaking coherently," and not "impaired in any way." *Id*. 73:4-25; Abeeluck Dep. 114:19-115:25. In addition, Officer Chen went so far as to say that he "determined that she [was] not [a] danger to herself or us." Pl.'s Excerpted Chen Dep. 78:7-8.

The City defendants' additional arguments to support their position are unpersuasive. The fact that Mizrahi told the individual defendants that she was "sad" does not mean that it was reasonable to believe that she was suicidal—a fact that EMT Nelson acknowledged. *See* Nelson Dep. 71:25-72:18. Regardless, Mizrahi's statement unquestionably does not constitute grounds for detaining her or taking her to the hospital against her will. *Cf*. *Greenaway*, 91 F. Supp. 3d at 234 ("The . . . [d]efendants fail to show that engaging in 'bizarre and unreasonable' behavior, including stripping naked and rubbing paint on oneself inside one's own residence is 'likely to result in serious harm to the person or others.'"). It is also not true that plaintiff's alleged consent to go
45 to the hospital "suggest[s] that plaintiff was experiencing mental health *45 symptoms." City Defs.' Mem of Law 14-15. On the contrary, the argument that plaintiff consented to go to the hospital cuts against the notion that she was in such an unstable state that the officers had probable cause to detain her.[18] *See Ruhlmann v*. *Ulster Cty*. *Dep't of Soc*. *Servs*., 234 F. Supp. 2d 140, 173 (N.D.N.Y. 2002) ("It is difficult to see how 'consent' has any place in the 'involuntary' admission context. . . . [T]o argue that plaintiff's consent has relevance to the claims herein necessarily implies that admission and treatment were voluntary, not involuntary.").

18 In their reply brief, the City defendants also argue that probable cause existed to seize Mizrahi because she "had a bottle of potentially fatal prescription tranquilizers in her apartment." City Defs.' Reply Mem. 10. Defendants did not make this argument in their moving papers. I therefore need not address it. *Cf*. *Keefe ex rel*. *Keefe v*. *Shalala*, 71 F.3d 1060, 1066 n.2 (2d Cir. 1995). I note, however, that, to the extent the defendant police officers were actually concerned about the medication, they could have called the doctor who prescribed it whose name was on the bottle. *See Kerman*, 261 F.3d at 241. More importantly, even in the presence of medication, the police officers must still have reasonably believed that plaintiff posed or could have posed a danger to herself in order to proceed with an involuntary seizure.

The defendant police officers' argument that they reasonably relied on the individual EMT defendants' determination that Mizrahi posed a danger to herself also fails.[19] EMTs Nelson and Abeeluck deny making the dangerousness determination on which Officers Chen and Corrado claim that they relied. *See* Nelson Dep. 48:7-12; 49:12-13; Abeeluck Dep. 76:21-23, 78:14-17. Indeed, EMTs Nelson and Abeeluck deny possessing the requisite qualifications to determine that someone is an EDP, *see* Nelson Dep. 48:13 -49:2, 50:4-5; Abeeluck Dep. 78:14-17, and the City defendants provide no evidence to suggest that they do. There is, therefore, a disputed factual issue as to whether the individual EMT defendants made the determination on which the defendant police officers say that they reasonably relied, thus precluding a grant of summary
46 judgment for the police officers on this claim. *46

19 The City defendants make this argument in the contexts of both probable cause and qualified immunity.

More importantly, even if EMTs Nelson and Abeeluck had determined that plaintiff was an EDP, it was not reasonable for the police officers to defer to the EMTs *in this situation*. A probable cause determination is fact-specific. Here, the defendant police officers possessed the *same* information as the EMTs—that an anonymous person, purporting to be plaintiff's "friend," called 911 to say that plaintiff was suicidal—and made the same observations that the EMTs did—that the plaintiff exhibited no signs of dangerous or suicidal behavior. Given that the defendant officers did not observe the plaintiff engaging in any troubling behavior or see anything in plaintiff's apartment that would be cause for concern, there was ample reason to doubt the validity of the individual EMT defendants' alleged determination. *See Kerman*, 261 F. 3d at 241 (explaining that an officer "is not free to disregard plainly exculpatory evidence"); *Matthews v. City of New York*, 2016 WL 5793414, at *4 (2016) (finding that the plaintiff had sufficiently alleged that there were no facts to establish probable cause for her arrest and hospitalization where she claimed she was calm and the defendants had the opportunity to observe her behavior).

While it may be reasonable for a police officer to rely on an EMT's medical assessment in certain situations, an officer cannot evade responsibility by blindly deferring to an EMT in spite of overwhelming evidence to the contrary.[20] *See Kerman*, 261 F.3d at 241("[A] fact-finder could well find that the police acted outside the bounds of both the Fourth Amendment and the qualified immunity standards of objective reasonableness . . . . [if he or she found that] the police not only failed to reasonably investigate [Kerman's] mental state, [but] also
47 grossly misjudged the *47 situation as it unfolded before them."); *see also Lozada*, 92 F. Supp. 3d at 91 (finding that the defendant state trooper could not rely on information provided by EMTs where the state trooper "had the opportunity to observe [p]laintiff and make his own determination as to whether her behavior warranted arrest"); *Schofield v. Magrey*, No. 3:12CV544 JBA, 2015 WL 521418, at *5 (D. Conn. Feb. 9, 2015) ("[W]here a defendant has 'knowledge of the facts that rendered the conduct illegal,' he may be liable even where his participation in the illegality is only '"indirect"—such as . . . helping others to do the unlawful acts.'") (quoting *Provost v. City of Newburgh*, 262 F.3d 146, 155 (2d Cir. 2001)). Even if it is true that the defendant police officers consistently rel[y]" on EMTs to determine whether an individual is an EDP, *see* City Defs.' Mem. of Law 15, that alleged fact does not render the decision to do so in this situation reasonable even if it could, as discussed below, support a finding of qualified immunity.

20 In a prior opinion on a motion to dismiss in this case, I noted that a police officer's training "could not be expected to override the judgment of a medical professional." Opinion & Order, dated Dec. 21, 2015, at 6, ECF No. 10. As explained above, however, the City defendants have not offered any evidence that the individual EMT defendants possess pertinent qualifications such that I should accord their alleged determination heightened deference. This is especially true in light of the fact that EMTs Nelson and Abeeluck affirmatively deny possessing those qualifications.

For these reasons, I find that the defendant police officers did not have probable cause to seize plaintiff as a matter of law. I therefore deny their motion for summary judgment based on this defense and grant plaintiff's corresponding motion for summary judgment. Thus, Officers Chen and Corrado are precluded from raising this defense at trial.

**iii. Qualified Immunity**

Even if plaintiff did not consent to confinement, all of the individual defendants argue that they are entitled to qualified immunity on plaintiff's false arrest claim because it was objectively reasonable for them to believe that plaintiff consented to go to the hospital. City Defs.' Mem. of Law 20; EMT Defs.' Mem. of Law 11-12. Officers Chen and Corrado also argue that they are entitled to qualified immunity because "the law in this [c]ircuit is not clearly established as to police officers' duties relative to EMS operations" and because it was objectively reasonable for them to rely on the individual EMT defendants' alleged determination *48 that it was

48 necessary to detain plaintiff. City Defs.' Mem. of Law 20-21. Plaintiff resists summary judgment on the issue of qualified immunity, contending that the individual EMT defendants are not entitled to qualified immunity because they are private parties. Pl.'s Opp'n 20. Further, she urges that any finding of qualified immunity in favor of the defendant police officers on her false arrest claim is, at this juncture, precluded by disputes of material fact. *Id*.

**a. EMTs Nelson and Abeeluck**

As explained above, EMTs Nelson and Abeeluck are not entitled to qualified immunity on plaintiff's false arrest claim because they are private parties. *See supra* p. 33-34.

**b. Qualified Immunity Based on Consent**

With respect to consent, the law regarding voluntariness was clearly established at the time of this incident. Moreover, the same disputes of material fact that preclude any finding that plaintiff consented to detention in her apartment or consented to go to the hospital also preclude any finding as a matter of law that it was objectively reasonable for the defendant police officers to believe that she did. Although defendants urge that plaintiff communicated mixed messages relating to the existence of consent, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S, at 255. Viewing the evidence—and the inferences that arise from the evidence—in a light most favorable to the plaintiff, defendants have not shown that no reasonable jury could conclude that officers' actions were "objectively unreasonable." *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29, 37 (2d Cir. 2003) (quoting *Ford v. Moore*, 237 F.3d 156, 162 (2d Cir. 2001)); *see Tsesarskaya v. City of New York*, 843 F. Supp. 2d 446, 459 (S.D.N.Y. 2012) ("Here, there are material factual disputes, including the inferences
49 that arise from the facts, *49 relating to the legality of the entry into [plaintiff's] apartment and her arrest, precluding resolution of the qualified immunity defense on summary judgment.").

**c. Qualified Immunity Based on Probable Cause**

*i. The Absence of Clearly Established Law*

On the issue of probable cause, Officers Chen and Corrado argue that they are entitled to qualified immunity because the law in this circuit is not clearly established as to how police officers should interact with EMS when both entities respond to an emergency. City Defs.' Mem. of Law 20-21. In urging the absence of clearly established law, however, the defendant officers misunderstand what law governs the issue posed in this case. While it is true that courts cannot "define clearly established law at a high level of generality," *al-Kidd*, 563 U.S. at 742, the right at issue here is not the broad right to be free from unreasonable seizures absent probable cause. Rather, it is the specific right not to be involuntarily seized for psychiatric or medical attention absent probable cause to believe that the person presents a danger to himself or others. This right is clearly established and it—not how EMTs and police should work together—is the law at issue in this case. *See Green v. City of New York*, 465 F.3d 65, 83-84 (2d Cir. 2006) (holding that "it was clearly established at the time of the incident under review that a competent adult could not be seized and transported for treatment unless she presented a danger to herself or others") (citing *Glass*, 984 F.2d at 57). Indeed, for the law to be clearly established, it is not necessary that the "action in question has previously been held unlawful," but only that "in the light of pre-existing law the unlawfulness [would] be apparent [to a reasonable official]." *Anderson*, 483 U.S. at 640 (citations omitted). There are, therefore, no questions about the law governing the legality of the defendants' alleged conduct in this case that warrant granting the defendant police officers qualified immunity as a matter
50 of law. *50

*ii. Objective Reasonableness*

Officers Chen and Corrado could still be entitled to summary judgment on plaintiff's claim of false arrest if undisputed facts establish that their beliefs and corresponding actions were objectively reasonable, thus conferring upon them qualified immunity. *See Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004) ("[T]he analytically distinct test for qualified immunity is more favorable to the officers than the one for probable cause."). In the false arrest context, an officer is entitled to qualified immunity where there was "arguable" probable cause for the arrest. *Zellner v. Summerlin*, 494 F.3d 344, 369 (2d Cir. 2007). "Arguable probable cause exists 'if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met.'" *Escalera v. Lunn*, 361 F. 3d 737, 743 (2d Cir. 2004) (quoting *Golino v. City of New Haven*, 950 F.2d 864, 870 (2d Cir. 1991)). However, arguable probable cause "should not be misunderstood to mean 'almost' probable cause," and if "officers of reasonable competence would have to agree that the information possessed by the officer at the time of arrest did not add up to probable cause, the fact that it came close does not immunize the officer." *Gonzales v. City of Schenectady*, 728 F.3d 149, 157 (2d Cir. 2013) (quoting *Jenkins v. City of New York*, 478 F.3d 76, 87 (2d Cir. 2007)).

Applying this doctrine here, qualified immunity is, at the outset, precluded by disputed issues of material fact. Even if those issues were resolved, however, the factual record before me is insufficiently developed to address the question of objective reasonableness. *See generally Myers*, 819 F.3d at 633 (finding that the district court erred in granting qualified immunity on summary judgment where the record contained insufficient evidence to
51 support the conclusion that the officer reasonably believed that plaintiff was dangerous to herself or others). *51

First, as stated previously, the factual record is unclear concerning whether it was the individual EMT defendants who made the determination that plaintiff was an EDP. Although Officers Chen and Corrado contend that the individual EMT defendants *did* make this determination, EMTs Nelson and Abeeluck deny both doing so and being qualified to do so. Likewise, the record is unclear as to whether it would have been reasonable for the defendant police officers to conclude from the individual EMT defendants' actions that the EMTs had made such a determination.

Moreover, the current factual record is too sparse to determine, whether, as the attorney for the defendant police officers argues in his legal memorandum, it is actually the "practice" of these defendants to defer to EMTs in the context of EDPs. *See* City Defs.' Mem. of Law 15. In addition, the current record provides little or no evidence pertinent to assessing whether, if the officers did accord deference to the judgment of the EMTs, their determination to do so would have been objectively reasonable. Beyond the defendant officers' own somewhat ambiguous testimony on the point, [21] the only evidence in the record is the New York City Police Department Patrol Guide concerning how police officers should interact with emotionally disturbed persons. *See* Reply Decl. of Cherie Brown in Further Supp. of City Defs.' Summ. J. Mot. ("Brown Reply Decl."), Ex. U ("Patrol Guide Procedure No. 216-05"), ECF No. 137-7. As plaintiff argues, these guidelines do not indicate that police officers, in determining whether to arrest such a person as a danger to herself, should defer to EMTs or anyone else. *See* Patrol Guide Procedure No. 216-5; Pl.'s Opp'n 20-21; *see also* City Defs.' Reply Mem. 12 (describing
52 the Patrol Guide as "completely silent as to EMS"). The record does not address department- *52 wide or even precinct-wide policies on this issue. Nor does it elucidate any instruction the officers may have received from superiors regarding how to handle these situations—be it written instruction, instruction as part of general training, or explicit instructions in the field. It is thus not possible to assess the nature or pervasiveness of the

officers' training by superiors in the department that may render the individual police defendants' asserted deference to the EMTs' judgment objectively reasonable, notwithstanding settled legal principles to the contrary.

[21] Although both officers attest that it is their own practice to defer to EMTs in the context of EDP determinations—an assertion a reasonable jury need not credit—they do not clearly assert that their own "practice" is department-wide or otherwise pervasive. *See* Chen Dep. 116:12-24; Corrado Dep. 35:17-20.

To support their position, the officers cite *Kraft v. City of New York*, in which the court granted qualified immunity to two police officers who helped transport an assumed EDP to the hospital.[22] City Defs.' Reply Mem. 11. In *Kraft*, however, numerous factors absent here led the court to conclude that the officers were entitled to qualified immunity. Chief among them is that it was "undisputed" in *Kraft* that an EMS supervisor made the ultimate decision to transport plaintiff to the hospital. 696 F. Supp. 2d at 420. Therefore, there was no question—as there is here—as to who bore responsibility for the decision to seize the plaintiff.

[22] The City defendants discuss *Kraft* at length in the part of their reply brief that addresses probable cause. *See* City Defs.' Reply Mem. 11. They do so mistakenly, however, because *Kraft* addressed only qualified immunity. *See* 696 F. Supp. 2d 403, 418 (S.D.N.Y. 2010).

In addition, the *Kraft* court emphasized that it was objectively reasonable for the police defendants to rely on the EMS supervisor's instruction to transport the plaintiff to the hospital because that instruction was "apparently valid." *Id*. (quoting *Anthony*, 229 F.3d at 138). It was "apparently valid" in light of, among other things, first-hand information provided to *both* the police defendants and EMS personnel by three people at the scene. Thus, the defendant officers were entitled to qualified immunity because it was objectively reasonable to rely on the EMT supervisor's decision *because* that decision was supportable in light of surrounding
53 circumstances. *53

In sum, I deny the defendant police officers' motion for summary judgment on plaintiff's false arrest claim on the basis of qualified immunity because there are disputed issues of material fact and because the factual record as it currently stands does not allow me to assess whether the police officers' alleged deference to the EMTs' judgment was objectively reasonable.[23]

[23] To the extent plaintiff implicitly seeks summary judgment on the City defendants' defense of qualified immunity, I deny her summary judgment for the same reasons.

**D. Failure to Intervene**

The defendant officers also move to dismiss plaintiff's claim for failure to intervene. City Defs.' Mem. of Law 17-18. They make four arguments. First, they argue that plaintiff failed to establish the existence of an underlying constitutional violation. *Id*. at 18. Second, they argue that it is not clear that the duty to intervene extends to intervention in unlawful actions by EMS personnel. *Id*. at 17. Third, they contend that a reasonable officer could not have known that plaintiff's constitutional rights had been violated. *Id*. at 18. Fourth, they argue that plaintiff cannot allege that the defendant officers both directly engaged in unconstitutional conduct and also failed to intervene to stop that conduct. *Id*. In response, plaintiff contends that defendant police officers "simply stood by and let Nelson make the seizure decision, a decision that the law required [the officers to] make." Pl.'s Opp'n 22.

It is widely recognized that "all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence." *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994). "An officer who fails to intercede is liable for the preventable harm caused by the actions of the other officers where that officer observes or has reason to know" that other officers are violating a person's constitutional rights. *Id.* Liability may attach only when "(1) the
54 officer had a *54 realistic opportunity to intervene and prevent the harm; (2) a reasonable person in the officer's position would know that the victim's constitutional rights were being violated; and (3) the officer does not take reasonable steps to intervene." *Jean-Laurent v. Wilkinson*, 540 F. Supp. 2d 501, 512 (S.D.N.Y. 2008) (citing *O'Neill v. Krzeminsi*, 839 F.2d 9, 11-12 (2d Cir. 1988)).

The defendant police officers' first argument that plaintiff has not established the existence of an underlying constitutional violation fails. As discussed above, plaintiff's unlawful entry and arrest claims survive defendants' motions for summary judgment.

The officers' second argument likewise fails. Whether the officers' duty to intervene extends to the actions of the individual EMT defendants depends, in part, on whether EMTs Nelson and Abeeluck were state actors. *See Adickes*, 398 U.S. at 150-52; *Ramirez v. City of Chicago*, 82 F. Supp. 2d 836, 840-841 (N.D. Ill. 1999). Because, as explained above, that question must go to a jury, I cannot conclude as a matter of law that the defendant police officers did not have a duty to intervene on this basis.

Nor can the defendant police officers prevail on their argument that they could not have known that plaintiff's constitutional rights had been violated. It is undisputed that the defendant officers were present for the entire interaction with the plaintiff until plaintiff entered the ambulance. Given that a reasonable jury could find that the individual defendants illegally entered her apartment and confined her against her will, a reasonable jury could likewise find that the defendant officers knew or should have known that plaintiff's constitutional rights were being violated by the EMTs and, thus, that the officers had an obligation to intervene.

As to their final argument, the defendant police officers are correct that a jury cannot find them liable for directly engaging in unconstitutional conduct and for failing to intervene to stop that conduct. *See Jackson v.*
55 *City of New York*, 939 F. Supp. 2d 219, 232 (E.D.N.Y. 2013). *55 However, it is possible that a jury could conclude that the individual EMT defendants—and not the defendant police officers—were directly responsible for the false arrest but that the officers failed to intervene to stop the false arrest. *See Mack v. Town of Wallkill*, 253 F. Supp. 2d 552, 559 (S.D.N.Y. 2003); *Matthews v. City of New York*, 889 F. Supp. 2d 418, 443-44 ("[T]he failure to intervene claim is contingent upon the disposition of the primary claims underlying the failure to intervene claim."). For these reasons, I deny the defendant police officers' motion for summary judgment on plaintiff's failure to intervene claim.

## II. State Claims

**A. False Imprisonment**

As with plaintiff's federal false arrest claim, defendants seek summary judgment on plaintiff's second cause of action for false imprisonment under New York law. *See* Defs.' Mem. of Law 22; EMT Defs.' Mem. of Law 4-13. "In New York, the tort of false arrest is synonymous with that of false imprisonment." *Posr*, 944 F.2d at 96. As stated earlier, the elements of a cause of action for false arrest brought under the Fourth Amendment and New York law are substantially the same. *See Weyant*, 101 F.3d at 852. For the reasons stated in pages 35-47, therefore, I deny defendants' motions for summary judgment on plaintiff's state false imprisonment claim.

**B. IIED**

Both sets of defendants seek summary judgment on plaintiff's claim that they committed the tort of intentional infliction of emotional distress. Defendants assert that plaintiff has not met her burden to prove essential elements of that tort and that she seeks to recover for the same alleged conduct that supports her other claims. City Defs.' Mem. of Law 22-23; EMT Defs.' Mem of Law 17-21. Plaintiff argues that the defendants' conduct
56 "is fairly characterized *56 as outrageous" and that there are disputed issues of material fact that preclude summary judgment for the defendants. Pl.'s Opp'n 27-28.

"Under New York law, a claim for intentional infliction of emotional distress requires a showing of: (1) extreme and outrageous conduct; (2) intent to cause, or reckless disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress." *Stuto v. Fleishman*, 164 F.3d 820, 827 (2d Cir. 1999) (citing *Howell v. New York Post Co.*, 612 N.E.2d 699, 702 (N.Y. 1993)). Courts have found defendants liable for IIED only when "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." *Id.* (quoting *Howell*, 612 N.E.2d at 702). Under New York law, a claim for IIED may be invoked "only as a last resort," that is, where no other avenues for recovery exist. *Salmon v. Blesser*, 802 F.3d 249, 256-57 (2d Cir. 2015) (quoting *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 158 (2d Cir.2014)).

Plaintiff's IIED claim fails as a matter of law. First, plaintiff has not shown that the defendants' conduct was "extreme and outrageous." *See Nicholas v. City of Binghamton, N.Y.*, No. 10-CV-1565, 2012 WL 3261409, at *17 (N.D.N.Y. Aug. 8, 2012) (finding no IIED claim under similar circumstances); *see also Stuto v. Fleishman*, 164 F.3d 820, 828 (2d Cir. 1999) (explaining that cases in which courts have sustained claims for IIED "involve[] some combination of public humiliation, false accusations of criminal or heinous conduct, verbal abuse or harassment physical threats, permanent loss of employment, or conduct contrary to public policy"). Despite plaintiff's assertion to the contrary, *see* Pl.'s Opp'n 28, *Kerman* does not suggest that it was. Although this case is analogous to *Kerman* in crucial respects discussed previously, I agree with the City defendants that
57 it is not analogous for purposes of plaintiff's IIED claim. *See* City Defs.' *57 Reply Mem. 16-17. In addition to allegedly "slam[ing] the partially open door into [Kerman's] forehead, sending his eyeglasses flying and knocking him to the floor," the officers in *Kerman* allegedly held a gun to Kerman's head, said they would shoot him if he moved, dragged him on his stomach up the stairs, and kept him handcuffed and naked for an hour in view of people who had gathered to see what was going on. 261 F.3d at 233. The individual defendants' conduct in this case is not comparable.

Second, plaintiff's IIED claim is duplicative of her other claims, and thus cannot provide a separate avenue for recovery. While it is true that, in limited circumstances, some courts have sustained IIED claims even where the conduct complained of fell under other traditional tort doctrines, those cases presented exceptional facts. For example, in *Sylvester v. City of New York*, on which plaintiff relies, the court allowed the plaintiffs' IIED claims to move forward not only because the police officers "detain[ed] innocent individuals, pressure[d] them to give false statements, and ignore[d] their requests to leave police custody," but also because the police did these things "all while a family member [was] dying in a nearby hospital."[24] 385 F. Supp. 2d 431, 443 (S.D.N.Y. 2005). The court explained that even though the plaintiffs' IIED claims and false imprisonment claims overlapped, they were not wholly duplicative because the tort of false imprisonment did not cover the elicitation of allegedly false statements and the fact that the police officers' actions occurred while a family member was dying nearby. *Id.* at 443-44. Again, the conduct of which Mizrahi complains is readily
58 distinguishable from that in *Sylvester* and falls well within the ambit of her other tort claims. *58

24 Plaintiff conspicuously omits this last piece of information from her description of the case. *See* Pl.'s Opp'n 29 n.79. ---- ----

For these reasons, I grant defendants' motions for summary judgment on plaintiff's IIED claim.

**C. NIED**

Defendants also seek the dismissal of plaintiff's NIED claim. They argue that plaintiff suffered no physical injury, that she has not identified a specific duty that defendants owed her, and that her NIED claim is duplicative of her intentional tort claims. City Defs.' Mem. of Law 23-24; EMT Defs.' Mem. of Law 21-22. Plaintiff contends that she suffered physical manifestations of her emotional distress as well as severe emotional distress. Pl.'s Opp'n 29. She also argues that defendants' conduct caused her to fear for her physical safety. *Id*. at 30.

As with IIED claims, a claim for NIED under New York law requires a showing of extreme and outrageous behavior, a causal relationship between the conduct and the injury, and severe emotional distress. *See Romero v. City of New York*, 839 F. Supp. 2d 588, 631 (E.D.N.Y. 2012). A plaintiff may establish her NIED claim based on the "bystander" theory or (2) the "direct duty" theory. *Baker v. Dorfman*, 239 F.3d 415, 421 (2d Cir. 2000) (quoting *Mortise v. United States*, 102 F.3d 693, 696 (2d Cir. 1996)). The "bystander" theory, which requires a plaintiff to witness the death or serious injury of an immediate family member, *see id*., does not apply here. Under the "direct duty" theory, plaintiff must show that she "suffer[ed] emotional distress caused by 'defendant's breach of a duty which unreasonably endangered [plaintiff's] own physical safety.'" *Id*. (second alteration in original) (quoting *Mortise*, 103 F.3d at 696); *see also Simpson v. Uniondale Union Free Sch. Dist*., 702 F. Supp. 2d 122, 135 (E.D.N.Y. 2010) (citation and quotations omitted) ("[I]t is well settled that the circumstances under which recovery may be had for purely emotional harm are extremely limited, and thus a cause of action seeking such recovery must generally be premised upon a breach of a duty owed directly to the
59 plaintiff which *59 either endangered the plaintiff's physical safety or caused the plaintiff fear for his or her own physical safety."). "The duty . . . must be specific to the plaintiff, and not some amorphous, free-floating duty to society." *Mortise*, 102 F.3d at 696. New York also recognizes a cause of action in cases where there is "an especial likelihood of genuine and serious mental distress, arising from . . . special circumstances, which serves as a guarantee that the claim is not spurious." *Johnson v. State*, 334 N.E.2d 590, 592 (N.Y. 1975) (citation and quotations omitted).

Plaintiff has not satisfied any of the elements for her NIED claim. As with her IIED claim, plaintiff has not shown that defendants' behavior was extreme and outrageous. She also has provided no evidence of a "specific" duty owed to her by the defendants. *See Kraft*, 696 F. Supp. 2d at 424. Even if such a duty existed and was breached, plaintiff has not offered sufficient evidence that the breach unreasonably endangered her physical safety or reasonably caused her to fear for her physical safety. Simply saying so in a response to an interrogatory is not sufficient. Pl.'s Opp'n 30 n.84; *see Kraft*, 696 F. Supp. 2d at 425. Furthermore, plaintiff's situation does not rise to the level of "special circumstances" alluded to *Johnson*, in which the New York Court of Appeals upheld an NIED claim by a woman who was negligently misinformed by a hospital that her mother had died. *Johnson*, 334 N.E.2d at 591.

For these reasons, I grant defendants' motions for summary judgment as to plaintiff's NIED claim.

**D. Negligent Training, Hiring, and Supervision**

NYPH moves to dismiss plaintiff's negligent hiring, training, and supervision claim on the basis that there is no evidence to support it. EMT Defs.' Mem. of Law 26-28. The City defendants argue that plaintiff did not raise this claim against the defendant City in her Second Amended Complaint and cannot do so now in her
60 opposition to the City defendants' motion *60 for summary judgment. City Reply Mem. 17-18. Plaintiff contends that her claim is viable against both institutional defendants because all of the individual defendants—both police officers and EMTs—testified that they had not received training on how to make an EDP determination. *See* Pl.'s Opp'n 30. According to plaintiff, therefore, the individual defendants' employers, the City of New York and NYPH, "failed to provide the basic training required to perform their duties and that that failure caused Mizrahi harm." *Id*. at 31.

To state a claim for negligent hiring, training, supervision or retention under New York law, "in addition to the standard elements of negligence, a plaintiff must show: (1) that the tort-feasor and the defendant were in an employee-employer relationship; (2) that the employer knew or should have known of the employee's propensity for the conduct which caused the injury prior to the injury's occurrence; and (3) that the tort was committed on the employer's premises or with the employer's chattels." *Tsesarskaya*, 843 F. Supp. 2d at 463-64 (quoting *Ehrens v. Lutheran Church*, 385 F.3d 232, 235 (2d Cir. 2004)). "A cause of action for negligent hiring or retention requires allegations that the employer . . . failed to investigate a prospective employee notwithstanding knowledge of facts that would lead a reasonably prudent person to investigate that prospective employee." *Id*. (quoting *Bouchard v. N.Y. Archdiocese*, 719 F. Supp. 2d 255, 261 (S.D.N.Y. 2010)). Crucially, the employee's allegedly unlawful conduct must occur outside the scope of employment. *See Biggs v. City of New York*, No. 08 CIV. 8123 PGG, 2010 WL 4628360, at *10 (S.D.N.Y. Nov. 16, 2010); *Colodney v. Continuum Health Partners*, Inc., No. 03 Civ. 7276, 2004 WL 829158, at *9 (S.D.N.Y. Apr. 15, 2004) ("When an employee is acting within the scope of her employment, her employer may be held liable for the employee's negligence only under a theory of *respondeat superior*, and no claim may proceed against the employer for
61 negligent hiring or retention."). *61

Plaintiff's negligent training, hiring, and supervision claim fails. First, City defendants are correct that plaintiff may not raise a negligent hiring claim against the City for the first time in her opposition brief. *See Guo v. IBM 401(k) Plus Plan*, 95 F. Supp. 3d 512, 526-27 (S.D.N.Y. 2015). Second, all parties concede that the individual EMT defendants were acting within the scope of their employment. Plaintiff, therefore, has a claim against NYPH for vicarious liability but not for direct liability based on the hospital's own negligence. In addition, plaintiff has failed to adduce any evidence that NYPH improperly investigated either individual EMT defendant when he or she was hired or that it had reason to believe that either EMT Nelson or Abeeluck had a propensity to falsely imprison individuals. I therefore grant the defendants' motions for summary judgment as to plaintiff's negligent hiring, supervision, and retention claim.

## CONCLUSION

For the foregoing reasons, defendants' motions are granted in part and denied in part. Specifically, I deny the individual EMT defendants' motion for summary judgment on plaintiff's unlawful entry and false arrest claims under § 1983 as well as plaintiff's state false imprisonment claim. I also deny their motion for summary judgment on plaintiff's federal claims based on qualified immunity. I grant their motion for summary judgment on plaintiff's remaining state law claims. Furthermore, I deny NYPH's motion for summary judgment on plaintiff's state false imprisonment claim but grant NYPH's motion as to plaintiff's other state law claims.

As to the City defendants, I deny the defendant police officers' motion for summary judgment on plaintiff's unlawful entry, false arrest, and failure to intervene claims under § 1983, as well as plaintiff's state false imprisonment claim. I grant their motion for summary judgment on plaintiff's remaining state law claims. I

deny the City's motion for summary judgment on *62 plaintiff's state false imprisonment claim but grant the City's motion as to plaintiff's other state law claims.

As to plaintiff, I grant her motion for partial summary judgment dismissing the individual defendants' defense of exigent circumstances for their allegedly unlawful entry into her apartment. I also grant her summary judgment on the defendant police officers' affirmative defense of qualified immunity on this basis. In addition, I grant plaintiff's motion for partial summary judgment dismissing the defendant police officers' defense of probable cause as to her false arrest claim. However, the defendant police officers' defense of qualified immunity on this claim remains open.

Therefore, the following defendants, claims, and defenses remain:

- On plaintiff's federal claims, EMTs Nelson and Abeeluck remain as defendants in the case but can be found liable only if a jury concludes that they were state actors under the "joint action" test. The individual EMT defendants cannot advance a qualified immunity defense under federal law.

- On plaintiff's unlawful entry claim, all individual defendants remain in the case. They may all advance a consent defense. The defendant police officers may also argue that they are entitled to qualified immunity on the basis of consent. However, no defendant can advance the defense of exigent circumstances, and the defendant police officers may not argue that they are entitled to qualified immunity on the basis of exigent circumstances.

- On plaintiff's federal false arrest claim, all individual defendants remain in the case. They may all advance a consent defense. The defendant police officers may also argue that they are entitled to qualified immunity on the basis of consent. No

*63 defendant can advance the defense of probable cause. However, the defendant police officers may argue that they are entitled to qualified immunity on the basis of arguable probable cause.

- On plaintiff's failure to intervene claim, the defendant police officers remain in the case.

- On plaintiff's state false arrest claim, all defendants remain in the case.

SO ORDERED.

/s/_____

Allyne R. Ross

United States District Judge Dated: August 13, 2018

Brooklyn, New York

14 Civ. 8065
United States District Court, S.D. New York.

# Airday v. City of N.Y.

310 F. Supp. 3d 399 (S.D.N.Y. 2018)
Decided May 10, 2018

14 Civ. 8065

05-10-2018

George AIRDAY, Plaintiff, v. The CITY OF NEW YORK, Keith Schwam, and David M. Frankel, Defendants.

LAW OFFICE OF NATHANIEL B. SMITH, 111 Broadway, Suite 1305, New York, NY 10006, By: Nathaniel B. Smith, Esq., Attorneys for Plaintiff. LACHARY W. CARTER, ESQ., Corporation Counsel of the City of New York, 100 Church Street, Room 2–122, New York, NY 10007, By: Don H. Nguyen, Esq., Attorneys for Defendants.

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Sweet, D.J.

402 *402

LAW OFFICE OF NATHANIEL B. SMITH, 111 Broadway, Suite 1305, New York, NY 10006, By: Nathaniel B. Smith, Esq., Attorneys for Plaintiff.

LACHARY W. CARTER, ESQ., Corporation Counsel of the City of New York, 100 Church Street, Room 2–122, New York, NY 10007, By: Don H. Nguyen, Esq., Attorneys for Defendants.

OPINION

Sweet, D.J.

Defendants the City of New York (the "City"), Keith Schwam ("Schwam") and David Frankel ("Frankel") (collectively, the "Defendants") have moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment dismissing the Amended Complaint ("AC") of plaintiff George Airday ("Airday" or the "Plaintiff") alleging violations of 42 U.S.C. §§ 1983 and 1988, and the First, Fifth, and Fourteenth Amendments of the United States Constitution. Based on the facts and conclusions which follow, the motion of the Defendants is granted in part and denied in part, and the First Amendment claims of the Plaintiff are dismissed.

## I. Prior Proceedings

Airday commenced this action on October 7, 2014 against the City of New York, Keith Schwam, and David Frankel alleging violations of 42 U.S.C. §§ 1983 and 1988, and the First, Fifth, and Fourteenth Amendments of the United States Constitution. In particular, Plaintiff alleged: (1) retaliation against him in violation of his First Amendment right of free speech; (2) violation of his Fourteenth Amendment procedural and substantive due process rights; and (3) violation of his Fourteenth Amendment right to equal protection.

This Court granted in part and denied in part Defendants' dismissal motion on September 15, 2015 (the "September Opinion"). See Airday v. City of New York, 131 F.Supp.3d 174 (S.D.N.Y. 2015). In so doing, this Court dismissed all claims except for "Plaintiff's procedural due process claim with respect to Defendants' decision to not renew his office in [December] 2013." Id. at 184.

Plaintiff filed an amended complaint (the "AC") on October 8, 2015, alleging that Airday was a City Marshal for 29 years from January 1984 through December 2013; that a City Marshal is a public officer who operates his or her own business enforcing judgments and collecting fees upon execution of those judgments on behalf of judgment-creditors who are his clients or customers; and that as a City Marshal, Airday satisfactorily performed his duties over the course of his career. (See id. ¶¶ 8–17.) Plaintiff further alleges that his five-year term of office was regularly renewed, consistent with the established practice of renewing the terms of the other City Marshals. (Id. ¶¶ 13–16.) Discovery proceeded.

Defendants brought the instant motion for summary judgment on January 10, 2018, and it was heard and marked fully submitted on February 21, 2018.

## II. The Facts

The facts have been set forth in the Defendants' Local Civil Rule 56.1 Statement of Undisputed Facts, (Dkt. No. 76), the Plaintiff's Rule 56.1 Responsive and Counter–Statement, (Dkt. No. 83), and Defendants' *403 Responses to Plaintiff's Local Rule 56.1 Statement, (Dkt. No. 91). The facts are not in dispute except as noted below.

403

Defendants assert that New York City Marshals ("City Marshals") are officers of New York's court system, empowered to perform sensitive, law enforcement work, including enforcing judgments, garnishing wages, seizing property, and effecting evictions. (Affirmation of Marjorie Landa in Opposition to Respondent's Motion to Dismiss and Cross–Motion for Judgment on the Pleadings dated March 28, 2013 ("Landa Aff."), Ex. I, Dkt. No. 77 at ¶ 8.) City Marshals carry a badge and are permitted to carry a firearm. (Id. ) They are entrusted to use both with the utmost discretion. (Id. ) The position is one of trust and requires sound judgment and an unwavering commitment to lawful and ethical conduct. (Id. ) These statements are objected to by Plaintiff as lacking foundation and instead being legal conclusions rather than statements of fact. (Pl.'s 56.1 ¶ 4.)

Defendants assert that New York City Civil Court Act § 1601(1) authorizes the Mayor to appoint an applicant to a five-year term as City Marshal, (Defs.' 56.1 ¶ 5), but Plaintiff objects to this statement on the ground that it is a conclusion of law, not a statement of fact, for which no response is required. (Pl.'s 56.1 ¶ 5.) Plaintiff further states that City Marshals are appointed in practice to five-year terms that are regularly renewed by way of holdover status or a reappointment process. (Id. ) Defendants provide that a City Marshal must seek reappointment before the expiration of his or her term, or risk not being reappointed to office, (Tang–Alejandro Dep. 77:11–18.[1] ) Again, Plaintiff objects to this assertion as a legal conclusion and states that the evidence from this deposition is inadmissible because the deposition itself lacks foundation and qualification since the statutory provisions cited do not support the contention that an application for reappointment before a City Marshal goes into a holdover status is required as a condition to reappointment. (Pl.'s 56.1 ¶ 6.)

[1] Citations to "Tang–Alejandro Dep." refer to the deposition of Caroline Tang–Alejandro dated August 17, 2017, Ex. D, Dkt No. 77, deposition pages for which were submitted with the Declaration of Garrett S. Kamen dated January 10, 2018 ("Kamen Decl."), Ex. A, Dkt. No. 77, and incorporates the exhibits referenced therein.

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New York City Civil Court Act § 1610 authorizes the New York State Appellate Division to discipline, suspend and remove a City Marshal:

> The appellate division may discipline by reprimand or censure, or may temporarily suspend or permanently remove any marshal for cause, provided that written charges are first filed with said court, and that the marshal be given due notice thereof and be afforded an opportunity to be heard at a full and complete hearing. The appellate division may, in its discretion, suspend a marshal from the performance of his or her official duties pending a hearing upon the charges. Upon charges being preferred against a marshal by a judge of the appellate division, such court shall forthwith cause notice of suspension of the marshal to be served upon him or her, and the marshal shall thereupon remain suspended until the hearing and determination of the charges....

( N.Y. City Civ. Ct. Act § 1610.)

In November 1975 and February 1976, the Appellate Division for the First and Second Departments issued Joint Administrative Orders ("JAO") 453 and 456 setting forth the Department of Investigation's ("DOI") supervisory powers, which include the power to conduct investigations into a City Marshal's activities, examine
404 their books and records, promulgate directives *404 concerning the official records to be kept by them and the procedures for performing their official duties, as well as the power to discipline them. (New York City Marshals Handbook of Regulations effective April 24, 2013 ("Marshals' Handbook" or the "Handbook"), Ex. J, Dkt No. 77.) JAO 453 also authorized DOI to promulgate the Marshals' Handbook, which was approved by the Appellate Division in JAO 542. (Id. at 905–909.)

Plaintiff concurs with the above, but states that § 1601 gives the Appellate Divisions for the First and Second Department the authority to discipline City Marshals, and the Appellate Divisions' JAO 456(4) prohibits DOI from immediately or unilaterally suspending a City Marshal. (Pl.'s 56.1 ¶ 8.) Plaintiff further states that JAO 453(8) provides that a City Marshal can be disciplined for "failure to testify concerning his official duties at an investigative or administrative hearing held at the [DOI] after being granted immunity for the use of the testimony in a criminal proceeding." (Marshals' Handbook at 908.) Plaintiff asserts that the Marshals' Handbook similarly provides a City Marshal with protection against self-incrimination in that a refusal to answer questions or provide information is grounds for discipline "after the marshal has been advised that neither his or her statement nor any information or evidence derived therefrom will be used against the marshal in a subsequent criminal prosecution other than for perjury or contempt arising from such testimony." (Id. at 731.)

The Marshals' Handbook provides that "(a) No person shall prevent, seek to prevent, interfere with, obstruct, or otherwise hinder any study or investigation conducted pursuant to the New York City Charter, [JAO] 453, or this Handbook. A marshal's violation of this subsection shall constitute cause for removal from office or other appropriate penalty.... (b) Full cooperation with the [DOI] shall be afforded by every city marshal.... A marshal's violation of this subsection shall constitute cause of removal from office or other appropriate penalty...." (Id. at 731.) Moreover, Section § 1–16 of the Handbook provides that: "If the criminal charges bear upon the marshal's fitness for office, the pendency of such charges may be a cause for disciplinary action, including but not limited to an application to the Appellate Divisions for the marshal's suspension pending a hearing or pending resolution of the criminal charges." (Id. at 735–36.)

A City Marshal's day-to-day activities are overseen by two different mayoral agencies, the DOI and the Department of Finance ("DOF"). (Deposition of Louis Jordan dated August 8, 2017 ("Jordan Dep.") Ex. C, Dkt. No. 77 at 38:22–39:04.) Keith Schwam ("Schwam") served as the Director of the Marshals' Bureau at

DOI, and Louis Jordan ("Jordan") served as the Director of the Marshal Program at DOF. (Deposition of Keith Schwam dated March 30, 2017 ("Schwam Dep.") Ex. B, Dkt. No. 77 at 7:21–24; Jordan Dep., Ex. C. at 12:15–19; Deposition of George Airday dated March 29, 2017 ("Airday Dep.") Ex. A, Dkt. No. 77 at 33:06–10.)

Plaintiff was appointed to a five-year term as a City Marshal with Badge Number 7 on January 24, 1984 by Mayor Edward Koch. (Airday Dep. at 17:04–05, 20:22–25.) After Plaintiff submitted an application for re-appointment, Mayor Michael Bloomberg re-appointed Plaintiff on January 22, 2009 with a stated expiration date of December 20, 2013. (Re–appointment Letter by Mayor Bloomberg dated January 22, 2009 ("Bloomberg Letter") Ex. K, Dkt. No. 77.) Plaintiff states that this statement skips over two decades of history where he was regularly held over and re-appointed, along with other marshals. (Pl.s' 56.1 ¶ 13.) Plaintiff's five-
405 year *405 term as a marshal expired on December 20, 2013. (Airday Dep. at 106:13–15.)

The DOF oversees the New York City Scofflaw Program ("Scofflaw Program"), a program in which the DOF enforces parking related fines and judgments against offending owners by, among other things, securing or towing vehicles. (Id. at 26:22–27:02.) Defendants assert that the Scofflaw Program can be effectuated in a number of ways, including but not limited to the use of City Marshals, New York City Sheriffs, and collection agencies. (Deposition of Andrew Salkin dated November 21, 2017 ("Salkin Dep.") Ex. E, Dkt. No. 77 at 55:10–24.) However, Plaintiff denies this statement. (Pl.'s 56.1 ¶ 16.) Defendants further provide that DOF may select, suspend, and remove a City Marshal from the Scofflaw Program at any time and for any reason. (Jordan Dep. at 47:13–18.) Plaintiff disagrees with this statement to the extent that it is a conclusion of law. (Pl.'s 56.1 ¶ 17.)

Plaintiff served in the Scofflaw Program, where his responsibilities included the enforcement of parking and related fines and judgments against vehicles and their owners by towing vehicles, enforcing and collecting on the unpaid fines and judgments, and otherwise taking responsibility for the care, custody, and control of the vehicles. (Am. Compl. at ¶¶ 20–21.) Plaintiff provides that over time about 12–14 City Marshals, including Plaintiff, were part of the DOF's Scofflaw Program at the relevant times and not all City Marshals were part of the Scofflaw Program. (Pl.'s 56.1 ¶ 11.) Plaintiff, like each City Marshal, was "assigned" to specific "areas of enforcement." (Airday Dep. at 31:20–32:24.)

Plaintiff asserts that Jordan provided that Plaintiff always performed satisfactorily as a member of the DOF's Scofflaw Program, (Jordan Dep. at 79–80), but Defendants state that there were "minor" issues that "raised questions or concerns" about whether Plaintiff should be allowed to participate in the Scofflaw Program (Id. at 78:21–79:21.)

The DOF initiated the Paylock Booting Program ("Paylock Booting Program" or the "Booting Program"), a program in which a metal boot is affixed to a wheel of a vehicle as an alternative means to compel payment of unpaid fines and judgments. (Airday Dep. at 47:15–21.) In other words, the Booting Program is an "open procurement that [the City] put on the street" for a "self-removing booting system with supporting turnkey technology that included the payment process and vehicle finding systems." (Salkin Dep. at 17:21–18:05, 19:05–15.) Defendants assert that the City engaged in an "open procurement" in which it invited bidders to respond, and to which Paylock and other bidders responded. (Id. ) Plaintiff disagrees with this statement, instead noting that this contract (the "Paylock Contract") was a five-year no-bid contract with the City for up to $70,152,000.00. (See Airday Dep. at 134:2–22; Schwam Dep. 34:23–36:11.) Defendants further assert that Schwam and Jordan had no involvement in the negotiation of or approval of the Paylock Contract, (see

Schwam Dep. at 60:16–21; Jordan Dep. at 32:14–25); however, Plaintiff alleges that both Schwam and Jordan admitted to having discussions about objections and concerns raised by the City Marshals over the Paylock proposal. (Schwam Dep. at 16:22–21:11.)

From 2010 to 2012, Plaintiff alleges that he "question[ed] the appropriateness and the legality of the Paylock [B]ooting [P]rogram," and "disseminated his analysis and criticisms" to "Ken Kelly and the other marshals in the program." (See Am. Compl. at ¶¶ 32, 34, 39; Airday Dep. at 53:04–08, 54:18–25.) In his capacity as
406 Executive Director of the City Marshal Association, Ken Kelly ("Kelly") served as *406 "spokesperson" for the City Marshals and expressed concerns about Paylock on the association's behalf. (See Schwam Dep. at 24:09–23; Airday Dep. at 33:11–20.)

Plaintiff identified a number of inquiries that he allegedly made to Kelly and the other City Marshals, all of which concerned the program's implementation and operation including the following inquiries: (a) "how Paylock was chosen by the City and whether a no-bid contract was appropriate and legal"; (b) "who would be in charge under the proposal for tracking fines paid to Paylock"; (c) "who would be responsible for supervising Paylock"; (d) "what fees would be charged to the vehicle owners"; (e) "what would be the City Marshal's law enforcement and administrative roles, if any, in the booting process"; (f) "what would ... Paylock's fee be under the proposed system"; (g) "whether a vehicle could be legally 'un-booted' upon payment of the outstanding fines and judgments and left operational on City streets where the vehicle's registration status had expired and the vehicle cannot under law be parked or operated on public streets"; and (h) "whether it was appropriate to omit or disregard necessary and legal guidelines from the Paylock [B]ooting [P]rogram." (Am. Compl. at ¶¶ 39–40.)

Plaintiff alleges that he contacted four elected officials in 2011 and "early 2012" to "create political pressure to oppose the Paylock Booting Program" by notifying them that Paylock "was not properly designed and that the program [was] a mistake and the fact that it was done without open bid." (See Am. Compl. at ¶ 36; Airday Dep. at 135:14–20.) Plaintiff further alleges that he spoke to City Council Member Oliver Koppell ("Councilman Koppell") in a "casual" manner on two or more occasions before and after March 2011 when he saw the Council member walking "on the street," where he "told him that it would be a good idea if he and the City Council looked into this proposal that seems ... to be way off the reservation." (Am. Compl. at ¶ 37.) Plaintiff states that he testified to bringing up the issue at least twice with Councilman Koppell. (Id. )

Plaintiff also alleges that he spoke to a person in the "contracts department" at the Office for the New York City Comptroller in or around March 2011 to ask "if they had any information about the [Paylock] contract; if they were aware of it[,] [a]nd that it seems as if there's a problem with this proposed contract." (See Airday Dep. at 57:16–60:02; Am. Compl. at ¶ 37.) Plaintiff did not communicate with Schwam or anyone else at DOI about his concerns as to Paylock. (Airday Dep. at 60:03–07.) Moreover, Plaintiff did not communicate with Frankel about Paylock in any manner, and did not communicate with Jordan about Paylock until after the program had "already started," (see Airday Dep. at 60:21–61:09; 136:04–08), although Plaintiff denies the statement with respect to Jordan, (see id. at 60:21–61:25; Jordan Dep. at 93:23–100:16.)

On December 21, 2011, Plaintiff was arrested and charged with assault in the third degree (a class A misdemeanor), menacing in the third degree (a class B misdemeanor), and harassment in the second degree following an incident with his fiancée. (Schwam Email, dated May 30, 2012 ("May 30, 2012 Schwam Email"), Ex. L.) Those charges were filed by the Bronx District Attorney's Office in the Bronx Supreme Court, Criminal Division. (Id. at 238–39.) The criminal complaint charged that Plaintiff "shoved" his fiancée to the ground,

"struck her several times in the face with an open hand," and threatened to "kill" her, and further charged that Plaintiff's actions caused his fiancée to sustain "bruising and swelling to her lower back and face and
407 experienced annoyance, *407 alarm and fear for her physical safety." (Id. )

In response to this allegation, Airday admits that Lynda Schaefer ("Schaefer") made a criminal complaint against him but denies that she was his "fiancée" on the ground that she was his girlfriend. (Airday Dep. at 62:5–10.) Plaintiff further states that he was acquitted of the charges after a trial when the court found that the complaining witness was not credible. Judge Ruben Franco of the Bronx County Criminal Court issued an Order of Protection ("OP") against Plaintiff on December 22, 2011 that directed Plaintiff to "surrender any and all ... firearms owned or possessed." (May 30, 2012 Schwam Email, Ex. L at 243.) Plaintiff was advised in court of the contents of the OP, and it was served on him in court later that day. (Pl.'s 56.1 ¶ 29.)

In the early morning hours of December 22, 2011, before the OP was issued and while Airday was locked up at the local precinct on the charge, Plaintiff admits that he gave the arresting police officer the information and access required to take his five weapons from his safe at home. (May 30, 2012 Schwam Email, Ex. L at 243.) The New York City Police Department ("NYPD") took custody of five handguns in Plaintiff's possession during the overnight period of December 21–22, 2017. (Id. at 240–42.) The arresting police officer searched the safe, which is three feet square, and stopped searching after finding five guns, not locating a sixth gun that Airday had been given in 1980 when he was a probation officer. (Pl.'s 56.1 ¶ 30.) Plaintiff alleges that he did not recall that he owned a sixth gun, a small handgun given to him 30 years prior, which he never used and for which he did not even have any bullets. (Id. ) Plaintiff further provides that when he received this sixth gun in 1980, he was not required to register it as he was a peace and probation officer at the time. (Id. ) Each of the five guns retrieved was listed with a detailed description, including its make, model number, caliber, color, and serial number, on the NYPD property clerk's invoice that the arresting Officer prepared on December 22, 2011. (May 30, 2012 Schwam Email, Ex. L. at 240–42.)

On December 22, 2011, DOI learned that "[plaintiff] was arrested last night (12/21/2011 at about 10 p.m.) ... on a domestic violence complaint by his fiancée." (Dec. 22, 2011 Schwam Email, Ex. M, Dkt. No. 77.) Airday notes that the complaining witness was his girlfriend, not his fiancée. (Pl.'s 56.1 ¶ 31.)

On January 10, 2012, the Bronx District Attorney's Office notified DOI that the "injuries [allegedly caused by plaintiff] to the complainant [were] more severe than originally believed and that she had some broken ribs." (Email from Teresa Pinckney dated January 10, 2012 ("Pinckney Email"), Ex. N, Dkt. No. 77.) Plaintiff denies this assertion, and provides instead that the injuries Pinckney refers to occurred earlier in the month of December 2011 when Plaintiff's girlfriend was in a car accident. (Pl.'s 56.1 ¶ 32.)

On January 13, 2012, the NYPD License Division mailed a letter to Plaintiff advising him that his gun licenses were suspended and instructing him to surrender any and all firearms immediately to his local precinct. (May 30, 2012 Schwam Email at 245–46.) On January 18, 2012, the NYPD License Division notified detectives that a gun registered to Plaintiff had not been turned over on December 22, 2011, following Plaintiff's arrest, and that one of the five guns removed on that date was unregistered. (Airday Dep. at 72:25–76:01.) However, Plaintiff denies this statement. (Pl.'s 56.1 ¶ 34.)

408 On January 18, 2012, Plaintiff was arrested on charges of (1) criminal contempt *408 and criminal possession of a weapon based on his possession of a .22 caliber Derringer in violation of the OP, and (2) criminal possession of a weapon, specifically, an unregistered .25 caliber Hawes handgun. (May 30, 2012 Schwam Email at 247–48.) The criminal complaint, filed by the Bronx District Attorney's Office in Bronx Supreme Court, Criminal

Division, charged Plaintiff with criminal contempt in the second degree (a class A misdemeanor). (Id. ) Plaintiff denies these statements, and contends that he was only charged with the first count of criminal contempt. (Id. at 247.)

Plaintiff asserts that there is no evidence in the record supporting that he misrepresented the origins of the Hawes .25 caliber weapon. (Pl.'s 56.1 ¶ 86.) Defendants object to this statement on the grounds that Plaintiff has failed to cite admissible evidence, and that it is instead based on uncorroborated, self-serving hearsay contradicted by the record evidence. (Defs.' Responses to Pl.'s 56.1 ¶ 85.) NYPD determined that the Hawes .25 firearm taken from Plaintiff on December 22, 2011 was unregistered and unlicensed and on January 20, 2012, Plaintiff's attorney represented to DOI that the "unlicensed gun that was recovered from [Plaintiff's] safe ... belong[ed] to his father and when his father passed away [Plaintiff] put it in his safe for safe keeping." (Litwack letter to Schwam, dated January 20, 2012 ("Litwack Letter to Schwam"), Defs.' Ex. P at 31.) Plaintiff later testified instead that he received this firearm from a "supervisor at the Probation department" in 1980, i.e., several years before Plaintiff became a City Marshal. (Airday Dep. at 68:14–19.)

By email dated January 19, 2012, Schwam informed Commissioner Rose Gill Hearn ("Commissioner Hearn") that:

> [Y]esterday evening ... Airday ... was arrested and charged with 2 counts of Criminal Possession of a Weapon (firearm) and Criminal Contempt, both class A misdemeanors. These are arrest charges.... The contempt charge and one weapon charge is based on his possession yesterday of a handgun, in his residence, in violation of an Order of Protection issued on December 22, 2012, which in turn was a result of his arrest the previous day on an assault charge in a domestic incident involving his fiancée. Yesterday, the police ... went to Airday's Bronx residence in response to the NYPD Licensing Division's report that one of the firearms on his license was not turned in on 12/22/2011.
>
> I have told [Airday's attorney] Ken Litwack that under these circumstances, Airday cannot be permitted to perform the duties of a marshal and that he should resign. Litwack does not disagree.... I am sending both of them a letter that says the same and that unless Airday resigns we will be compelled to seek his immediate suspension and removal.
>
> I am also directing him pending further instructions to cease performing duties other than redeeming cars already in his custody (a function that his office staff handles). Will keep you posted.

(Schwam Email to Hearn, dated January 19, 2012 ("Jan. 19, 2012 Schwam Email to Hearn"), Ex. 0, Dkt. No. 77.) The statement is objected to as hearsay, speculation, and for lack of personal knowledge. (Pl.'s 56.1 ¶ 36.)

In making this recommendation, Defendants allege that Schwam relied on the "police report" and "the records of the guns that were recovered from Marshal Airday's premises on two occasions, which came from the police[;] ... there were conversations between [the] detectives or investigators at DOI and [the] detectives [and] police officers at the police department. We also had records at DOI that in *409 effect listed all the guns that we know about that Marshal Airday had. [Schwam] also ... had a discussion with [Airday's attorney] Ken Litwack, who made certain representations about what had occurred." (Schwam Dep. at 101:23–102–20.) Defendants allege that Commissioner Hearn acknowledged Schwam's recommended course of action, (see Jan. 19, 2012 Schwam Email to Hearn); however Plaintiff denies this statement.

409

On January 19, 2012, Schwam sent a letter to Plaintiff requesting that he resign his appointment as a City Marshal:

> [DOI] has been informed that you were arrested on ... January 18, 2012 and charged by the arresting officer with two counts of Criminal Possession of a Weapon (firearm) in the Fourth Degree and Criminal Contempt in the Second Degree, both class A misdemeanors, based in part upon your possession yesterday of a handgun, recovered by the Police, in violation of an Order of Protection dated December 22, 2011 and upon your possession on December 22, 2011 of an unregistered handgun. That arrest follows closely your arrest on December 21, 2011 on assault and other charges in a domestic incident, which resulted in the above-mentioned Order of Protection. Furthermore the Police Department reports that a handgun listed on your license was not turned in by you and is unaccounted for.
>
> Under these circumstances, you cannot be permitted to hold office and perform the duties of a City marshal, and this Department will be compelled to seek your removal and immediate suspension unless you immediately submit your resignation. Pending that resignation or suspension you are not to perform any duties other than the orderly redemption of vehicles and collection and remittance of funds in relation to vehicles already in your custody and all necessary recordkeeping attendant to those activities. You are not to perform any other functions without express written authorization of this Department. Upon resignation you will be responsible to comply with the wind-down procedure specified in Joint Administrative Order 453 and the Marshals Handbook.

(Schwam Email to Airday, dated January 19, 2012 ("Schwam Email to Airday"), Pl.'s Ex. 4, Dkt. No. 86–4.) In this letter, Schwam advised Plaintiff that he could continue to "collect money" and "release vehicles," as well as "perform the functions that involved the accounting for the money and remitting it." (Id. )

On January 20, 2012, Plaintiff's attorney, Ken Litwack ("Litwack"), sent a letter to DOI setting forth Plaintiff's account of the two arrests. In that letter, Litwack made the following representations:

> I am following up on our conversation ... in which I proposed that Marshal Airday be allowed to maintain his office with his duties severely circumscribed until the matters before the Criminal Court are sorted out. Under my proposal Marshal Airday will not be allowed to do any work whatsoever in the field ... I have spoken to the Marshal and he will be willing to agree to this....
>
> I know that there are some troubling facts here and I know that if any of the negative inferences that can be drawn from these facts are established it would not bode well for the Marshal.... I am requesting that the Marshal be put on limited duty, pending the outcome of these matters ....

(Litwack Letter to Schwam at 30–31.) Plaintiff objects to this email as inadmissible under Rule 408 of the Federal Rules of Evidence in that it reflects an attempt by Litwack to reach a resolution of the dispute with DOI, and that it is being improperly used as an alleged admission of liability in violation of that Rule. (Pl.'s 56.1 ¶ 41.) *410 Moreover, Plaintiff contends that the letter is cited out of context in that the offer of compromise by Plaintiff's counsel was that Plaintiff would not be required to close his office and that an Associate Marshal would carry out Plaintiff's City Marshal duties while the criminal charges remain pending. (Id. ) Schwam responded to Litwack's letter that same day. (Schwam Letter to Litwack, dated January 20, 2012 ("Schwam Letter to Litwack"), Defs.' Ex. P at 27–29.)

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The January 23, 2012 DOI Weekly Status Report states that: "City Marshal Airday was arrested on charges relating to possession of handguns either not on his license or in his possession after an Order of Protection required his surrender of all guns. Discussions with his attorney re[garding] possible resignation are underway."

(DOI's Weekly Status Report, dated January 23, 2012 ("DOI Weekly Status Reports"), Defs.' Ex. Q at 23.) The statement is objected to by Plaintiff on best evidence and hearsay grounds. (Pl.'s 56.1 ¶ 43.)

On January 30, 2012, DOI instructed Plaintiff to provide documents by the following day, January 31, 2012, related to his NYPD-issued handgun licenses and handguns identified by the NYPD as having been in his custody, including but not limited to: (1) a copy of the criminal complaint; (2) any correspondence or notices he received from the NYPD on or after December 22, 2011 regarding his handgun licenses; (3) copies of all applications for handgun licenses and renewals; (4) records reflecting the loss, theft, or transfer of any handgun and any notifications to the NYPD of such loss, theft, or transfer; and (5) any and all records relating to the above-described Derringer and Hawes handguns. (Pinckney Letter to Plaintiff, dated Jan. 30, 2012 ("Pinckney Letter to Plaintiff"), Defs.' Ex. R at 61.) Defendants state that Plaintiff did not produce the requested documentation by the date directed in the above-mentioned letter. (Defs.' 56.1 ¶ 45.) On January 31, 2012, Plaintiff's attorney, Stuart London ("London"), posed two questions to Schwam: (1) whether Plaintiff could resume his tow operation using an Associate Marshal; and (2) whether DOI would bring departmental charges against Plaintiff if he refused to resign as City Marshal. (London Letter to Schwam, dated Jan. 31, 2012 ("London Letter to Schwam"), Defs.' Ex. S at 36.)

Defendants assert that on February 7, 2012, DOF learned from Plaintiff that he had been arrested in December 2011 and January 2012. (Jordan Dep. at 40:23–41:06.) Jordan contacted his supervisor, New York City Sheriff Edgar Domenech ("Sheriff Domenech"), to advise him of the situation and, in response, Sheriff Domenech requested Jordan "send him a recommendation." (Id. at 44:13–20.) Plaintiff denies these statements, and instead provides that DOI and DOF were notified of Plaintiff's arrests when they happened, and that DOF suspended Plaintiff when DOI suspended him. (See Pl.'s 56.1 ¶ 46.)

The following day, on February 8, 2012, Jordan sent a recommendation to Sheriff Domenech advising that Plaintiff not be "reinstated [into the Scofflaw Program] due to lack of notification to DOF of the incident and not hearing from him until ... yesterday February 7, 2012." (Jordan Letter to Domenech, dated Feb. 8, 2012 ("Jordan Letter to Domenech"), Defs.' Ex. T at 946.) Plaintiff denies this statement, and notes that Jordan testified that DOI suspended Plaintiff in January of 2012 and that suspension from the Scofflaw Program was therefore automatic following his suspension by Schwam. (Pl.'s 56.1 ¶ 47.) Plaintiff further states that the DOF sent Plaintiff a letter formally stating that it was not providing him with work under the Scofflaw Program
411 because of the pending charges. (Id. )*411 In response to a request by Sheriff Domenech that DOI state its position, Schwam stated in relevant part that:

> My understanding is that it is DOF's discretionary decision to choose which marshal or marshals to enforce the City's judgments, including the decision not to have Airday towing for the City. I believe that is an entirely appropriate decision, given the pending criminal charges, including that of violating the Court's order of protection, particularly when the work of a City marshal, for DOF and others, is to enforce court orders. I also understand that you have additional operational concerns, including, among others, Airday's failure to notify you or provide information to DOF regarding his status in the weeks since his January 18 arrest, during which he was not towing.

(Schwam Letter to Domenech, dated Feb. 9, 2012 ("Schwam Letter to Domenech"), Defs.' Ex. T at 945.) Plaintiff objects to this statement as hearsay. (Pl.'s 56.1 ¶ 48.)

Defendants assert that Sheriff Domenech accepted Jordan's recommendation that Plaintiff not be reinstated into the Scofflaw Program and "made the decision to remove Marshal Airday from the Scofflaws ... Program" on February 9, 2012. (Jordan Dep. at 47:09–48:10.) However, Plaintiff states that he was removed as a result of

actions taken by the DOI, and not based on Sheriff Domenech's decision and Jordan's recommendation. (Pl.'s 56.1 ¶ 49.)

In separate and in conjunction, Defendants assert that the December 2011 arrest, the January 2012 arrest, and the failure to notify DOF of the two arrests formed a sufficient basis to terminate Plaintiff from the Scofflaw Program. (Jordan Dep. at 55:06–20.) Plaintiff denies this statement, and states that Jordan testified that the official position of DOF was set forth in the letter by its counsel on May 29, 2012, which states that Plaintiff was suspended because of the pending criminal charges. (Grossel Letter to Sterinbach, dated May 29, 2012 ("Grossel Letter to Sterinbach"), Pl.'s Ex. 17.)

In a letter dated February 10, 2012, DOI advised Plaintiff that: "It is [DOI's] position that under the circumstances ... [that] Airday needs to step down, following a brief wind-down period. It is our hope that rather than attempting to prolong the process, the marshal will avail himself of the opportunity he is being offered to bring his business as a City marshal to an orderly and responsible conclusion, deal with the criminal charges he faces, and put this matter behind him." (Schwam Letter to London, dated Feb. 10, 2012 ("Schwam Letter to London"), Defs.' Ex. U at 689.) DOI added, "[l]eaving aside the domestic violence allegations, Marshal Airday's failure to comply with a court order fully and scrupulously, while already facing criminal charges in a matter as serious as this one, demonstrates a lack of fitness for his office." (Id. at 690.) Plaintiff denies that the charges or allegations demonstrate a lack of fitness to serve as City Marshal. (Pl.'s 56.1 ¶ 52.)

The February 13, 2012 DOI Weekly Status Report reports that: "DOI's position is that Airday must resign." (Jan. 23, 2012 DOI Status Report). Plaintiff objects to this statement as hearsay. (Pl.'s 56.1 ¶ 53.)

Defendants provide that in a letter dated February 13, 2012 and a letter dated February 17, 2012, Plaintiff's attorney informed DOI that Plaintiff would not provide the documentation requested by DOI unless DOI filed formal disciplinary charges against him. (May 30, 2012 Schwam Email.) Plaintiff denies this statement and provides that he was not able to provide the requested documents due to the pending criminal charges, which took precedent over administrative proceedings. (Pl.'s 56.1 ¶ 54.)*412 On February 17 and on February 23, 2012, DOI advised Plaintiff's attorney that Plaintiff's continuing failure to comply with DOI's instruction was a breach of his legal obligations under the City Charter, the Marshals' Handbook, and JAO 453, and was obstructing DOI's investigation. (May 30, 2012 Schwam Email at 253–54.) On May 30, 2012, DOI filed Charges and Specifications with the Appellate Division for the First and Second Departments. (Id. at 226–28.) Charge One alleged that Plaintiff interfered and failed to cooperate with an investigation by the DOI into issues related to his handguns and discrepancies in his handgun license records uncovered by the NYPD in the wake of his arrests, and that this conduct violated Chapter I, §§ 1–9(a) and (b) of the Marshals' Handbook. (Id. at 227.) Charges Two and Three alleged that Plaintiff had been arrested in December 2011 and January 2012 with charges stemming from those arrests pending in criminal court, in violation of New York City Civil Court Act § 1610 and Chapter I, § 1–1 of the Marshals' Handbook. (Id. at 227–28.) Plaintiff confirms the above, but asserts that Schwam was the one who filed the charges. (Pl.'s 56.1 ¶ 56.)

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On June 1, 2012, DOI served Plaintiff and Plaintiff's attorney with the Charges and Specifications. (Schwam Email to Airday & London, dated June 1, 2012 ("Schwam Email to Airday & London"), Defs.' Ex. V.) Plaintiff states that Schwam emailed the charges to the Appellate Division on May 30, 2012 and failed to provide him with notice of the charges until two days later on June 1, 2012 because the Appellate Divisions told Schwam to make such service of process. (Pl.'s 56.1 ¶ 57.)

On June 11, 2012, the Appellate Division for the First and Second Departments issued JAO 2012–1, which suspended Plaintiff from serving as a City Marshal pending a hearing on the Charges and Specifications. (Joint Administrative Order 2012–1, dated June 11, 2012 ("JAO 2012–1"), Defs.' Ex. W at 364–65.) On June 13, 2012, DOI Deputy Commission & General Counsel Marjorie Landa ("Deputy Landa") filed the Charges and Specifications with the New York City Office of Administrative Trials and Hearings ("OATH"). (Landa Letter to OATH, dated June 13, 2012 ("Landa Letter to OATH"), Defs.' Ex. X at 382–83.)

On July 2, 2012, OATH Administrative Law Judge Faye Lewis granted the parties' request to adjourn In the Matter of Department of Investigation v. George Airday, No. 12–2038 (July 2, 2012) pending the resolution of the matters pending in criminal court. (Defs.' Ex. Y.) On October 19, 2012, Plaintiff was found not guilty as to the charges stemming from the December 2011 arrest and the Bronx District Attorney's Office elected to dismiss the remaining charges on March 1, 2013. (Sterinbach Letter, dated March 4, 2013 ("March 4, 2013 Sterinbach Letter"), Defs.' Ex. Z.) DOI contacted OATH and Plaintiff on March 7, 2013 to reinstate Charge One of the Charges and Specifications. (Kearney Letter to OATH, dated March 7, 2013 ("March 7, 2013 Kearney Letter to OATH"), Defs.' Ex. AA.)

In April and May 2013, DOI and Plaintiff's attorney discussed resolving the disciplinary proceeding pending before OATH by way of a "fine, with Airday to be replaced at the end of his term in December 2013." (See Jan. 23, 2012 DOI Status Report at 748–749, 765–766, 779–780 & 806–807.) Plaintiff denies this statement, noting that the DOI Status Report is hearsay and does not support the contention that there was discussion about Plaintiff being replaced. (Pl.'s 56.1 ¶ 63.) Also, Plaintiff states that Schwam testified that he did not give notice
413 to Plaintiff when he replaced him and that he did not feel obligated *413 to tell Plaintiff what he was going to do "down the road." (Schwam Dep. at 158:14–160:19 & 224:20–23.)

On May 23, 2013, the Appellate Division for the First and Second Departments received a stipulation executed by Plaintiff, Plaintiff's attorney, and DOI resolving the formal disciplinary proceeding pending before OATH. (Stipulation, dated May 20, 2013 ("the Stipulation"), Defs.' Ex. BB at 850–52.) By entering into this Stipulation, Plaintiff agreed: (i) to "plead guilty to some administrative charge, [i.e.,] not cooperating with DOI"; (ii) to pay a $7,500 fine as the penalty for his failure to provide DOI with the documents specified in Charge One of the Charges and Specifications; (iii) to "fully cooperate with DOI's investigation of his conduct"; and (iv) that his guilty plea would be "filed as a public record in DOI and with the Appellate Divisions of the New York State Supreme Court ... and will be considered for all purposes as part of Marshal Airday's official record." (See id.; Airday Dep. at 96:02–11.) Plaintiff further states that the Stipulation provides that Charges Two and Three are withdrawn and that the Stipulation was the "final disposition" of Charge One. (Pl.'s 56.1 ¶ 65.)

In a May 29, 2013 email sent to Plaintiff's attorney and the Appellate Division for the First and Second Departments, DOI clarified that the Stipulation was a "final disposition of Charge One" and warned that it "does not resolve the underlying issues or foreclose the possibility of future disciplinary charges." (Agostino Email to Schwam, dated May 28, 2013 ("Agostino Email to Schwam"), Defs.' Ex. CC at 891.) Plaintiff denies this statement, and provides that the evidence does not show that Schwam sent the email to Plaintiff's counsel. (Pl.'s 56.1 ¶ 67.)

On June 11, 2013, the Appellate Division for the First and Second Departments issued JAO 2013–5 lifting Plaintiff's suspension, which began one year earlier on June 11, 2012. (Tang–Alejandro Dep. at 61:23–62:10.) Also in June 2013 and in accordance with the Stipulation, Plaintiff was questioned by DOI about the circumstances giving rise to the gun charges. (Airday Dep. at 97:25–98:23.) Plaintiff stated, among other

things, that he had "forgotten" that he possessed an unlicensed firearm and admitted that he never "registered" that firearm. (Id. at 71:15–17 & 99:09–18.) Tang–Alejandro testified that "it didn't seem that [Plaintiff] was cooperating with Mr. Schwam's investigation." (Tang–Alejandro Dep. at 61:23–62:10.) Following this questioning, on June 11, 2013 Plaintiff's suspension was lifted and he resumed working as a City Marshal. (Airday Dep. at 102:20–22.)

In an October 23, 2013 memorandum entitled "Appointment of New City Marshal to Succeed City Marshal George Airday," Schwam recommended that "one of the four prospective new City Marshals be appointed to succeed City Marshal George Airday, Badge No. 7, upon expiration of his term on December 20, 2013." (Schwam Memorandum, dated Oct. 23, 2013 ("Schwam Memo"), Defs.' Ex. EE.) In this memorandum, Schwam detailed the basis for his decision, which included among other things: (1) Plaintiff's possession of an "unlicensed gun"; (2) Plaintiff's failure to "list all of his guns" on numerous applications throughout his tenure as a City Marshal; (3) the disclosure on June 14, 2013 that Plaintiff misrepresented the origin of the unlicensed gun to DOI investigators in January 20, 2012; and (4) Plaintiff's refusal to provide documents and records to DOI, which was the subject of Charge One in the above-described Charges and Specifications that resulted in
414 Plaintiff's one year suspension and a $7,500 fine. (Id. at 987–88.)*414 Defendants further state that Schwam made a recommendation to the "Office of the Mayor" that "Marshal Airday's successor be appointed to the office that [Airday] held, which in effect would replace Marshal Airday as a City marshal in accordance with the New York City Civil Court Act that expressly authorizes that." (Schwam Dep. at 65:03–67:17.) Schwam identified the "reasons for recommending that [the Office of the Mayor appoint a successor upon the expiration of Airday's term] ... had to do with Marshal Airday's conduct and judgment that was exposed in the aftermath of his two arrests in December 2011 and January 2012." (Id. at 68:24–69:10.) In particular, Schwam testified that:

> It involved several elements. One, the marshal was in possession unlawfully of two firearms. Two, the fact became known after the marshal was arrested on a domestic violence charge, and was under an obligation to surrender all of his firearms. The fact that he was arrested within four weeks of the domestic violence arrest with facts that indicated that he had not surrendered all his firearms as directed by the court, and that he had been in possession for some period of time before his domestic violence arrest of an unregistered firearm were the principal acts that caused me to make the recommendation.
>
> Those acts ... reflected judgment that fell far short of the standard that I believe was warranted for someone who is, Number 1, [a] mayoral appointee; and Number 2, holding the position that involves the scrupulous attention to rules, court orders, and adherence to the law in situations that involve actions that—the position involves actions at ken against members of the public.
>
> [T]he position involves a mayoral appointment, a delegation of very serious authority to take away people's property, to remove people's vehicles, to remove people from their homes, to remove money from people's bank accounts. Those are very serious responsibilities that call for uncompromised integrity, mature judgment, adherence, scrupulous adherence to rules, laws and court orders and basic seriousness in how the person goes about conducting their affairs both personal and official.
>
> The conduct that I described and the fact that the marshal having been arrested once failed to do the things that were required of him to stay well clear of being arrested again, and that he had not done those things and that, in fact, done the opposite, said to me that we need[ed] to replace Marshal Airday.

(Id. at 69:11–71:07.) Plaintiff denies that Schwam made any "recommendation" because Schwam testified that he acted unilaterally and did not obtain or seek approval for his decision. (Id. at 148:9–150 & 213:23–217:23.)

The December 6, 2013 DOI Weekly Status Report reports that: "We expect that a new marshal, already approved and qualified, will be appointed to succeed City Marshal George Airday upon expiration of Airday's term on December 20. Special Investigator Caroline Tang–Alejandro is coordinating the prospective marshal's completion of the necessary statutory steps (bond, oath, badge, etc.)." (DOI Weekly Status Report at 937–938 & 943–944.) Plaintiff objects to this statement as hearsay. (Pl.'s 56.1 ¶ 74.)

Plaintiff's five-year term as a marshal expired on December 20, 2013. (Airday Dep. at 106:13–15.)

The December 20, 2013 DOI Weekly Status Report reports that: "A letter of appointment for new City Marshal Frankie Alvarez signed by the Mayor will be issued ... appointing Alvarez to the office that will be vacant upon
415 the expiration of City *415 Marshal George Airday's term on December 20." (DOI Weekly Status Report at 949–950.) Plaintiff objects to this statement as hearsay. (Pl.'s 56.1 ¶ 76.)

Frankie Alvarez ("Alvarez") was appointed to Airday's badge number (Badge No. 7) on December 20, 2013, and "qualified" for the office on December 21, 2013, by filing his oath of office with the City clerk. (Bloomberg Letter to Alvarez, dated Dec. 21, 2013 ("Bloomberg Letter"), Defs.' Ex. FF.) DOI notified Plaintiff by letter dated December 23, 2013 that: "Your term of office has expired. In accordance with Section 1601 of the New York City Civil Court Act [ ], your successor has been appointed to that office. Accordingly, your service as a City Marshal has ended." (Schwam Letter to Airday, dated Dec. 23, 2013 ("Dec. 23, 2013 Schwam Letter to Airday"), Defs.' Ex. GG.) Plaintiff provides that it was Schwam who made the notification.

Defendants assert that DOI advised Plaintiff, through his attorneys, that he would not be reappointed at the expiration of his term in December 2013 on multiple occasions, including in January and February 2012, as well as in May 2013. (See, e.g., Schwam Dep. at 151:03–152:02 & 152:03–18.) Plaintiff denies this statement on the grounds that Schwam testified that he gave Airday no notice and objects that it is hearsay. (Pl.'s 56.1 ¶ 79.)

Schwam testified that it was not reasonable for Plaintiff to have assumed that he would remain a City Marshal after the expiration of his term:

> [T]he law is very clear that upon the expiration of a marshal's term, his successor shall be appointed, and that upon expiration of the term, the marshal's office is considered vacant for purposes of choosing his successor.
>
> To me, that should put anyone who understands anything about the business of being a marshal on notice that what you get is a five-year term. At the end of that five-year term, the presumption is you are going to be replaced.
>
> In light of Marshal Airday's conduct and the lack of judgment that was exposed by his two arrests and the facts that were developed as a result of them, Marshal Airday should have been well aware that his future as a marshal was in grave jeopardy.

(Schwam Dep. at 159:16–160:19.) Airday objects to these statements as speculation and opinion, (Pl.'s 56.1 ¶ 80), although he concedes that he had "no[ ] explicit" reason to believe he would be reappointed as a City Marshal or maintained in a holdover role after the expiration of his five-year term in December 2013. (Airday Dep. at 136:10–14.)

Defendants provide that Plaintiff told City Council member Andrew Cohen that: "[T]he NYC Civil Court Act Sect[ion] 1602 states that a Marshal may be replaced without cause.... This is true for all Marshals whose terms expire; a marshal whose term has expired can be replaced at will.... My agreement to the stipulation was pro-forma. The option to terminate is in the law whether or not I had agreed to the stipulation." (Airday Letter, dated Jan. 17, 2014 ("Jan. 17, 2014 Airday Letter"), Defs.' Ex. HH at 971.) Plaintiff objects on the ground that he is not qualified to provide a legal opinion and that his lay reading of Section 1602 is wrong. (Pl.'s 56.1 ¶ 82.) Plaintiff further states that the context of his statement shows that he was simply stating that the law generally gives the courts the power to discipline City Marshals. (Id. )

Defendants assert that prior to commencing this action, Plaintiff believed that the reason he was not reappointed as a City Marshal was because: "[Schwam held] animosity and anger at [him] for challenging his order to resign or face charges." *416 (Jan. 17, 2014 Airday Letter at 971.) Plaintiff states that there were other reasons expressed in that letter and in the subsequent court pleadings for why the Defendants acted as they did against Airday. (Pl.'s 56.1 ¶ 83.) Plaintiff further provides that his statements about Schwam's state of mind are incomplete and not admissible. (Id. )

Plaintiff provides that there are several comparable City Marshals who were not harshly disciplined or replaced in the way that Schwam treated Airday, including Charles Marchisotto ("Marchisotto"); Joel Shapirro ("Shapirro"); Howard Schain ("Schain"); and Jeffrey Rose ("Rose"). (Pl.'s 56.1 ¶ 91.) Defendants object to this statement because Plaintiff does not identify or describe what he means by this statement, making it impossible to provide a meaningful response. Defendants further object for failing to cite admissible evidence to support the contention, and because it is based on an uncorroborated, self-serving hearsay statement.

Plaintiff provides that on June 20, 2008, City Marshal Marchisotto was arrested for aggravated harassment and stalking of his former girlfriend. (Marchisotto Record, dated June 24, 2008 ("Marchisotto Record"), Pl.'s Ex. 28.) Over the course of several months, Marchisotto repeatedly text messaged and tailgated his girlfriend. (Id. ) A few days after Marchisotto's arrest, he invoked his Fifth Amendment right against self-incrimination at a meeting at DOI with Schwam and his attorney. (Id. ) The NYPD Licensing Division also revoked his firearm permit because Marchisotto failed to notify the Licensing Division of the arrest and failed to cooperate with their investigation. (Id. ) Schwam never suspended Marchisotto; never told him to resign; never filed any charges against him. (Id. ) Marchisotto was also found not guilty of the criminal charges against him on March 25, 2010, but unlike Airday, Marchisotto was never suspended and continues to be a Marshal today. (Id. )

Moreover, Plaintiff states that Marchisotto is also a landlord in Brooklyn, owning two large residential buildings, and in 2006, Schwam learned that these buildings had over 115 violations, 43 of which had been deemed hazardous by the NYC Department of Buildings for lead paint violations. (City Marshal Records, Pl.'s Ex. 29.) Plaintiff says that Schwam told Marchisotto to simply continue in his purported efforts to address the violations and did not take any disciplinary action. (Pl.'s 56.1 ¶ 93.) Defendants object to these statements as failing to cite admissible evidence, and as being based on an uncorroborated, self-serving hearsay statement. (Defs.' 56.1 ¶ 93.) Defendants further state that the issue pertaining to the buildings owned by Marchisotto pre-dates his initial appointment as a City Marshal, and that DOI could not discipline a person before being appointed as a City Marshal. (City Marshal Records at 1450.) Moreover, the cited documentation confirms that DOI investigated Marchisotto's background and presented its findings to the Mayor's Committee on City Marshals on October 31, 2006. (Id. at 1394–95.) As Committee Member Judge Daniel Joy observed, the Committee examined the "documents and other information provided ... by Keith Schwam, and ... concluded

that the nature and extent of the violations currently pending against this applicant's buildings should not disqualify Mr. Marchisotto from further processing by this Committee." (Id. at 1450.) Defendants also state that the statement is not material or relevant. (Defs.' 56.1 ¶ 93.)

Next, Plaintiff provides that on April 20, 2004, City Marshal Shapirro was accused of assault by a victim of
417 alleged assault, and the only step that Schwam took was to issue to Shapirro a letter of admonition. *417 (See Schwam Dep. at 80:16–24 & 171:8–172:14; Shapirro Investigation, dated Dec. 3, 2004 ("Shapirro Investigation"), Pl.'s Ex. 31.) Previously, Shapirro was arrested on November 5, 1985 for menacing and criminal possession of a weapon and was acquitted on July 24, 1986. (Shapirro Investigation at 2772.) In a third incident, on May 5, 2009, Schwam interviewed Shapirro about a claim that he committed perjury during a landlord-tenant proceeding, and Shapirro asserted his Fifth Amendment right against self-incrimination. (Shapirro Perjury Case, dated Oct. 10, 2009 ("Shapirro Perjury Case"), Pl.'s Ex. 33 at 3174.) Schwam took no action to suspend Shapirro and five months after the charge was made, Shapirro resigned his office. (Schwam Dep. at 76:8–83:6.)

Defendants object to this paragraph as failing to cite admissible evidence to support its contention, and argue that it is based on an uncorroborated, self-serving hearsay statement. (Defs.' 56.1 ¶ 94.) Defendants further state that Shapirro was not accused of "assault" by a victim, but was the "subject of a complaint from a person who called [DOI's] office, and said he put his hands on [him]" while effecting an eviction in April 2004, and that Schwam took many steps after this accusation, e.g., Schwam conducted an investigation that included interviewing Shapirro, the complainant, and three additional witnesses and that based on the investigation, Schwam issued Shapirro a "letter of admonition" and that Schwam immediately commenced an investigation following accusations that Shapirro lied under oath while testifying in an eviction proceeding in 2008 and analyzed the "court decision, Marshal Shapirro's records, and the court's audio and printed record of his testimony" and had DOI investigators interview Marshal Shapirro and Judge Madhavan, (Shapirro Perjury Case at 3172), and that Schwam "substantiate[d] the allegation" that Shapirro committed perjury and instructed Shapirro to resign "no later than September 15, 2009," warning that he could be removed from office after a "formal disciplinary proceeding" with the Appellate Division and, even if Shapirro prevailed, the Mayor could exercise his "discretionary authority to appoint a qualified successor" and that Shapirro resigned from office effective on September 15, 2009, obviating the need for "further administrative action by DOI with respect to any potential disciplinary penalty or removal," (id. at 3171, 3175), and that Shapirro was not a member of the Scofflaw Program. (Schwam Dep. at 82:23–83:03.) Defendants also state that the statement is not material or relevant.

Next, Plaintiff provides that City Marshal Schain was found guilty of misconduct by Schwam, including tampering with official records and filing false records, paid a fine of $50,000 and agreed to a four-month suspension. (Pl.'s 56.1 ¶ 95.) At no time during Schwam's investigation of Schain did Schwam seek Schain's temporary suspension or tell Schain to resign or cease activities after the four-month suspension. (Schwam Dep. at 173:14–179:4.) Schain resumed duties as a City Marshal and as a part of the Scofflaw Program, and after his term expired he was held over and continues to act as a City Marshal. (Id. )

Defendants object to these statements for failure to cite admissible evidence and for being based on an uncorroborated, self-serving hearsay statement. (Defs.' 56.1 ¶ 95.) Schwam investigated Schain and brought charges against him on or before 2000, ultimately resulting in Schain "acknowledg[ing] his responsibility for the charged misconduct, and agree[ing] to [a 4 month] suspension and [$50,000] fine." (DOI Press Release,

dated Oct. 6, 2015, ("DOI Press Release"), Pl.'s Ex. 30.) Schwam did not recommend Schain for reappointment
418 after he investigated the conduct described above. (Schwam Dep. at *418 175:03–05.) Defendants also state that the statement is not material or relevant.

Finally, on March 31, 2009, Schwam resolved disciplinary issues against City Marshal Rose with a $40,000 fine for several violations or other acts of misconduct, including false arrest and assault; failing to provide DOI with information; and preparing and filing false records of his office. (Rose Disciplinary Stipulation, dated March 31, 2009 ("Rose Disciplinary Stipulation"), Pl.'s Ex. 34; Rose Stipulation of Settlement and Order of Dismissal, dated March 5, 2013 ("Rose Settlement Agreement"), Pl.'s Ex. 35.) In resolving the false arrest and assault charge, the City paid $10,000 and Rose and his attorney paid $5,000. (Rose Settlement Agreement.) Although all these events took place while Schwam was the Director of the Marshal's Bureau, Schwam never directed Rose to cease operations during the pendency of the charges either as a City Marshal or as a member of the DOF Scofflaw Program. (Schwam Dep. at 183:12–184:21.) Rose was held over as a City Marshal after these charges were resolved, and he continues to be a City Marshall today. (Id. )

Defendants object to these statements on the grounds of failing to cite admissible evidence to support the contention, and for being an uncorroborated, self-serving hearsay statement. (Defs.' 56.1 ¶ 96.) Defendants state that DOI investigated Rose for seizing a car in a traffic lane, inaccurate recordkeeping, and delays in reporting criminal activity by an employee (not a false arrest or assault), and that Rose cooperated with the investigation, took responsibility for his actions, and agreed to a $40,000 fine as an "alternative to a formal disciplinary proceeding." (Rose Disciplinary Stipulation; Schwam Dep. at 183:12–23). Plaintiff cites to a civil lawsuit, where the parties reached a "settlement [that] does not indicate any fault or liability on the part of any party." (Rose Settlement Agreement.) Defendants also state that the statement is not material or relevant.

## III. The Applicable Standard

Summary judgment is appropriate only where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The relevant inquiry on application for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251–52, 106 S.Ct. 2505. A court is not charged with weighing the evidence and determining its truth, but with determining whether there is a genuine issue for trial. Westinghouse Elec. Corp. v. N.Y.C. Transit Auth., 735 F.Supp. 1205, 1212 (S.D.N.Y. 1990) (quoting Anderson, 477 U.S. at 249, 106 S.Ct. 2505 ). "The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 247–48, 106 S.Ct. 2505 (emphasis in original).

## IV. Defendants' Motion for Summary Judgment is Granted in Part, and Denied in Part

419 The claims against Defendant Frankel, the former Commissioner of the DOF, *419 have been withdrawn by the Plaintiff as there is no evidence of his personal involvement in the actions taken against Plaintiff by Schwam. (Pl.'s Opp. Br. 5.) Moreover, the demand for punitive damages in the 'whereas clause' of the AC is limited to

Schwam as a claim for punitive damages may not be made against the City of New York. (Id. ) The class-of-one equal protection claim and the substantive due process claim in the AC are duplicative of the procedural due process and selective enforcement claims, so the latter have similarly been withdrawn. (Id. )

a. Defendants' Motion for Summary Judgment Dismissing Plaintiff's Due Process Claim is Granted in Part, and Denied in Part

Plaintiff's AC asserts that Defendants violated his right to procedural due process when, first, Schwam temporarily suspended Airday in January 2012 without notice or a hearing, and second, Schwam unilaterally and without notice permanently removed Airday from his office in December 2013 by not adhering to the long-standing practice for all City Marshals to renew their terms. (Pl.'s Br. 19–21.) The facts upon which Plaintiff bases his procedural due process violation are established in part and disputed in part. As a consequence, Defendants' motion for summary judgment as to this claim is granted in part, and denied in part.

The Due Process Clause of the Fourteenth Amendment provides certain procedural safeguards as to the deprivation of liberty and property interests. Bd. of Regents of State Colls, v. Roth, 408 U.S. 564, 570, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). "When protected interests are implicated, the right to some kind of prior hearing is paramount." Id. Accordingly, "[t]he threshold issue is always whether the plaintiff has a property or liberty interest protected by the Constitution." Narumanchi v. Bd. of Trustees, 850 F.2d 70, 72 (2d Cir. 1988). To determine whether procedural requirements apply at all, "we must look not to the weight but to the nature of the interest at stake." Roth, 408 U.S. at 571, 92 S.Ct. 2701 (citing Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 ).

"Property interests ... are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law–rules or understandings that secure certain benefits and that support clams of entitlement to those benefits." Id. at 577, 92 S.Ct. 2701. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." S & D Maint. Co., Inc. v. Goldin, 844 F.2d 962, 965 (2d Cir. 1988) (citing Roth, 408 U.S. at 577, 92 S.Ct. 2531); see also Roth, 408 U.S. at 578, 92 S.Ct. 2701 ("Just as the welfare recipients' property interest in welfare payments was created and defined by statutory terms, so the respondents' property interest in employment at Wisconsin State University–Oshkosh was created and defined by the terms of his appointment."). In the public employment context, a person is deemed to have a property interest in continued employment where a tenured position is held, see Slochower v. Bd. of Educ., 350 U.S. 551, 559, 76 S.Ct. 637, 100 L.Ed. 692 (1956), a contract provides as such, see Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952), or where there is a clearly implied promise of continued employment, see Connell v. Higginbotham, 403 U.S. 207, 208, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971).

First, Plaintiff asserts that he maintained a property interest in his continued employment with the Scofflaw
420 Program, *420 and that his procedural rights were violated when he was temporarily suspended from the program in January 2012. Pursuant to the Standard Operating Procedures ("SOP") of the Scofflaw Program, "DOF ... reserves the right ... to direct a Marshal to discontinue the participation of any personnel in the program," and "[i]n the exercise of discretion, the City may terminate the services of a Marshal under this S.O.P. for a conflict of interest or appearance of impropriety." (Scofflaw SOP, date effective Aug. 24, 2009 ("Scofflaw SOP"), PI.'s Ex. 27 at 955.) Plaintiff has not pointed to a statute, rule, contractual agreement or policy providing for his continued appointment to the Scofflaw Program for a designated period of time. Accordingly, absent specific language or facts demonstrating a custom or practice providing for Plaintiff's

continued employment with the Scofflaw Program, Plaintiff has failed to establish that he held a property interest in this position, and as such his constitutional right to due process was not violated by his removal from the Scofflaw Program without notice or an opportunity to be heard. See Roth, 408 U.S. at 577, 92 S.Ct. 2701 ("A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.").

Second, Plaintiff argues that as part of his position as City Marshal, he enjoyed an entitlement to the renewal of his five-year term, and that Schwam's unilateral decision not to rehire Plaintiff for another term violated Plaintiff's constitutional rights to notice and a meaningful opportunity to be heard. Specifically, Airday contends that he had a due process right based on the practice for all City Marshals to renew their terms. (Pl.'s Br. 20.) Defendants contend that "there is no statute, rule, or policy that guaranteed [Plaintiff] the right to remain in that office after the expiration of his stated term of appointment," and that, instead, the controlling statutes required that Plaintiff be appointed to an office with a fixed term of employment and that the office be deemed vacant at the time that the term expired. (Defs.' Br. 15.) Defendants further argue that, pursuant to these statutes, Plaintiff's term expired on December 20, 2013, and Alvarez was appointed to succeed him on December 20, 2013 and was deemed qualified for that office on December 21, 2013, bringing Plaintiff's service as a City Marshal to an end at that time. (Id. at 16.)

While the presence of a written contract outlining a party's formal rights "would make the existence of the right much more apparent, its absence does not foreclose the possibility" that Airday possessed a property interest in a renewed term as City Marshal. Ezekwo v. New York City Health & Hosps. Corp., 940 F.2d 775, 782 (2d Cir. 1991). The parties through their course of dealing and practice can create additional rights and duties. Id."In determining which interests are afforded such protection, a court must look to whether the interest involved would be protected under state law and must weigh 'the importance to the holder of the right.' " Id. at 783. A person has the required property interest for purposes of due process where rules or mutually explicit understandings support an expectation of continued employment. Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). The law of contracts, including the rules governing implied contract, can establish the required property interest, based on a party's words, conduct, the surrounding circumstances, and the meaning of the parties' conduct as found based on their past practices. Id.

For instance, in Ezekwo, 940 F.2d at 782, the Circuit held that a doctor had a property interest in being rotated into the *421 Chief Resident position at the defendant hospital based on a long-standing practice of rotating all residents into the position and the resident's reasonable reliance on the practice. Moreover, in Perry, 408 U.S. at 603, 92 S.Ct. 2694, the Supreme Court held that a professor who spoke out against educational authorities had a protected property interest in his position and was therefore entitled to "a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency."

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Under New York law, a contract implied can be based upon the conduct of the parties, Parsa v. State of New York, 64 N.Y.2d 143, 148, 485 N.Y.S.2d 27, 474 N.E.2d 235 (1984). Whether an implied contract was formed involves factual issues regarding the parties' intent and the surrounding circumstances, Jemzura v. Jemzura, 36 N.Y.2d 496, 503–04, 369 N.Y.S.2d 400, 330 N.E.2d 414 (1975). The existence of an implied contract is ordinarily determined by an objective test; that is, whether a reasonable person would think the parties intended to make a new binding agreement. Martin v. Campanaro, 156 F.2d 127 (2d Cir. 1946).

Here, Plaintiff has demonstrated that a factual issue exists as to whether an implied contract was created as a result of the past practice of holding over City Marshals for reappointment following the expiration of their statutory term. The issue concerns the existence of a property interest in reappointment of Marshals after the expiration of their terms. In the September Opinion, it was concluded that there was a factual issue as to whether the parties had a mutual understanding of the renewal of the position after expiration, and the factual dispute remains. See Airday, 131 F.Supp.3d at 183. The Plaintiff himself has held a City Marshal position by way of holdover status for over two decades since his initial appointment in 1984. (Pl.s' 56.1 ¶ 13.) Moreover, Plaintiff has established that several other City Marshals have also maintained their positions by way of holdover status. Schwam unilaterally without notice permanently removed Airday from his office in December 2013 and assigned Airday's badge to Alvarez. Accordingly, there remains a factual dispute as to whether Plaintiff was entitled to notice and a hearing. This dispute bars the Defendants' motion for summary judgment dismissing Airday's procedural due process claim.

b. Defendants' Motion for Summary Judgment Dismissing Plaintiff's Selective Enforcement Claim is Denied

Plaintiff alleges that his suspension as City Marshal in January 2012 and his removal in December 2013 violated his constitutional right to equal protection because the evidence demonstrates that several other similarly situated City Marshals accused of assault, harassment, or other misconduct were not similarly deprived of their offices.

To prevail on his equal protection claim, which is based on a theory of selective enforcement, Plaintiff must show both (1) that he was treated differently from other similarly situated individuals; and (2) that "such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 790 (2d Cir. 2007). As to the first prong, plaintiffs must show that they are similarly situated such that "(1) the persons to whom they compare themselves are similarly situated in all material respects and (2) the defendants knew there were similarly situated individuals and consciously applied
422 a different standard to plaintiffs." *422 Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills, 815 F.Supp.2d 679, 696 (S.D.N.Y. 2011). "The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Much as the lawyer's art of distinguishing cases, the ‘relevant aspects’ are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely or necessary, but the cases must be fair congeners. In other words, apples should be compared to apples." Id. (citing T.S. Haulers, Inc. v. Town of Riverhead, 190 F.Supp.2d 455, 463 (E.D.N.Y. 2002) (internal citation omitted) ). "Generally, whether two entities are similarly situated is a factual issue that should be submitted to the jury ... [but] this rule is not absolute and ‘a court can properly grant summary judgment where it is clear that no reasonable jury could find the similarly situated prong met.’ " Cine SK8, Inc., 507 F.3d at 790–91.

The facts as set forth above establish a factual conflict both as to whether Plaintiff is similarly situated to the other Marshals cited and whether Schwam's conduct amounted to malice and bad faith sufficient to satisfy the second prong of the inquiry. While Defendants argue that the City Marshals Plaintiff compares himself to are sufficiently dissimilar to Plaintiff to warrant dismissal of this claim, the "relevant aspects" overlap enough to present a genuine issue of material fact to a jury. Each of the persons cited are City Marshals who engaged in similar behavior to Plaintiff, including harassment, assault, and misconduct of which DOI was aware. Unlike the other City Marshals, Airday was temporarily suspended and then permanently removed from his office, raising a genuine question as to why Plaintiff was treated differently than the other similarly situated

individuals. Moreover, it remains an open factual question whether Plaintiff's grievances were the result of Defendants malice or bad faith. These factual disputes bar the Defendants' motion for summary judgment to dismiss Airday's equal protection claim.

c. Defendants' Motion for Summary Judgment Dismissing Plaintiff's First Amendment Claim is Granted

Finally, Plaintiff contends that Schwam's actions against him constituted an act of retaliation in violation of his First Amendment right to free speech. While a similar claim concerning speech between Plaintiff and other City Marshals and the Marshals' Association of the City of New York was dismissed in Airday, 131 F.Supp. at 182, the AC has since been revised to assert that Defendants retaliated against Plaintiff after he contacted elected officials in 2011 and 2012 to "oppose" the implementation of the Paylock Booting Program. (See AC ¶¶ 32–37; 56.1 ¶ 23.) Defendants seek dismissal of this claim on the grounds that Airday spoke as an employee rather than as a public citizen and because the communications alleged in the AC were not the cause of Schwam's actions. Because Plaintiff failed to establish either that his speech was protected or that a nexus existed between his speech and Schwam's actions, Defendants' motion for summary judgment as to this claim is granted.

The requirements to establish a violation of a First Amendment speech right were previously set forth in the September Opinion, and are summarized as follows. "A plaintiff asserting a First Amendment retaliation claim must establish that: '(1) his speech or conduct was protected by the First Amendment; (2) the defendant took an adverse action against him; and (3) there was a causal connection between this adverse action and the protected
423 speech.' " Matthews v. City of New York, 779 F.3d 167, 172 (2d Cir. 2015)*423 (citing Cox v. Warwick Valley Cent. School Dist., 654 F.3d 267, 272 (2d Cir. 2011) ). The issue of whether speech is protected by the First Amendment is a matter of law. See Connick v. Myers, 461 U.S. 138, 148, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

Courts follow a two-step inquiry for determining whether a government: employee's speech is protected: First, it must determine "whether the employee spoke as a citizen on a matter of public concern," which in turn encompasses two subquestions: "(1) whether the subject of the employee's speech was a matter of public concern and (2) whether the employee spoke 'as a citizen' rather than solely as an employee." Id. (citing Jackler v. Byrne, 658 F.3d 225, 235 (2d Cir. 2011) ) (internal citation omitted). If either question is answered negatively, then the relevant speech is not protected and the inquiry ends. Id. If both questions are answered affirmatively, the second determination is "whether the relevant government entity 'had an adequate justification for treating the employee differently from any other member of the public based on the government's needs as an employer.' " Id. (citing Lane v. Franks, —— U.S. ——, 134 S.Ct. 2369, 2380, 189 L.Ed.2d 312 (2014) ). "Only if the statements involved address a matter of public concern is it necessary for a court to balance the interests of the speaker against the state's interest in efficient government." Ezekwo, 940 F.2d at 781 (citing Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) ). "The Supreme Court has recognized a tension in public employment free speech cases between an employee's First Amendment rights and the 'common sense realization that government offices could not function if every employment decision became a constitutional matter.' " Id. (citing Connick, 461 U.S. at 143, 103 S.Ct. 1684 ). Accordingly, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes," and this speech does not enjoy constitutional protection. Garcetti v. Ceballos, 547 U.S. 410, 421, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). The relevant question is whether the speech is directed to the employee's "regular duties." Matthews, 779 F.3d at 173.

The Plaintiff contends that he "disseminated his criticisms of the Paylock program to other City Marshals, to the Marshals' Association, to the [DOF], to local politicians and to the NYC Comptroller's Office." (Pl.'s Br. 11, 29–30; see also Pl.'s 56.1 ¶¶ 22–27.) The September Opinion determined that "complaints ... [that] were not expressed to anyone beyond his own colleagues, the Marshals' Association, and unidentified individuals ... support a conclusion that Airday engaged in speech as a public servant pursuant to his job duties, not as a citizen." Airday, 131 F.Supp.3d at 180–81.

Plaintiff has not established that he "spoke as a citizen on a matter of public concern," in relaying his concerns about the Paylock Program. See Jackler, 658 F.3d at 235. Plaintiff noted an email sent to Kelly, Executive Director at the Marshals' Association in March 2011, and "the other City Marshals," in which he discussed his concerns about the program's implementation and operation. (Pl.'s 56.1 ¶ 22.) Specifically, Plaintiff communicated his concerns regarding the following inquiries: (a) "how Paylock was chosen by the City and whether a no-bid contract was appropriate and legal"; (b) "who would be in charge under the proposal for tracking fines paid to Paylock"; (c) "who would be responsible for supervising Paylock"; (d) "what fees would be charged to the vehicle owners"; (e) "what would be the City Marshal's law enforcement and administrative
424 roles, if any, in the booting process"; (f) "what would ... Paylock's fee be under *424 the proposed system"; (g) "whether a vehicle could be legally 'un-booted' upon payment of the outstanding fines and judgments and left operational on City streets where the vehicle's registration status had expired and the vehicle cannot under law be parked or operated on public streets"; and (h) "whether it was appropriate to omit or disregard necessary and legal guidelines from the Paylock [B]ooting [P]rogram." (Id. ) This email was principally concerned with the impact of Paylock on the Plaintiff's business operation, and there is no evidence that it was directed to the Defendants or an elected official.

Plaintiff also contends that he contacted four elected officials in 2011 and 2012 to complain about the implementation and operation of the Paylock Booting Program. (Id. ¶ 23.) However, no details as to the time, method or substance of these communications are set forth other than a conclusory allegation. (See id.; see also Rankin, 483 U.S. at 388, 107 S.Ct. 2891 (citing Connick, 461 U.S. at 146, 103 S.Ct. 1684 ) ("Whether an employee's 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.") ).

Next, Plaintiff alleges that he spoke to City Councilmember Koppell in a "casual" manner when he saw him walking "on the street," at which point Plaintiff "told him that it would be a good idea if he and the City Council looked into this proposal that seems ... to be way off the reservation." (Pl.'s 56.1 ¶ 24.) Plaintiff spoke in similarly cryptic terms when he allegedly telephoned an unknown person at the Office for the New York City Comptroller to ask in general terms "if they had any information about the [Paylock] contract; if they were aware of it, [a]nd that it seems as if there's a problem with this proposed contract." (Id. ¶ 25.) These allegations lack the evidentiary support needed to warrant a finding that the Plaintiff engaged in protected speech. Plaintiff has not established any information regarding the speech that he alleged was disseminated to City Councilmember Koppell and the New York City Comptroller's Office, except to say that it may have occurred in 2011 or 2012. (See id. ¶¶ 24–25.) Plaintiff adds only that his "objections and concerns about Paylock were not limited to concerns about how his job would be performed and his first concern was the means whereby Paylock was selected and the procurement process." (Id. ¶ 89.) However he provides no further detail as to the content of his concerns. The conclusory nature of Plaintiff's allegations fall short of stating a matter of public concern.

In addition, Plaintiff's speech "focused primarily on private motives related to employment grievances." See Reuland v. Hynes, 460 F.3d 409, 417 (2d Cir. 2006) ; Ezekwo, 940 F.2d at 781 (holding that the speech at issue was not a matter of public concern because both the motive of the speaker and the content of the speech were related to personal grievances). Plaintiff's criticisms focused on how the Paylock Booting Program would impact his business operation: (i) "who would be in charge under the proposal for tracking fines paid to Paylock"; (ii) "who would be responsible for supervising Paylock"; and (iii) "what would be the City Marshal's law enforcement and administrative roles, if any, in the booting process." (Pl.'s 56.1. ¶ 22). As the Circuit has noted, "[s]peech that, although touching on a topic of general importance, primarily concerns an issue that is 'personal in nature and generally related to [the speaker's] own situation,' such as his or her assignment, promotion, or salary, does not address matters of public concern." Jackler, 658 F.3d at 236 (citation omitted); see also Connick, 461 U.S. at 149, 103 S.Ct. 1684 ("To presume that all matters which transpire within a *425 government office are of public concern would mean that virtually every remark–and certainly every criticism directed at a public official–would plant the seed of a constitutional case.").

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Finally, no evidence has been submitted that DOI, DOF, Schwam, or Frankel were aware of the Plaintiff's purported speech described in the AC. Accordingly, Plaintiff is unable to establish the requisite nexus to support his claim of retaliation. See Cobb v. Pozzi, 363 F.3d 89, 108 (2d Cir. 2003) (holding "that a plaintiff may not rely on conclusory assertions of retaliatory motive to satisfy the causal link," and "[i]nstead, he must produce some tangible proof to demonstrate that his version of what occurred was not imaginary.") (quotation, citation, and alteration omitted). The Plaintiff contends that a jury could find that Schwam knew of Plaintiff's "objections and is simply feigning lack of knowledge." (Pl.'s Br. 30–31.) However, this unsupported speculation is belied by the Plaintiff's acknowledgement that he "did not communicate with Schwam or anyone else at DOI about his concerns as to Paylock," as set forth in paragraph 26 of the Plaintiff's 56.1 Statement of Facts. (Pl.'s 56.1 ¶ 26.)

Because the Plaintiff has not established protected speech as a citizen, and in the absence of a nexus between that speech and the actions taken by Schwam in January 2012 and December 2013, the Defendants' motion for summary judgment as to Airday's First Amendment claim is granted.

d. The Defendants' Motion for Summary Judgment Dismissing the AC Against Schwam on the Grounds of Qualified Immunity is Denied

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." Ashcroft v. al–Kidd, 563 U.S. 731, 735, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). This doctrine "balances two important interests–the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

In determining whether the relevant law is "clearly established," courts "consider the specificity with which a right is defined, the existence of Supreme Court or Court of Appeals case law on the subject, and the understanding of a reasonable officer in light of preexisting law." Terebesi v. Torreso, 764 F.3d 217, 231 (2d Cir. 2014). A clearly established right "is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.' " Mullenix v. Luna, —— U.S. ——, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015) (citing Reichle v. Howards, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012) ; see also Terebesi, 764 F.3d at 230 (internal citations and quotations omitted) ("Official conduct

violates clearly established law 'when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every 'reasonable official would have understood that what he is doing violates that right.' ") ). As such, "existing precedent must have placed the statutory or constitutional question beyond debate." Aschroft v. al–Kidd, 563 U.S. 731, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011).

First, as to the due process claim, the Defendants argue that they are entitled to qualified immunity because
426 there is no support for the theory that they should have known that removing Plaintiff from *426 the Scofflaw Program in February 2012, recommending his suspension to the Appellate Division in 2012, and appointing a successor at the expiration of Plaintiff's term in 2013 violated a constitutional right. (Defs.' Br. 22.) However, United States and Circuit case law cited above demonstrate that the constitutional law regarding property interests and the rights that attach to such interests is a clearly established area of the law. Moreover, Schwam, an attorney, has acknowledged that notice is a fundamental aspect of due process, (see Schwam Dep. 109:21–24), demonstrating his knowledge of this area of law. Schwam also prepared the submission to the First and Second Departments, which sets forth the law on how the Appellate division, rather than DOI or Schwam, makes the decision to temporarily suspend a City Marshal. (Pl.'s Ex. 5 at 234.) Moreover, "[s]ummary judgment on qualified immunity grounds is not appropriate when there are facts in dispute that are material to a determination of reasonableness." Kerman v. City of New York, 261 F.3d 229, 240 (2d Cir. 2001). Thus, to the extent that there remains a factual dispute as to the due process claim regarding whether an implied contract existed as a result of the City's alleged practice of holding over City Marshals for reappointment following the expiration of their statutory term, and as to the selective enforcement claim, Defendants are not entitled to qualified immunity.

## V. Conclusion

For the foregoing reasons, Defendants' motion for summary judgment is granted in part, and denied in part.

It is so ordered.

No. 16-4226-cv
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# Hadid v. City of Elizabeth

Decided Apr 18, 2018

No. 16-4226-cv

04-18-2018

Bobby Farid Hadid, Plaintiff-Appellant, v. City of New York, Police Commissioner Raymond W. Kelly, in his Official Capacity as Police Commissioner of The City of New York, William J. Bratton, in his Official Capacity as Police Commissioner of The City of New York, David Cohen, individually and in his Official Capacity as Deputy Police Commissioner for Intelligence, City of New York, Thomas Galati, individually and in his Official Capacity as Chief of the Intelligence Division, John Miller, individually and in his Official Capacity as Deputy Police Commissioner for Intelligence, City of New York, Charles Campisi, in his Individual and his Official Capacity as Commanding Officer, Internal Affairs Bureau, New York City Police Department, Christopher Broschart, Charles Hynes, in his Official Capacity as District Attorney, Kings County, New York, Melissa Carvajal, Individually and in her Official Capacity as Assistant District Attorney, Kings County, New York, Elizabeth Moehle, individually and in her Official Capacity as Assistant District Attorney, Kings County, New York, Defendants-Appellees.

FOR APPELLANT: NATHANIEL B. SMITH (John Lenoir, on the brief), Law Office of Nathaniel B. Smith, Esq., New York, N.Y. FOR APPELLEES: JONATHAN A. POPOLOW, Special Counsel (Richard Paul Dearing and Scott Nathan Shorr, Assistant Corporation Counsels, on the brief), for Zachary W. Carter, Corporation Counsel of the City of New York, New York, N.Y.

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FOR THE COURT: Catherine O'Hagan Wolfe, Clerk

**SUMMARY ORDER RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of April, two thousand eighteen. PRESENT: JOHN M. WALKER, JR., ROSEMARY S. POOLER, *Circuit Judges*, GEOFFREY W. CRAWFORD,* *District Judge*.** *2

2

* Judge Geoffrey W. Crawford, United States District Court for the District of Vermont, sitting by designation.

## FOR APPELLANT:

NATHANIEL B. SMITH (John Lenoir, *on the brief*), Law Office of Nathaniel B. Smith, Esq., New York, N.Y.

## FOR APPELLEES:

JONATHAN A. POPOLOW, Special Counsel (Richard Paul Dearing and Scott Nathan Shorr, Assistant Corporation Counsels, *on the brief*), *for* Zachary W. Carter, Corporation Counsel of the City of New York, New York, N.Y.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Kuntz, *J.*, Reyes, *M.J.*).

**UPON DUE CONSIDERATION**, **IT IS HEREBY ORDERED**, **ADJUDGED**, **AND DECREED** that the
3 judgment of the district court is **AFFIRMED.** *3

Plaintiff-Appellant Bobby Farid Hadid appeals from the November 30, 2015 judgment of the United States District Court for the Eastern District of New York dismissing his claims for malicious prosecution, abuse of process, denial of a fair trial, denial of due process, municipal liability, and civil rights conspiracy, and his First Amendment retaliation claims relating to acts that occurred prior to January 5, 2012. Hadid also appeals from the April 22, 2015 judgment of the district court denying leave to amend his complaint, and from the December 16, 2016 judgment of the district court granting summary judgment in favor of the Defendant-Appellees on his First Amendment retaliation claim relating to the rejection of his application for reinstatement. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the specification of issues on appeal.

**I. Dismissal**

"We review *de novo* the dismissal of a complaint pursuant to Rule 12(b)(6), construing the complaint liberally, accepting all factual allegations as true, and drawing all reasonable inferences in the plaintiff's favor. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016) (internal citation and quotation marks omitted).

4 Hadid challenges the dismissal of his complaint on multiple grounds. None are availing. *4

A. Abuse of Process

The district court dismissed the abuse of process claims brought under state and federal law on the grounds that they were time barred. The district court held that Hadid's abuse of process claims accrued on April 13, 2011, the day that he was arrested on perjury charges. Hadid argues that under the rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), his abuse of process claim did not accrue until after his perjury conviction was overturned on appeal. *Heck* stands for the principle that, where a § 1983 claim would be factually inconsistent with an extant criminal conviction, the claim does not accrue until the conviction is overturned. *See Id.* at 486-87. This rule follows from the broader principle that a § 1983 claim should not function as a means by which to relitigate the facts underlying a conviction.

The abuse of process claim at issue here is not factually inconsistent with Hadid's perjury conviction; the fact of Hadid's ultimate conviction of the offense of perjury does not necessarily dispel the possibility that he was the victim of unconstitutional abuse of process in the events leading up to the conviction. Hadid could have pursued this claim while the perjury prosecution was pending or while his conviction stood, and his doing so

would not have amounted to a collateral attack on the validity of the conviction. *Heck* tolling is thus not appropriate here. The district court did not err, therefore, in dismissing Hadid's abuse of process claims as time barred. *5

B. Malicious Prosecution

The district court dismissed the malicious prosecution claims brought under state and federal law, on the grounds that the grand jury indictment created a presumption of probable cause for the perjury charge and Hadid had not alleged bad faith sufficient to rebut that presumption on the part of any of the non-prosecutor defendants. One of the elements of a malicious prosecution claim is that the defendant lacked probable cause to commence the proceeding. *See Manganiello v. City of New York*, 612 F.3d 149, 161 (2d Cir. 2010).

On appeal, Hadid asserts that the complaint's failure to rebut the presumption of probable cause was not a proper basis for dismissal against the NYPD Defendants. But the affirmative defense of probable cause was apparent from the face of the complaint, which acknowledges that Hadid was indicted and convicted. *See* Complaint, ¶¶ 50 and 60. "An affirmative defense may be raised by a pre-answer motion to dismiss under Rule 12(b)(6) . . . if the defense appears on the face of the complaint." *Iowa Pub. Emps.' Ret. Sys. v. MF Glob., Ltd.*, 620 F.3d 137, 145 (2d Cir. 2010) (quoting *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 74 (2d Cir. 1998)). The district court did not err in dismissing the malicious prosecution claim for failure to rebut the presumption of probable cause.[1] *6

[1] We have routinely affirmed dismissals of malicious prosecution claims at the pleading stage where the plaintiff has failed to allege facts sufficient to rebut the presumption of probable cause flowing from a grand jury indictment. *See, e.g., Lewis v. City of New York et al.*, 591 F. App'x 21, 22 (2d Cir. 2015) (summary order); *Jennis v. Rood et al.*, 310 F. App'x 439, 441 (2d Cir. 2009) (summary order). --------

Hadid also argues that the district court, in dismissing the malicious prosecution claim, did not draw in his favor all reasonable inferences from the facts pleaded in the complaint. He claims the district court should have drawn an inference that the indictment was procured in bad faith, but cites only the following allegations as proper bases for such an inference:

- The NYPD Defendants directly urged, encouraged, and importuned prosecutor Defendants to obtain an indictment with the malicious purpose of discrediting Hadid in the event he spoke out about alleged anti-Muslim bias or activities.

- The Defendants made no attempt to independently verify information regarding Hadid's alleged contacts with Grison and trips to France.

- The Defendants maliciously initiated the perjury prosecution without probable cause.

The final of these is an assertion of a legal conclusion rather than a fact, and the district court correctly ignored it. The remaining two cannot support a reasonable inference of bad faith procurement of the indictment. That the Defendants acted with "malicious purpose" is not necessarily inconsistent with probable cause having been present. Although Hadid claims that the Defendants subjectively desired to harm him, he fails to sufficiently allege that the indictment was produced by fraud, perjury, the suppression of evidence, or other bad-faith police misconduct. *See Dufort v. City of New York*, 874 F.3d 338, 352 (2d Cir. 2017). He therefore fails to negate the

presence of probable cause. That the Defendants did not independently *7 verify Hadid's contacts with Grison similarly does not negate probable cause, especially given that Hadid himself testified to his contacts with Grison in open court.

The district court did not err in not inferring from the allegations in the complaint that the Defendants procured the indictment in bad faith, nor in concluding that the presumption of probable cause flowing from the indictment had not been rebutted. Thus, there was no error in the district court's dismissal of the malicious prosecution claim, an essential element of which is the absence of probable cause.

C. First Amendment Claims

The district court dismissed on timeliness grounds Hadid's First Amendment claims based on alleged discrete acts of retaliation for his complaints about the Citywide Debriefing Unit's practices, where those acts occurred prior to January 5, 2012. In particular, these acts include Hadid's reassignment from the Intelligence Division to a precinct and the initiation of several internal disciplinary proceedings against him. The district court determined that First Amendment retaliation claims based on these acts were outside the three-year statute of limitations, as Hadid filed his complaint on January 5, 2015. *See* Decision & Order (Doc. 51) at 16-17.

Hadid invokes the continuing violation doctrine in an attempt to save these claims, but the continuing violation doctrine "applies not to discrete unlawful acts, even where those discrete acts are part of a 'serial violation,' but to claims that by their nature accrue only after the plaintiff has been subjected to some threshold *8 amount of mistreatment." *Gonzalez v. Hasty*, 802 F.3d 212, 220 (2d Cir. 2015) (internal alterations omitted). The district court did not err in identifying Hadid's reassignment and internal discipline as discrete acts to which the continuing violation doctrine could not apply, and did not err in dismissing the claims arising from them as untimely.

D. Fair Trial and Due Process

The district court dismissed Hadid's fair trial and due process claims on the basis that, to the extent that the complaint makes any allegations of violations of these rights by non-immune defendants, the allegations are conclusory and insufficient. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. We do not perceive, nor does Hadid point to, any part of the complaint that adequately pleads any violation of his fair trial or due process rights. There was no error in the district court's dismissal of these claims.

E. Conspiracy

The district court dismissed Hadid's conspiracy claims under §§ 1983 and 1985 on the basis that the complaint failed to allege sufficiently the existence of any agreement among the Defendants to achieve an unlawful end. Hadid asserts that the district court's decision on this issue was "wrong and was based on an unbalanced and selective reading of the allegations in the Complaint," Appellant's Brief at 48, but does not cite to, nor do we perceive, any specific allegation or *9 collection of allegations in the complaint that pleads adequately the existence of any agreement to achieve an unlawful end. We discern no error in the district court's dismissal of these claims.

F. Municipal Liability

The district court dismissed Hadid's municipal liability claims on the grounds that there was no direct causal link between the municipal policy he alleged to exist—to wit, the profiling and interrogation of people on the basis of their religion—and his alleged injuries.

On appeal, Hadid asserts that the allegations in the complaint "are sufficient under settled law." Appellant's Brief at 49. The district court correctly noted that "[p]laintiffs who seek to impose liability on local governments under § 1983 must prove that 'action pursuant to official municipal policy' caused their injury." *Connick v. Thompson*, 563 U.S. 51, 60-61 (2011) (quoting *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)). Hadid seeks to draw a causal connection between the alleged religious-profiling policy of the CDU and his demotion and prosecution. But it cannot fairly be said that he was demoted or prosecuted "pursuant to" that policy, *see Connick*, 563 U.S. at 60; his allegation really is that he was demoted and prosecuted for speaking out against the policy. The district court did not err in ruling that this was not a
10 sufficiently direct causal link, and did not err in dismissing Hadid's municipal liability claims. *10

**II. Leave to Amend**

"We review a district court's denial of leave to amend for abuse of discretion, unless the denial was based on an interpretation of law, such as futility, in which case we review the legal conclusion *de novo*." *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012).

There seems to have been some confusion in the proceedings below regarding the timeframe in which Hadid could filed an amended pleading as of right. Among other things, the magistrate judge (Reyes, *M.J.*) issued an ambiguous oral modification of a scheduling order that made such modification conditional on the district court's decision on Hadid's motion to the district court. Although Hadid may have understandably been confused, he missed multiple opportunities to file an amended complaint, only asked for extensions at the last minute, and failed to clarify his deadline in the face of ambiguity. Ultimately, he filed his complaint beyond any conceivable interpretation of the timeframe in which he could file as of right under the Rule 16 scheduling order as amended. The district court did not err, therefore, in applying the Rule 16 good cause standard, nor did it abuse its discretion in finding no good cause, as it correctly determined that Hadid failed to show sufficient due diligence.

**III. Summary Judgment**

"We review *de novo* a district court's grant of summary judgment, construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor. Our task is to determine
11 whether the district *11 court properly concluded that there was no genuine dispute as to any material fact, such that the moving party was entitled to judgment as a matter of law." *Minda v. United States*, 851 F.3d 231, 234 (2d Cir. 2017) (internal citations and quotation marks omitted).

The district court correctly ruled that Hadid had failed to adduce any evidence sufficient to support a finding that there was a causal connection between his participation in the *New York Times* article and the denial of his reinstatement. *See Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 114 (2d Cir. 2011) (surviving summary judgment on a First Amendment retaliation claim requires a public employee to present evidence of "a causal connection between the protected activity and the adverse employment action" (quoting *Dillon v. Morano*, 497 F.3d 247, 251 (2d Cir. 2007))). The district court also correctly determined that Hadid failed to present evidence sufficient to raise any genuine issue as to whether he would have been reinstated absent the *Times* article. *See Anemone*, 629 F.3d at 114 ("[E]ven if there is evidence that the adverse employment action was

motivated in part by protected speech, the government can avoid liability if it can show that it would have taken the same adverse action in the absence of the protected speech." (quoting *Heil v. Santoro*, 147 F.3d 103, 109 (2d Cir. 1998))).

The evidence in the record on appeal reveals that there were ample grounds to reject Hadid's reinstatement application whether or not Hadid spoke to the *Times*. The district court did not err in granting summary judgment in favor of the Defendants. *12

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We have fully considered all of Hadid's remaining arguments in favor of reversal and find them without merit. The judgment of the district court is **AFFIRMED.**

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

10 Civ. 6005
United States District Court, S.D. New York.

# Schoolcraft v. City of N.Y.

248 F. Supp. 3d 506 (S.D.N.Y. 2017)
Decided Mar 30, 2017

10 Civ. 6005.

03-30-2017

Adrian SCHOOLCRAFT, Plaintiff, v. The CITY OF NEW YORK, et al., Defendants.

NATHANIEL B. SMITH, ESQ., 100 Wall Street, 23rd Floor, New York, NY 10005, JOHN LENOIR, ESQ., 829 Third Street, NE, Washington, DC 20002, Attorneys for Plaintiff. NEW YORK CITY LAW DEPARTMENT, 100 Church Street, 3rd Floor, New York, NY 10007, By: Alan H. Scheiner, Esq., Attorneys for Defendants.

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Sweet, D.J.

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NEW YORK CITY LAW DEPARTMENT, 100 Church Street, 3rd Floor, New York, NY 10007, By: Alan H. Scheiner, Esq., Attorneys for Defendants.

OPINION

Sweet, D.J.

The plaintiff Adrian Schoolcraft ("Schoolcraft" or the "Plaintiff") has moved pursuant to Local Civil Rule 6.3 and Rules 59(e), 54(b), and 60(b), Fed R. Civ. P., for reconsideration of certain portions of the September 6, 2016 order awarding the Plaintiff $1,093,658.04 for attorneys' fees, costs, and disbursements in this civil rights action against The City of New York, certain of its officers and employees (the "City"), Jamaica Hospital Center, and certain of its employees (collectively, the "Defendants"). Based upon the conclusions set forth
508 below, the motion for reconsideration is granted, and upon reconsideration, the 35% reduction of attorneys'*508 fees is modified to a 25% reduction.

## I. Prior Proceedings

The September 6, 2016 order (the "September 2016 Order") described the prior proceedings. *See Schoolcraft v. City of N.Y.* , No. 10 CIV. 6005 (RWS), 2016 WL 4626568, at *1–2 (S.D.N.Y. Sept. 6, 2016). Familiarity with the prior proceedings and facts is assumed.

The instant motions were marked fully submitted on November 17, 2016.

## II. The Applicable Standard

A motion for reconsideration is properly granted where "the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir. 1995) ; see *also Farez–Espinoza v. Napolitano,* 08 Civ. 11060 (HB), 2009 WL 1118098, at *3 (S.D.N.Y. Apr. 27, 2009). Pursuant to Local Civil Rule 6.3, the Court may reconsider a prior decision to "correct a clear error or prevent manifest injustice." *Medisim Ltd. v. BestMed LLC,* 2012 U.S. Dist. LEXIS 56800, at *2–3, 2012 WL 1450420, at 1 (S.D.N.Y. Apr. 23, 2012) (citing *RST (2005) Inc. v. Research in Motion Ltd.,* 597 F.Supp.2d 362, 364–65 (S.D.N.Y. 2009) ).

Reconsideration of a court's prior order under Local Rule 6.3"is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Ferring B.V. v. Allergan, Inc.,* No. 12 Civ. 2650 (RWS), 2013 WL 4082930, 2013 WL 4082930, at *1 (S.D.N.Y. Aug. 7, 2013) (quoting *Sikhs for Justice v. Nath* , 893 F.Supp.2d 598, 605 (S.D.N.Y. 2012) ). Accordingly, the standard of review applicable to such a motion is "strict." *CSX,* 70 F.3d at 257.

The burden is on the movant to demonstrate that the Court overlooked controlling decisions or material facts that were before it on the original motion and that might "materially have influenced its earlier decision." *Anglo Am. Ins. Group v. CalFed, Inc.* , 940 F.Supp. 554, 557 (S.D.N.Y. 1996) (internal quotation marks and citation omitted). A party seeking reconsideration may neither repeat "arguments already briefed, considered and decided" nor "advance new facts, issues or arguments not previously presented to the Court." *Schonberger v. Serchuk,* 742 F.Supp. 108, 119 (S.D.N.Y. 1990) (citations omitted).

"The reason for the rule confining reconsideration to matters that were ‘overlooked’ is to ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." *Polsby v. St. Martin's Press, Inc.,* No. 97 Civ. 690 (MBM), 2000 WL 98057, at *1 (S.D.N.Y. Jan. 18, 2000) (internal citation and quotation marks omitted).

## III. The Motion to Reconsider is Granted

Plaintiff's counsel Nathaniel B. Smith, Esq., ("Smith") noted that the City had taken the position in its initial opposition to the application that $450 was a reasonable rate for Smith. *See* City Memorandum of Law in Opposition, Docket Entry 661 ("City's Opp'n") at 15. The City also urged the adoption of a $400 hourly rate for Plaintiff's counsel Jon L. Norinsberg, Esq. ("Norinsberg"). Given the resolution of this action by the Offer of Judgment including reasonable counsel fees, these recommendations were significant and overlooked in
509 fashioning the September *509 6 Order. Therefore, the motion to reconsider is granted.

## IV. The Fee Reduction is Modified

The 35% reduction in attorneys' fees determined in the September 6 Order reduced the rate for Smith and Norinsberg below that which the City posited was reasonable. A reduction of 25% will approximate the City's recommendations and, under the circumstances set forth in the September 6 Order, upon reconsideration results in a reasonable attorneys' fee.

## V. Reconsideration of the *Arbor Hill* and *Johnson* Factors is Denied

Plaintiff has previously sought reconsideration based on new arguments that could have and should have been made earlier. *See Schoolcraft v. City of N.Y.,* 133 F.Supp.3d 563, 571–72 (S.D.N.Y. 2015) (denying motion for reconsideration because plaintiff's arguments were not previously advanced); *Schoolcraft v. City of N.Y.,* No. 10

CIV. 6005 RWS, 2012 WL 2958176, at *5 (S.D.N.Y. July 20, 2012) (denying motion to reconsider in part because motion as based on new arguments). Plaintiff does so again here.

"[A] party requesting [reconsideration] is not supposed to treat the court's initial decision as the opening of a dialogue in which that party may then use Rule [6.3] to advance new facts and theories in response to the court's rulings." *Church of Scientology Int'l v. Time Warner, Inc.,* No. 92 Civ. 3024 (PKL), 1997 WL 538912, at *2 (S.D.N.Y. Aug. 27, 1997) ; *see also Ferring B.V. v. Allergan, Inc.,* No. 12 Civ. 2650 (RWS), 2013 WL 4082930, at *1 (S.D.N.Y. Aug. 7, 2013) (a party seeking reconsideration may neither repeat "arguments already briefed, considered and decided," nor "advance new facts, issues or arguments not previously presented to the Court") (internal citations and quotation marks omitted).

Plaintiff argues for the first time that the Court applied the wrong standard in determining reasonable fees; specifically that the Court should not have: (1) followed the leading Second Circuit decision of *Arbor Hill* ; (2) considered the *Johnson* factors; (3) considered the size of the law firms; or (4) considered the apparent reputational benefits to counsel as called for by *Arbor Hill. See* Norinsberg Team Reconsideration Memorandum of Law, Docket Entry 641 ("Norinsberg Br.") at 2–5, 6–10; Smith Team Reconsideration Memorandum of Law, Docket Entry 644 ("Smith Br.") at 14. For this argument, Plaintiff relies primarily on the Supreme Court opinions in *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), and *Perdue v. Kenny A.* , 559 U.S. 542, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010), and four district court decisions never before cited.

There were nine previous submissions on fees from the Norinsberg and Smith teams. *See* Docket Entries 560, 561, 605, 610, 620, 621, 624, 625, and 630. *Arbor Hill,* the *Johnson* factors, the size of the law firm, and the reputational benefits to counsel were all addressed by the City in its Opposition. *See, e.g.,* City's Opp'n at 4–5, 48–51, 54–55. Plaintiff and the City both cited *Blum* and *Perdue* , but Plaintiff did not urge that those cases overruled *Arbor Hill* or any other authorities on which the City reliea. *See* City's Opp'n at 4–5, 22, 47–48 (citing *Arbor Hill, Johnson, Blum,* and *Perdue* ); Norinsberg Team Memorandum of Law on Fees, Docket Entry 561 ("Norinsberg Prior Br.") at 16, 19, 29 (citing *Blum* and *Perdue* ); Smith Team Memorandum of Law on Fees, Docket Entry 620 ("Smith Prior Br.") at 30–31 (citing *Blum* and *Perdue* ).

510 *510 The Plaintiff's new argument impugning *Arbor Hill's* case-specific approach to determining reasonable fees is contrary to Plaintiff's prior submissions. The Smith team wrote: "As the Second Circuit has explained, this fact-finding 'contemplates a case-specific inquiry into the prevailing market rates for counsel of similar experience and skill to the fee applicant's counsel.' " Smith Prior Br. at 30 (quoting *Farbotko v. Clinton Cnty.* , 433 F.3d 204, 209 (2d Cir. 2005) ). The Norinsberg team cited *Arbor Hill* favorably in its moving brief, and only the lower court's decision in *Arbor Hill* in its Reply. *See* Norinsberg Prior Br. at 20; Norinsberg Team Reply Memorandum of Law on Fees, Docket Entry 624 ("Norinsberg Prior Reply Br.") at 48.

The Second Circuit has reaffirmed *Arbor Hill* since *Perdue,* citing the two cases together and equating their methodologies:

> Both this Court and the Supreme Court have held that the lodestar—the product of a reasonable hourly rate and the reasonable number of hours required by the case—creates a "presumptively reasonable fee." *Arbor Hill Concerned Citizens Neighborhood Assoc. v. Cnty. of Albany,* 522 F.3d 182, 183 (2d Cir. 2008) ; *see also Perdue v. Kenny A. ex rel. Winn* , 559 U.S. 542, 130 S.Ct. 1662, 1673, 176 L.Ed.2d 494 (2010).

*Millea v. Metro–N. R.R.* , 658 F.3d 154, 166–67 (2d Cir. 2011) ; *see also Dunda v. Aetna Life Ins. Co.,* No. 6:15-CV-6232-MAT, 2016 WL 4831962 (W.D.N.Y. Sept. 15, 2016) (same). In other words, whether the methodology is called the "presumptively reasonable fee" as in *Arbor Hill* or the "lodestar" as in *Perdue* the method is the same: calculation of reasonable hours times reasonable rates to arrive at a presumptively reasonable fee.

Courts in this Circuit have continued to explicitly apply the factors that Plaintiff claims have been ruled improper well after the Supreme Court decisions relied on by Plaintiff. In *Townsend v. Benjamin Enters.,* 679 F.3d 41, 59–60 (2d Cir. 2012), the Second Circuit affirmed the district court's hourly rate decision, which was based in part on the size of the law firm. In *Finch v. N.Y. State Office of Children & Family Servs.,* 861 F.Supp.2d 145, 153 n.50 (S.D.N.Y. 2012) (Scheindlin, J.), the district court applied *Blum, Perdue* , and Second Circuit law, and concluded that a lower rate applied because plaintiff's counsel was a sole practitioner, noting that "[t]he size of the law firm is a significant factor in determining the relevant market rates." (citing *Reiter v. Metropolitan Transp. Auth. Of State of New York,* No. 01 Civ. 2762, 2007 WL 2775144 (S.D.N.Y. Sept, 25, 2007), in which the court noted that "the large firms listed on the [National Law Journal] survey have acquired a reputation that allows them to command high rates in the market. Many other firms, in particular smaller firms that may be providing equally capable services, simply do not command anywhere near such rates...."). In the recent decision in *Garcia v. Chirping Chicken NYC, Inc.* , No. 15 Civ. 2335 (JBW)(CLP), 2016 U.S. Dist. LEXIS 32750, at *57–58 (E.D.N.Y. Mar. 11, 2016) (Poliak, J.), the Court applied the *Arbor Hill* method, including the *Johnson* factors, and noted the factor of potential reputational benefits to the attorney.

The motion to reconsider based on *Arbor Hill* and the application of the *Johnson* factors is denied.

## VI. Reconsideration Based on the City's Summaries is Denied

The Plaintiff has attacked the City's calculations and characterizations of the counsel's hours in four filings: two briefs on fees, a separate motion to strike, and a reply on the motion to strike. However, Plaintiff has not
511 previously raised the *511 errors which the Smith team now cites on reconsideration. In fact, the Smith team in reply discussed the deposition time and acknowledged that it warranted some reduction in rates, but never mentioned its new attacks on the same subject.

Plaintiff's counsel have had the City's Audit since April 8, 2016 and the coding worksheets since May 11, 2016. *See* Docket Entry 635; *see also* September 6 Order at *4, n.2. As the City previously stated, the Audit's "calculations are based on the time charges submitted by plaintiff, and could be confirmed or disputed by the parties or the Court by reference to the material submitted by Plaintiff.... If the Plaintiff believes that the calculations are in error, he can submit his own calculations." City Opp'n at 15. Yet Plaintiff alleged only a handful of minor, alleged discrepancies when litigating the fee motion, which amounted to typographical errors. *See* Reply Affirmation of Nathaniel B. Smith, Docket Entry 621 at ¶¶ 9–11; City's Surreply Memorandum of Law Opposing Fee Application, Docket Entry 632 at 13. Although Smith now claims the mistake in briefing was so obvious that it was deliberate, his own team did not raise the issue even with their knowledge of their own time records until after the Court's ruling.

The Plaintiff chose to submit fee information in numerous different forms and formats, including in non-electronic form, and refused the City's request for production of the electronic files containing the data. *See* City's Letter Motion to Compel Fee Discovery, Docket Entry 576; Plaintiff's Letter Response to City's Letter Motion to Compel Fee Discovery, Docket Entry 577. In opposing Plaintiff's motion to strike the Audit, the City offered to have Judith Bronsther testify about her methods and processes, and thus be subjected to cross-

examination, but Plaintiff never took up the offer. *See* City's Letter Regarding Motion to Strike, Docket Entry 635. Nor did the Plaintiff ever seek discovery from ASI or Bronsther, to which the City states it would have consented.

The time to challenge the accuracy of the Bronsther Report was before the completion of the submissions on the fee application, not after.

## VII. Conclusion

The motions to reconsider are granted. Upon reconsideration, the attorneys' fees will be reduced by 25%. The remaining requests for reconsideration are denied.

It is so ordered.

# Schoolcraft v. City of N.Y.

Decided Sep 1, 2016

10 Civ. 6005 (RWS)

09-01-2016

ADRIAN SCHOOLCRAFT, Plaintiff, v. CITY OF NEW YORK, ET AL., Defendants

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Sweet, D.J.

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Plaintiff's Counsel Jon Norinsberg, Esq. ("Norinsberg"), Nathaniel Smith, Esq. ("Smith"), Joshua Fitch, Esq. ("Fitch"), Gerald Cohen, Esq. ("Cohen"), John Lenoir, Esq. ("Lenoir"), and Howard A. Suckle, Esq. ("Suckle") (collectively, "Primary Counsel"), on behalf of Plaintiff Adrian Schoolcraft ("Plaintiff" or "Schoolcraft"), move for an award of attorney's fees, costs, and disbursements pursuant to Federal Rule of Civil Procedure 54(d) and 42 U.S.C. § 1988. Separately and initially on their own behalves and subsequently on behalf of Plaintiff, Harvey Levine, Esq., Richard Gilbert, Esq., and Peter Gleason, Esq. (together, "LGG") likewise move for an award of attorney's fees and costs. Plaintiff has also moved to strike the expert report, opinion, and testimony of Judith Bronsther. Defendant City of New York ("Defendant" or the "City") has moved to strike ECF No. 631. Based on the conclusions set forth below, the motion to strike the report, opinion, and testimony of Bronsther is granted in part and denied in part, the fee applications are granted in part and denied in part, and the motion to strike ECF No. 631 is denied as moot. *4

## I. Prior Proceedings

A detailed recitation of the facts of the underlying case is provided in this Court's opinion dated May 5, 2015, which granted in part and denied in part five motions for summary judgment. See Schoolcraft v. City of New York, No. 10 CIV. 6005 RWS, 2015 WL 2070187, at *1 (S.D.N.Y. May 5, 2015). Familiarity with those facts is assumed.

Plaintiff accepted an Offer of Judgment against the City of New York (the "City") pursuant to Federal Rule of Civil Procedure 68 on September 28, 2015. The Judgment provides "plaintiff shall be entitled to reasonable attorney's fees, expenses, and costs to the date of this offer for plaintiff's federal claims." Rule 68 Judgment, ECF No. 541, Ex. A at 4. Plaintiff's claims against Michael Marino, Gerald Nelson, Theodore Lauterborn, William Gough, Frederick Sawyer, Kurt Duncan, Christopher Broschart, Timothy Caughey, Shantel James, Timothy Trainor, Elise Hanlon, Steven Mauriello, and any other agent or employee defendants of the City of New York were dismissed pursuant to the Offer of Judgment on October 16, 2016. Following settlement conference on November 3, 2015, Plaintiff reached a settlement agreement with the remaining Defendants Jamaica Hospital Medical Center, Dr. Isak Isakov, and Dr. *5 Lillian Aldana-Bernier (collectively, the "Hospital Defendants").

The first of the instant motions was submitted December 16, 2016. The City sought Plaintiff's counsel's electronic fee records before opposing the fee applications and challenged the standing of Gilbert, Levine, and Gleason. Oral argument was held on February 11, 2016. By order dated February 25, 2016, Gilbert, Levine, and

Gleason were directed to produce evidence of their standing to file a fee application of Plaintiff's behalf. The matter was referred to Magistrate Judge Debra C. Freeman for conference related to settlement of the fee motions.

Following unsuccessful attempts to settle the matter, briefing continued. After the City filed its opposition with Judith Bronsther's expert report, opinion, and testimony, Plaintiff moved to strike the report, opinion, and testimony by letter dated April 12, 2016. Following Plaintiff's responsive submissions, the City moved to strike Smith's Reply, ECF No. 631, as procedurally improper. Oral argument was held on May 12, 2016, at which time the applications and motions to strike were deemed fully submitted. *6

## II. Applicable Standards

**a. Motion to Strike the Expert Report**

The standard for the admissibility of expert testimony is set forth in Federal Rule of Evidence 702:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts o the case.

Fed. R. Evid. 702.

Rule 702 was the subject of extensive analysis by the Supreme Court in Daubert and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). The Court emphasized in Daubert that

> [t]he inquiry envisioned by Rule 702 is ... a flexible one. Its overarching subject is the scientific validity and thus the evidentiary relevance and reliability of the principles that underlie a proposed submission. The focus of course, must be solely on principles and methodology, not on the conclusions that they generate.

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 594-95, 113 S. Ct. 2786, 2797, 125 L. Ed. 2d 469 (1993). The Federal Rules of Evidence assign to the district court the responsibility to act as a gatekeeper and to ensure that "an expert's testimony both rests on a reliable foundation and is relevant to the task *7 at hand." Id. at 597.

"[I]n analyzing the admissibility of expert evidence, the district court has broad discretion in determining what method is appropriate for evaluating reliability under the circumstances of each case." Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 265 (2d Cir. 2002). However, "[t]he Rules' basic standard of relevance ... is a liberal one," Daubert, 509 U.S. at 587. "A review of the caselaw after Daubert shows that the rejection of expert testimony is the exception rather than the rule." Fed.R.Evid. 702, Advisory Comm. Notes.

**b. Motions for Attorney's Fees, Costs, and Expenses**

Federal statute permits the court, "in its discretion" to "allow a prevailing party" in a federal civil rights action "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). "The Second Circuit has held that plaintiffs who accept Rule 68 offers of judgment qualify as 'prevailing parties' entitled to attorneys' fees and costs." Davis v. City of New York, No. 10 CIV. 699 SAS, 2011 WL 4946243, at *2 (S.D.N.Y. Oct. 18, 2011) (citations omitted). On the one hand, the court's discretion as to what constitutes a reasonable fee is "considerable." Barfield v. New York City Health & Hosps. Corp., *8 537 F.3d 132, 151 (2d Cir. 2008); accord CARCO GROUP, Inc. v. Maconachy, 718 F.3d 72, 85 (2d Cir. 2013) ("we give wide latitude to district courts

to assess the propriety of attorneys' fees and costs requests"). On the other, that discretion is not so unfettered as to allow the court to abandon binding precedent as to appropriate procedure for determining fee calculation. Millea v. Metro-N. R.R. Co., 658 F.3d 154, 166 (2d Cir. 2011).

However, the Second Circuit has also maintained that "there is no precise rule or formula for making fee determinations." Husain v. Springer, 579 F. App'x 3, 6 (2d Cir. 2014) (citing Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). The calculation of the product of the number of hours expended and a reasonable hourly rate, commonly referred to as the "lodestar method," is the most common analysis for an appropriate award of attorney's fees. See Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 551, 130 S. Ct. 1662, 1672, 176 L. Ed. 2d 494 (2010); see also Francois v. Mazer, 523 F. App'x 28, 29 (2d Cir. 2013) ("Awards of attorney's fees are generally calculated according to the 'presumptively reasonable fee' method, calculated as the product of the number of hours worked and a reasonable hourly rate." (citation omitted)). The
9 lodestar calculation is presumptively reasonable. Millea, 658 *9 F.3d at 167.

Notwithstanding the near consistent application of the lodestar method, just how the calculation operates has been inconsistently defined. See Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany & Albany Cty. Bd. of Elections, 522 F.3d 182, 186-190 (2d Cir. 2008). The trouble lies in precisely where and when the district court must assess the given fee's reasonableness. Id. After a comprehensive review of competing methodology, the Second Circuit panel in Arbor Hill abandoned the term "lodestar," recognizing that "[t]he net result of the fee-setting jurisprudence here and in the Supreme Court is that the district courts must engage in an equitable inquiry of varying methodology while making a pretense of mathematical precision." Id. at 189-90. What remains clear is that the district court must assess a reasonable hourly rate by determining "the rate a paying client would be willing to pay." Id. at 190.

Though the Court must analyze the fees a reasonable client would be willing to bear, it need not act as a reasonable client might by "set[ting] forth item-by-item findings concerning what may be countless objections
10 to individual billing items." Francois, 523 F. App'x at 29 (2d Cir. 2013) (citing Lunday v. *10 City of Albany, 42 F.3d 131, 134 (2d Cir.1994)). "Rather, in dealing with items that are excessive, redundant, or otherwise unnecessary, the court has discretion simply to deduct a reasonable percentage of the number of hours claimed as a practical means of trimming fat from a fee application.' Id. (citing Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 173 (2d Cir.1998) (citations and internal quotation marks omitted)). The same principle applies to calculation of a cost award. Id. **III. The Motion to Strike the Declaration and Report of Judith Bronsther, Esq. is Granted in Part and Denied in Part**

Plaintiff's counsel have moved to strike the declaration and report of Judith Bronsther, Esq. ("Bronsther"), filed in support of the City Defendants' opposition to the instant fee applications. See Decl. of A. Scheiner in Opp., ECF No. 598, Ex. B ("Bronsther Decl."), Ex. C ("Bronsther CV"), Ex. D ("Bronsther Report") (collectively the "Bronsther Submissions").

Bronsther's group Accountability Services, Inc. ("ASI") audited the invoices submitted by Plaintiff's counsel in this matter to "render an opinion with respect to the reasonableness of the hours expended and the
11 reasonableness of the expenses and whether the billing practices of the various groups are *11 consistent with acceptable billing practices." Bronsther Report at 1. Bronsther's qualifications include her admission to practice law in New York, "devot[ion] ... of her time to issues surrounding reasonable attorney's fees" since 1992 on behalf of ASI, review of fee applications in several cases including two in the last four years (one in New York state court, one in Florida state court), and publications and speaking engagements on the issues of legal fees. See id. at 2; Bronsther Decl. ¶¶ 1-2, 4, 6.

The conclusions in Bronsther's Report fail Rule 702 for inability to aid the Court as the trier of fact as to the reasonableness of Plantiff's Counsel's fees. To begin, "the court is itself an expert and can properly consider its own knowledge and experience concerning reasonable and proper fees and in light of such knowledge and experience and from the evidence presented, can form an independent appraisal of the services presented and determine a reasonable value thereof." Newman v. Silver, 553 F. Supp. 485, 497 (S.D.N.Y. 1982), aff'd in part, vacated in part on other grounds, 713 F.2d 14 (2d Cir. 1983). Bronsther having based her opinion on an after-the-fact review of this case and its records, her opinions as to reasonableness do not add value or assistance to
12 the Court in making a reasonableness determination. *12

Second, Bronsther's Report amounts to an analysis applying her interpretation of the law to the facts offered by Plaintiff's Counsel's submissions. Such legal opinions are not helpful to the Court in this circumstance in which the Court has far greater familiarity with the circumstances of the case. To accept them would usurp this court's role and obligation to apply that knowledge to reach a reasonability determination. See Nimely v. City of New York, 414 F.3d 381, 397 (2d Cir. 2005) ("expert testimony that usurps either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it by definition does not aid the jury in making a decision; rather, it undertakes to tell the jury what result to reach, and thus attempts to substitute the expert's judgment for the jury's." (internal quotation marks, brackets, and citations omitted)); see also De La Paz v. Rubin & Rothman, LLC, No. 11 CIV. 9625 ER, 2013 WL 6184425, at
13 *9n.11 (S.D.N.Y. Nov. 25, 2013).[1] *13 Accordingly, Bronsther's opinions cannot be considered.

[1] Defendants cite several out of Circuit cases to the contrary. Defendants' only citation possibly binding on this Court, Webb County v. Board of Education of Dyer County, Tennessee, is to footnote supporting a recitation of facts as it related to a question about fee awards for administrative proceedings. 471 U.S. 234, 239n.7, 105 S. Ct. 1923, 1926, 85 L. Ed. 2d 233 (1985). Even were the case apposite and any precedent was suggested, the very next two footnotes note "three experts offered varying opinions," none of which the District Court adopted. Id. at 238n.8, 239n.9. That Court did not address the appropriate use of expert opinions on the reasonableness of fees.

However, separate from the opinions and conclusions offered, the Bronsther Submissions also summarize Plaintiff's voluminous billing submissions, disaggregating the number of hours billed to different elements of this case and providing their sums, see Bronsther Report 19-27, 32-25, 36-42, 81-85, 92-103, 104-107, and categorizing expenses, id. at 2, 15-18, 109-112. Under Federal Rule of Evidence 10006, "a proponent may use a summary, chart, or calculation to prove the content of voluminous writings . . . that cannot be conveniently examined in court." Fed. R. Evid. 1006. Thus, Bronsther's factual observations and calculations will be accepted as summary figures. See e.g., Takeda Chem. Indus., Ltd. v. Mylan Labs., Inc., No. 03 CIV. 8253(DLC), 2007 WL 840368, at *8 (S.D.N.Y. Mar. 21, 2007), aff'd, 549 F.3d 1381 (Fed. Cir. 2008) ("To the extent that summary figures from the Marquess report are also contained in Mylan's brief, they have been
14 considered in connection with Mylan's arguments on this application.").[2] *14

[2] Nathaniel Smith, Esq. challenges Plaintiff's summary calculations as inadmissible under Rule 10006 because they are based on a coding system that has not been provided. The documents underlying summary calculations are counsel's own billing records, to which Plaintiff's Counsel's access cannot be doubted. Moreover, the City has since provided the coding data used. Furthermore, Defendant's request to strike Smith's Reply is denied as moot, as the Court does not adopt Smith's arguments.

As set forth above, the Bronsther Submissions are stricken to the extent they provide conclusions and legal opinions regarding reasonableness, and the factual summary evidence they provide will be admitted.[3] **IV. The Motions for Awards of Attorney's Fees, Costs, and Disbursements are Granted in Part and Denied in Part**

3 Defendant's request to appoint a Special Master is denied as moot.

Having obtained a Rule 68 Judgment against the City, Plaintiff is a "prevailing party" eligible for a fee award under § 1988. Davis, 2011 WL 4946243, at *2 (citations omitted).

**a. Primary Counsel**

Primary Counsel's fee application seeks a total of $4,260,564.70 in attorney's fees, costs, and expenses for 8,830.35 hours billed by eight attorneys and five paralegals and one law graduate as follows:

- Cohen & Fitch LLP: $500 per hour for 1,701.45 hours, a total of $850,725.
- Jon Norinsberg, Esq.: $600 per hour for 1,451.85 hours, a total of $871,110.

15 *15

- John Meehan, Esq. (Norinsberg associate): $350 per hour for 137.80 hours, a total of $48,230.
- Nicole Bursztyn (Norinsberg paralegal): $125 per hour for 103.15 hours, a total of $12,893.75.
- Nathaniel Smith, Esq.: $575 per hour for 2,246 hours (adjusted for travel time), a total of $1,275,062.50.
- John Lenoir, Esq.: $575 per hour for 1,310 hours (adjusted for travel time), a total of $736,575.00.
- Lysia Smejika, Jeanette Lenoir, and Jeremy Smith (Smith paralegals): $125 per hour for 442.18 hours, a total of $55,272.50.
- James McCutcheon, Esq. (Smith colleague): $250 per hour for 23.38 hours, a total of $5,845.
- Howard Suckle, Esq. (Smith of counsel): $575 per hour for 108.90 hours, a total of $62,617.50.
- Magdalena Bauza (law graduate): $150 per hour for 1,305.64 hours (adjusted for travel time), a total of $193,175.
- Costs and expenses for Smith of $135,235.73, for Norinsberg of $10,021.85, and for Cohen & Fitch of $3,800.87, totaling $149,058.45.[4]

Mem. of Law in Supp. Pl.'s Mot. for Atty's Fees, ECF No. 561, at 38-9 ("Primary Counsel's Br.").

4 Primary Counsel's brief reflects slightly different amounts, though the variations do not exceed a dollar. Primary Counsel's Br. at 39. The Court obtains the totals from the submitted affidavits and billing records. See Master Decl. in Supp. Mot. Atty's Fees ("Master Decl."), Ex. A ¶ 55 (claiming Norinsberg expenses as $10,021.25); id. Ex. B (claiming Smith expenses as $135,235.73); id. Ex. K (listing Cohen expense in invoice as $3,800.87).

**i. Reasonable Fees**

Arbor Hill set forth guidance for the "reasonable fee" analysis:

> We think the better course—and the one most consistent with attorney's fees jurisprudence—is for the district court, in

16 *16

> exercising its considerable discretion, to bear in mind *all* of the case-specific variables that we and other courts have identified as relevant to the reasonableness of attorney's fees in setting a reasonable hourly rate. The reasonable hourly rate is the rate a paying client would be willing to pay. In determining what rate a paying client would be willing to pay, the district court should consider, among others, the Johnson factors;[5] it should also bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively. The district court should also consider that such an individual might be able to negotiate with his or her attorneys, using their desire to obtain the reputational benefits that might accrue from being associated with the case. The district court should then use that reasonable hourly rate to calculate what can properly be termed the "presumptively reasonable fee."

Id. at 190.

> [5] "The twelve *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." Arbor Hill, 522 F.3d at 187. Though they must be considered, the Court need not "recite and make separate findings as to all twelve Johnson factors." Lochren v. Cty. of Suffolk, 344 F. App'x 706, 709 (2d Cir. 2009).

Primary Counsel argue that, in essence, each attorney should be awarded the highest fee he might justifiably command in any situation, without consideration of any limiting factors. For example, Primary Counsel argues
17 that a $600 per hour rate for Mr. Norinsberg is reasonable based on similar awards to *17 attorneys in civil rights cases, an award for $550 in a "routine civil rights case," and rates in New York's finest law firms. See Primary Counsel's Br. at 20-25. Primary Counsel similarly frame the $500 rate requested for the Cohen & Fitch attorneys, emphasizing that a rate of $325 per hour was approved for the firm in the Eastern District of New York three years ago, and thus additional experience obtained since that date, inflation, and forum in this district necessitate a bump of more than 50%. Primary Counsel's Br. at 25-31.[6]

> [6] Primary Counsel make similar arguments for Mr. Smith, Primary Counsel's Br. at 31-33, and Mr. Lenoir, id. at 33-35.

These arguments that use a previous fee or fee commanded by another type of attorney in another type of case as a starting point, only to be increased by any factor available, are premised on an understanding of attorney's rates as an ever-expanding bubble "untethered from the free market [the reasonable fee analysis] is meant to approximate." Arbor Hill, 522 F.3d at 184. They do not consider that the Johnson and Arbor Hill considerations can just as easily weigh in favor of reducing a fee award just as they can weigh in favor of increasing it. Our Circuit has tasked the lower courts with bursting the proverbial bubble: "the district court (unfortunately) bears
18 the burden of disciplining the market." *18

## Id.

The Court agrees that this litigation has been complex and demanded a great deal of effort from counsel over a long period of time, and that the Rule 68 Judgment represented an excellent recovery for Plaintiff. Norinsberg, Cohen & Fitch, and Smith applied experience and expertise warranting partner-level compensation. The time and labor required was considerable, although not preclusive of other employment (as demonstrated by the appearance of Plaintiff's counsel on other matters before this Court during the course of this litigation). However, the rates requested are excessive for this particular action, even for partner-level compensation.

Primary Counsel's individually requested fee rates are not equivalent to what "a reasonable, paying client, who wishes to pay the least amount necessary to litigate the case effectively" would be willing to bear in this District. See id. They are more equivalent to an opening bid in a negotiation; the highest number one might suggest to frame the conversation before the first counter-offer. A keen client would have negotiated these rates down.

19 Primary Counsel's own comparisons to the rates of large law *19 firms is illustrative; this argument works equally to Primary Counsel's detriment as it does to their benefit. Primary Counsel are all solo or small-firm practitioners whose practices are incomparable to large law-firms employing thousands of attorneys, where rates factor in massive overhead. See Wise v. Kelly, 620 F. Supp. 2d 435, 446 (S.D.N.Y. 2008) ("The legal community at issue here is one that covers small to mid-size firms in civil rights, or similar, cases.") (collecting cases awarding $230-$430 per hour for civil rights litigators). Furthermore, many clients of large law firms do not actually pay the hourly rates their counsel command on paper. See Sara Randazzo and Jacqueline Palank, Legal Fees Cross New Mark: $1,500 an Hour, Wall St. Journal, Feb. 9, 2016, available at http://www.wsj.com/articles/legal-fees-reach-new-pinnacle-1-500-an-hour-1454960708 ("For many firms, the stated rate is simply a starting point in discussions with corporate law departments.") As any reasonable clients would, they negotiate creative or fixed fee arrangements and request discounts. See id. Recent figures show that clients typically pay 83% of fees their law firms charge, a number that has been declining. Id. In other words, discounts are the norm and stated rates are more often hypothetical than they are reflective of market
20 rate. "Untethered" indeed. *20

The instant action was also highly desirable to Plaintiff's counsel, as evidenced by the widespread media coverage the action has received and that Primary Counsel actively sought. The value of such reputational benefits, which Plaintiff's counsel can and actively did leverage to obtain business into the future, must be offset against the purely theoretical highest rates Plaintiff's counsel could command.

A reduction in the requested fee amounts is also consistent with the awards Primary Counsel received in the past from contested fee applications. See e.g., Stanczyk v. City of New York, 990 F. Supp. 2d 242, 248 (E.D.N.Y. 2013), aff'd, 752 F.3d 273 (2d Cir. 2014) ("the hourly rate for Norinsberg-as lead trial counsel responsible for the strategy and overall direction of Stanczyk's case—requires a downward adjustment [from $450 to $350]")[7]; Marshall v. Randall, 10 Civ. 2714 (JBW)(VVP) (E.D.N.Y. Jan. 24, 2013) (awarding Cohen & Fitch $325 per hour); Arnone v. CA, Inc., 2009 U.S. Dist. LEXIS 17080, at *2 (S.D.N.Y. Mar. 6, 2009)
21 (awarding Smith the rate he had agreed upon with his *21 client, $425, in an ERISA case)

7 Primary Counsel cite Bernabe v. City of New York, 13 Civ. 5531, where Norinsberg was awarded $550 per hour one year ago, to argue Norinsberg's reasonable rate is $600. Primary Counsel's Br. at 24. Norinsberg received that rate in connection with an unopposed fee application for 18.05 hours of work, yielding less than $10,000 in fees. The case is inapposite to the instant contentious $4.2 million application.

As to Mr. Lenoir, his experience notwithstanding, his role in the "Smith Team" appears to be in aid to Mr. Smith, rather than commensurate. See Master Decl., Ex. E. Even were their roles equal, if the contributions of both Mr. Smith and Mr. Lenoir were partner level, either attorney could have performed the vast majority of their joint or overlapping work in this case alone. A reasonable client would not pay for duplicative work, or partner rates for work that could be performed by an associate (particularly not where paying for the work of several other partners), even if the partner performing them has exceptional experience. Mr. Suckle, though

likewise an experienced litigator, attests he has "litigated numerous Civil Rights actions, all on the plaintiff's side," though he names only one §1983 and one wrongful conviction trial. His role was far more limited even than Mr. Lenoir's, approximately 100 hours over five years of active litigation.

With respect to Mr. Meehan and Mr. McCutcheon, no previous award applies. However, "[a]ssociates in civil rights law firms with approximately three years of experience have typically been awarded amounts ranging
22 from $125 per hour to $200 per hour." E.S. v. Katonah-Lewisboro Sch. Dist., 796 F. Supp. 2d 421, 430 *22 (S.D.N.Y. 2011) (citations omitted), aff'd sub nom. E.S. ex rel. B.S. v. Katonah-Lewisboro Sch. Dist., 487 F. App'x 619 (2d Cir. 2012).

Having considered the factors set out in Arbor Hill and Johnson, a 35% reduction in the requested rates is warranted to align the fees requested by counsel with the market and what a reasonable client would be willing to pay for their services in connection with this or a comparable case.

A rate of $100 per hour is generally appropriate for paralegals in a small firm environment. See e.g., Barile v. Allied Interstate, Inc., No. 12 CIV. 916 (LAP) (DF), 2013 WL 795649, at *23 (S.D.N.Y. Jan. 30, 2013), report and recommendation adopted, No. 12 CIV. 916 (LAP), 2013 WL 829189 (S.D.N.Y. Mar. 4, 2013). Primary Counsel have not established the applicable experience of most of their paralegals and the court thus lacks adequate metrics by which to compare their reasonable rates. A reduction of 20% brings their rates in line with the market and the considerations unique to this litigation detailed above.

Generally, "[a] law clerk should ... be awarded slightly more than a paralegal." Id. at *19. However, it is not
23 clear *23 what level of value Bauza added. To begin with, her applied experience is unclear. The only information offered detailing Bauza's experience is her educational history. Master Decl. Ex. G, ¶ 5. In addition, Bauza performed her duties on a subset of Plaintiff's legal team that, within her office alone, included two partner-level attorneys (Smith and Lenoir) and an associate (McCutcheon). Nevertheless, Bauza seeks nearly $200,000 for "1273:05" hours of work, including travel. A premium of 50% beyond that awarded paralegals is unjustified, and a 30% reduction in Bauza's rate is warranted.

Accordingly, counsel's rates are reduced by 35%, Bauza's rate by 30%, and staff rates are reduced by 20% to reach rates a reasonable paying client would be willing to pay for litigation of this action by Primary Counsel and their staff.[8]

[8] This amount equals or exceeds what Norinsberg and Cohen & Fitch have been awarded in the past. Considering the added value of this litigation in particular as described supra, the amounts awarded, considered in the light of the value added to their reputations by this particular litigation, therefore adequately compensate for the additional experience and for litigation in this forum.

**ii. Hours Expended**

24 The instant action was actively litigated from its filing *24 in August 2010 until the Rule 68 Judgment obtained in October 2015. Approximately 15,000 pages of documents were produced and 38 depositions taken. See Def.'s Opp. at 7n.9. Primary Counsel request compensation for 8,830.35 hours of time. "The district court also should exclude from this initial fee calculation hours that were not ^reasonably expended.' Hensley, 4 61 U.S. at 434. The contentious and lengthy nature of this litigation notwithstanding, almost 9,000 hours is an unreasonable amount of time.

First, the requested number of hours is facially disproportionate when measured against benchmarks of other litigation, both larger and smaller. For example, in one recent seven plaintiff §1988 case spanning four years and involving 11,000 pages of discovery, 24+ depositions, and a ten day jury trial, the court found 2,385 hours excessive. Adorno v. Port Auth. of New York & New Jersey, 685 F. Supp. 2d 507, 515 (S.D.N.Y. 2010), on reconsideration in part, No. 06 CIV. 593 (DC), 2010 WL 727480 (S.D.N.Y. Mar. 2, 2010) ("reduc[ing] these hours by 10% to account for excess, duplicativeness, and waste"). In an Eastern District of New York discrimination case against the Suffolk County Police Department involving six plaintiffs, spanning five years (including trial), 2,838.25 hours was deemed excessive. Lochren v. Cty. of Suffolk, No. CV *25 01-3925 (ARL), 2008 U.S. Dist. LEXIS 38100, at *18 (E.D.N.Y. May 8, 2008) (performing 25% reduction). In a 38 plaintiff claim concerning prison conditions, spanning seven years, a month long trial, post-trial briefing, and "strenuous" litigation the district court called "one of the most bitterly fought battles" it had seen, only 6,036.8 hours were claimed. Lightfoot v. Walker, 826 F.2d 516, 520 (7th Cir. 1987).[9]

[9] Primary Counsel argue these cases cannot be relied upon as grounds for reduction because fees are a necessarily case-specific inquiry, and because the fact of reductions in those cases is not relevant to whether reduction is appropriate in this case. The Court does not rely upon them for either proposition or to support a conclusion that the number of hours reasonably expended in this case must have been similar to the number of hours expended in the cases cited. Rather, these cases are helpful to bring into relief the vast gulf between what Primary Counsel have claimed here is reasonable and what has been deemed reasonable in other similar, if distinguishable, contexts.

**1. Billing Inflation Resulting from Plaintiff's Litigation Team**

The nature of Plaintiff's litigation team led to significant inefficiencies and duplication of effort by all of plaintiff's counsel and staff. "There is no doubt that greater economies in attorney time could have been achieved if counsel had reasonably considered the staffing issues raised by their joint representation." Simmonds v. N.Y. City Dep't of Corr., *26 2008 U.S. Dist. LEXIS 74539, at *23 (S.D.N.Y. Sep. 15, 2008). Eight attorneys was excessive, and a reasonable client would not have chosen nor compensated counsel for such inefficient and duplicative staffing.[10] This unreasonable use of time is apparent both in a review of Primary Counsel's billing records, and from observation of this litigation. For example, records show Primary Counsel and staff spent a significant amount of time communicating and coordinating with one another, an unnecessary (or at least significantly less necessary) use of time than it would be for an appropriately staffed team for which a reasonable client would be willing to pay. Billing entry after billing entry shows duplicative work between counsel, far exceeding what should be necessary to complete a single task. Plaintiff was often represented at oral argument by five or more attorneys.

[10] Primary Counsel seek to recover for 8 attorneys, while arguing there were practically only five Plaintiff's counsel in this matter. Reply on Behalf of Norinsberg Team in Further Supp. Pl.'s Mot. for Atty's Fees at 4. Because Primary Counsel seek to recover for 8 attorneys, the Court address a team of 8 attorneys.

Three specific examples using Bronsther's summaries demonstrate the wasteful time spent by involving so many attorneys. First, Primary Counsel attended 38 of 41 depositions *27 in teams of two (and sometimes three[11]), resulting in 1, 443 hours related to deposing 34 witnesses - 42 billed hours per witness. Second, Primary Counsel seek compensation for 1,435 trial preparation hours. This case was settled short of trial. To be sure, trial in this matter threatened to be long and protracted. However, even assuming it was reasonable for Plaintiff's counsel to fully prepare for trial, this is an unreasonable amount of time. This amount of hours would be equivalent to two attorneys billing 12 hour days, seven days per week, for two full months, or two attorneys working a more "reasonable" schedule billing 10 hour days, six days per week for nearly three months. Taking into account an attorney cannot bill his every working hour, the number is even more facially unreasonable.

Plaintiff's counsel argues they prepared for trial twice due to an adjournment of some months. Under these circumstances, efficient counsel would not need to duplicate such efforts already thoroughly expended. Third, 1,380 hours were spent for meetings, telephone calls, and conferences. Even meetings that were not intra-counsel were often attended by 2-3 attorneys. Counsel needed an entire Team Meeting Weekend to coordinate.
28 These three examples alone total 4,258 billed hours, nearly 50% of the total hours for which *28 Primary Counsel seek to recover. Even if Bronsther's summaries are not accurate reflections, a review of the billing records establishes that such excessive intra-counsel coordination is not necessary for a reasonably sized team of attorneys prosecuting a similar action.

[11] Primary Counsel do not seek to recover for Bauza's attendance at depositions with two other Plaintiff's counsel. See Master Decl., Ex. G.

These are not the only areas in which Plaintiff's counsel billed excessive time or charged at excessive rates. In sum, review of the materials submitted demonstrates this case could have been competently litigated in far fewer hours by a much smaller team, or a team with an eye toward billing efficiency, warranting an unusually large deduction. Plaintiff's counsel cannot recoup compensation as highly experienced partner-level attorneys, while also staffing matters as if no single (or less experienced) attorney was capable of performing routine litigation tasks. See Andert v. Allied Interstate, LLC, 2013 U.S. Dist. LEXIS 104422, at *8 (S.D.N.Y. July 17, 2013) (rejecting fees for "tasks billed at a partner-level rate could have been performed equally well by a junior attorney or a paralegal" and "unnecessarily duplicative work such as e-mails, telephone calls, direct conversations, and the creation and review of internal memos and the client's case file"). In such circumstances,
29 an across-the-board reduction is warranted. See Lochren, 344 F. App'x at 709. *29

The excess and waste of this inflation of effort was not adequately trimmed from Primary Counsel's requests. See generally, Hensley, 461 U.S. at 434. Accordingly and as reasoned above, a 35% reduction in hours expended is warranted to account for the amount of time expended to keep Primary Counsel apprised of one another and manage such a large litigation team, rather than to reasonably litigate this action.

Plaintiff also cycled through counsel over the course of this litigation. Plaintiff hired Norinsberg, Cohen, and Fitch in June 2010. The complaint was filed in August 2010, but that team lost contact with Plaintiff, and the representation was terminated in late 2012. Plaintiff then retained Levine, Gilbert, and Gleason. A few months later, Plaintiff hired Smith and Lenoir. In April 2013, Levine, Gilbert, and Gleason experienced difficulty communicating with Plaintiff and ceased working on the matter. Plaintiff believed he had terminated their employment in May 2012 (not 2013), and Smith and Lenoir continued to represent Plaintiff. See Schoolcraft Decl., ECF No. 594-3. Norinsberg, Cohen, and Fitch were rehired in early 2015.

As a result, numerous hours were billed resulting solely from the shifts, such as time spent reviewing the file,
30 learning *30 the developments of the case, and navigating relationships and coordinating with prior counsel and Plaintiff (and his father). "[D]efendants should not bear the cost of the inefficiencies necessarily created by plaintiff's change in representation." Ganci v. U.S. Limousine Serv. Ltd., No. 10-CV-3027 JFB AKT, 2015 WL 1529772, at *6 (E.D.N.Y. Apr. 2, 2015). These staffing choices led to a significant number of hours that would not have been necessary for a reasonable client represented consistently by competent counsel.[12] After a review of the billing records, a further reduction of 2% is warranted for Primary Counsel.

[12] In addition to the time clearly attributable to overlap, such as Norinsberg's time spent negotiating a return to Plaintiff's legal team, Plaintiff shifted his point of communication and hierarchy of counsel throughout this litigation. Time must necessarily have been billed sorting through and navigating the staffing consequences of those choices.

**2. Medical Defendants**

Plaintiff's Rule 68 Judgment was obtained against the City and dismissed all Municipal Defendants. Plaintiff's case against Jamaica Hospital Medical Center, Dr. Lilian Aldana-Bernier, and Dr. Isak Isakov continued. Plaintiff's counsel do not disaggregate the hours attributable to the Medical Defendants from their fee request, and argue the City is unentitled to such reductions. See Reply on Behalf of Norinsberg Team ("Norinsberg Reply") at 13-22. *31

The Second Circuit has stated that "in simple justice the [settling Defendant] should not be required to pay for the processing of appellees' claim against the [non-settling Defendant]." J.G. by Mrs. G. v. Bd. of Educ. of Rochester City Sch. Dist., 830 F.2d 444, 447-48 (2d Cir. 1987). Where a Plaintiff is entitled to an award of attorney's fees under § 1988, inclusion of fees in an award as against one defendant for a claim attributable to another constitutes error. Id. ("remand[ing] to the district court for a reduction in its award by an amount that the court finds to be allocable to the prosecution of appellees' claim against the [non-settling Defendant])."

Plaintiff's threshold ground for opposing the request for reduction is grounded in contract law; because the Rule 68 offer of judgment states "plaintiff shall be entitled to reasonable attorney's fees," no limit was imposed on the fees for which the City is liable under the Judgment. Id. at 13-14. This argument is without merit. Plaintiff's counsel emphasizes the "shall be entitled to" language, but the notion that the City is not liable for costs relating to the case against the Hospital Defendants, which it did not and could not settle by the Rule 68 Offer of Judgment, turns on the explicit limit of "*reasonable* fees." The City cannot be deemed reasonably liable for the costs of prosecuting Defendants not covered by the Rule 68 Judgment. Under Plaintiff's logic, the City would be unentitled to any reduction for having agreed to pay fees in the Rule 68 Judgment, no matter how unreasonable the request, an impossible construction. The Court therefore analyzes the reasonableness of the fees accrued relating to the Hospital Defendants. *32

Primary Counsel next argue that the work against all defendants was "inextricably intertwined" and thus cannot be allocated. Norinsberg Reply at 14-17. The only in-circuit law cited for this proposition contrary to J.G. does not support Plaintiff's position. In Cabral v. City of New York, the court stated "[a]s a general matter, if a plaintiff prevails on a claim that generates a fee award, he may recover for work done on other claims if they were substantially related to the claim on which he prevailed." No. 12 CIV. 4659 LGS, 2015 WL 4750675, at *10 (S.D.N.Y. Aug. 11, 2015) (citing Tucker v. City of New York, 704 F.Supp.2d 347, 358 (S.D.N.Y.2010)). However, in the very next sentence, that court declined to award fees for the allegedly related claim, and the Court subtracted hours spent on the criminal predicate to Plaintiff's civil unlawful search and arrest claims. Id. The only other in-circuit law Plaintiff cites, Martinez v. Port Auth. of N.Y. & N.J., No. 01 CIV. 721 (PKC), 2005 WL 2143333, at *24 (S.D.N.Y. Sept. 2, 2005), aff'd sub nom. Martinez v. The Port Auth. of New York & New Jersey, 445 F.3d 158 (2d Cir. 2006), concerns pretrial discovery as it relates to claims Plaintiff succeeded upon as well as those that were unsuccessful. *33

The issue here is not the difference between the successful and unsuccessful claims arising from identical circumstances, for example succeeding on a claim of assault but not battery. Rather, Plaintiff seeks to intertwine the claims against the Municipal Defendants, which arose largely out of the circumstances of Plaintiff's employment and the events that occurred at his apartment on October 31, 2009. Plaintiff's claims against the Medical Defendants implicated that universe of facts, but turned instead on events that occurred at Jamaica Hospital Medical Center following the events that occurred at Plaintiff's home. To be sure, the two

universes of facts and the claims stemming therefrom are unquestionably related, in the broad and colloquial senses. But they are also practically and logically disaggregated and can be allocated to the appropriate Defendants.

34 The fact that Plaintiff billed hours to trying a case *34 against the Medical Defendants after having obtained the Rule 68 Judgment illustrates the practicality of a distinction. Plaintiff's counsel point to factual elements of this case that relate the cases against the Municipal Defendants and Hospital Defendants. This perspective ignores scope. That Sergeant James may have made a statement relevant to the Medical Defendants' defenses, NYPD officers may have been present at the hospital, or Lamstein spoke with Hospital personnel makes the cases against the Municipal Defendants and the Hospital Defendants somewhat related, but it does not make the relation inextricable. These are tangential facts that may fall under the broad scope of relevance at trial, but had the Medical Defendants' case turned on the case against the City, there would have been little to try following acceptance of the Rule 68 Judgment. Counsel cannot plausibly claim hundreds of hours for preparing their case against the Medical Defendants while also claiming the two cases were so inextricably interrelated that the City is liable to the hilt for fees for the case against the Medical Defendants.

35 All of Plaintiff's claims against the Medical Defendants except medical malpractice were dismissed on May 5, 2015. The remaining claims were settled. *35

The fees related to the prosecution of the claims against the Medical Defendants are not reasonably attributable to the City under the Rule 68 Judgment and the law of this Circuit. Because Plaintiff's fee applications fail to adequately disaggregate the hours spent relating solely to prosecution of claims against the Medical Defendants, an additional across-the-board reduction of 15% is warranted to deduct those hours attributable solely to the claims against the Medical Defendants for which the City is not liable.

**3. Non-Compensable Tasks**

Plaintiff's counsel has requested reimbursement for media, public relations, and administrative matters.[13] Such tasks are non-compensable. Webb, 471 U.S. at 241 ("Congress only authorized the district courts to allow the prevailing party a reasonable attorney's fee in an action or proceeding to enforce § 1983. Administrative proceedings established to enforce tenure rights created by state law simply are not any part of the proceedings
36 to enforce § 1983, and even though the petitioner obtained relief from his dismissal in the later civil rights *36 action, he is not automatically entitled to claim attorney's fees for time spent in the administrative process **1928 on this theory." (internal quotation marks and brackets omitted)); Williamsburg Fair Hous. Comm. v. New York City Hous. Auth., No. 76 CIV. 2125 (RWS), 2005 WL 736146, at *11 (S.D.N.Y. Mar. 31, 2005), opinion amended on reconsideration, No. 76 CIV.2125 RWS, 2005 WL 2175998 (S.D.N.Y. Sept. 9, 2005) ("non-compensable tasks include . . . publicity efforts, lobbying, and clerical work").

13 Hours billed relating to Plaintiff's motion to stay the administrative disciplinary proceeding in this action are compensable. Work on that adjudication itself is not.

Plaintiff's counsel argue that some, though not all, of the time Defendants attribute to non-compensable efforts was necessary review of existing media articles. Norinsberg Reply at 32-33. Alternatively, Plaintiff's counsel argue both that media attention was essential to Plaintiff's efforts to obtain evidence, and that an independent public interest required counsel to oversee that media attention. Plaintiff's counsel did not exercise billing judgment to remove any part of these tasks from their fee request, and do not provide persuasive evidence that

the sought-after attention was related to or necessary for evidence gathering. Counsel chose to fan the flames of attention in this case (evidenced, for example, by schoolcraftjustice.com and billing entries for consulting a documentarian), and cannot now charge the City with the cost of keeping an eye on the resulting fire. *37

Accordingly, 3% will be further deducted to account for non-compensable charges.

**4. Billing Practices**

It has been noted in this district that, where extremely detailed time records are submitted, "that very detail often hides exaggeration and excess." Barile, 2013 WL 795649, at *7. Such is the case here, with the records of over ten billing attorneys and staff.

For example, where "attorneys and staff have billed multiple entries of '0.1 hour'—often several on one day—for very brief, mundane tasks such as emailing a document, e-filing, or receiving a notice of appearance or other notification from the Court's automated Electronic Case Filing ('ECF') system. This excessive specificity appears designed to inflate the total number of hours billed, by attributing a separate 6 minutes to each brief task." Id. In such a long and excessively billed case such as this one, such practices are compounded and result in even greater unjustified fees than usual. Bronsther's report found Norinsberg billed 0.1 hours for 267 discrete tasks, Cohen for 173 tasks, Fitch for 182 tasks. Bronsther Report at 46-47. *38 These 6-minute increments were routinely billed for email and review of short documents. Such billing is excessive.

In addition, a substantial number of hours are billed with standardized, vague descriptions. For example, Bauza billed nine separate five-hour blocks to "jury instructions project" and three separate five-hour blocks to "timeline project." See Master Decl, Ex. N. The paralegals billed pages of entries in separate blocks to "summarize deposition of [deponent]" or "[deponent] summary deposition," where each review of each deposition was billed in multiple blocks. See id., Ex. I. Lenoir billed pages of distinct blocks to summarizing depositions the same way, such as "Summarize [deponent] deposition transcript" and "summarize deposition of [deponent]," again with each individual deposition appearing in several blocks of time. Smith billed five distinct blocks of time between 7.5 hours and 12 hours each with no more specific entry than "drafting summary judgment motion," or "drafting reply," "drafting opposition to [named] motion." Id. Cohen, Norinsberg, and Fitch each billed several entries to some version of the entry "review of deposition exhibits." These examples are illustrative of entries that, when billed repeatedly and by separate time-keepers, are too vague to allow the Court a meaningful opportunity to review whether all of the time allocated to the task was reasonable. *39 "Courts frequently respond to vague and difficult-to-decipher billing statements with an across-the-board percentage reduction in the fees claimed, often in the range of 20-30 percent." Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic, No. 10 CIV. 05256 KMW DF, 2012 WL 5816878, at *11 (S.D.N.Y. Nov. 14, 2012) (collecting citations). In light of the other reductions already applied, a further 10% reduction is warranted.

**iii. Fees on Instant Motion**

Smith requests fees-on-fees related to the instant motions. See Smith Group's Mem. of Law, ECF No. 620, at 36-7.

The Rule 68 Judgment provides "plaintiff shall be entitled to reasonable attorney's fees, expenses, and costs to the date of this offer[.]" Rule 68 Offer of Judgment at 3. On the terms of the agreement alone, fees-on-fees are denied.

Moreover, "plaintiff's counsel is not entitled to fees and expenses for work done preparing and filing this motion. The Rule 68 judgment limited recoverable fees and expenses to those incurred prior to the date of the offer." Long v. City of N.Y., 2010 U.S. Dist. LEXIS 81020, at *6 (S.D.N.Y. Aug. 6, 2010). Although some
40 courts have permitted such fees, Lee v. Santiago, *40 No. 12 CIV. 2558 PAE DF, 2013 WL 4830951, at *13 (S.D.N.Y. Sept. 10, 2013), they are not warranted here where Plaintiff's counsel did not attempt to settle the matter prior to filing, and did not exercise billing (or filing) judgment in their fee request and motion practice despite an awareness of the issues presumably raised in settlement discussions with a Magistrate Judge. See Long, 2010 U.S. Dist. LEXIS 81020, at *6 ("If the City's dispute over recoverable fees were in bad faith, than compensation for the work necessary for plaintiffs fee application may be justified. No such showing has here been made."). Any failure of the City to settle is counterweighted by Plaintiff's own role in perpetuating the instant dispute.

**iv. Primary Counsel's Fee Award**

Having reviewed Defendants' remaining objections, Primary counsel's arguments, and Plaintiff's time records, the aforementioned across-the-board reductions appropriately address all issues. As set forth above, a 35% deduction to counsel's requested rates, a 30% reduction to Bauza's rate, a 20% deduction to staff requested rates, and a sum total 65% reduction to the number of hours applies. The Court therefore finds the following
41 fee awards reasonable and warranted: *41

| Counsel/Staff | Rate | Hours | Total |
|---|---|---|---|
| Jon Norinsberg | $390 | 508.1475 | $198,177.53 |
| John Meehan | $227.50 | 48.23 | $ 10,972.33 |
| Nicole Bursztyn | $100 | 36.1025 | $ 3,610.25 |
| Nathaniel Smith | $373.75 | 766.15 | $286,348.56 |
| Nathaniel Smith (travel) | $186.875 | 19. 95 | $ 3,728.56 |
| James McCutcheon | $162.50 | 8.183 | $ 1,329.74 |
| Magdalena Bauza | $105 | 446.719[14] | $ 46,905.50 |
| Magdalena Bauza (travel) | $52.50 | 10.255 | $ 538.39 |
| Smith Paralegals[15] | $100 | 154. 7 | $ 15,470.00 |
| Howard Suckle | $373.75 | 38.115 | $ 14,245.48 |
| Joshua Fitch | $325 | 313.1625 | $101,777.81 |
| Gerald Cohen | $325 | 282.345 | $ 91,762.13 |
| John Lenoir | $373.75 | 438.2 | $163,777.25 |
| John Lenoir (travel) | $186,875 | 20.3 | **$ 3,793.56** |
| Total Fees: | | | $942,436.67 |

14 Bauza's fee records have not been submitted in a single comprehensive form. The Toggle.com submissions include totals but not line item billed rates, and it is additionally unclear on their face precisely where and how billing discretion was exercised to arrive at a "billable" time spent that differs from the "total" time spent. See Master Decl., Ex. N. Accordingly, the Court begins its calculations from the request reflected in the Declaration, "1,276:34 hours of billable time ... and 29:30 hours of travel time." Id., Ex. B ¶ 29. It is additionally unclear whether ":34" and ":30" reflect seconds or decimals of an hour. The Court presumes the latter, in keeping with the form of timekeeping submitted in all other applications.

15 The billing records submitted on behalf of Lysia Smejika, Jeanette Lenoir, and Jeremy Smith were not summarized on an individual basis. See id., Ex. I.

**v. Primary Counsel's Costs and Expenses**

An attorney's fees award properly includes "reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients" that are "incidental and necessary" to representation. U.S. Football League v.
42 Nat'l Football League, *42 887 F.2d 408, 416 (2d Cir. 1989) (citations excluded). Such costs properly include "photocopying, travel, telephone costs, postage and computerized research." Ortiz v. Chop't Creative Salad Co. LLC, 89 F. Supp. 3d 573, 591 (S.D.N.Y. 2015). Counsel seeks reimbursement for reasonable out-of-pocket fees as well as line-items to which they are not entitled.

Plaintiff's counsel seek to recover expert fees. Amendment to section 1988 provides "the court, in its discretion, may include expert fees as part of the attorney's fee" when awarding attorney's fees to enforce a provision of section 1981 or 1981a. But with respect to section 1983 claims, "§ 1988 conveys no authority to shift expert fees." W. Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 102, 111 S. Ct. 1138, 1148, 113 L. Ed. 2d 68 (1991); see also Walker v. City of New York, No. ll-CV-314 CBA, 2015 WL 4568305, at *13 (E.D.N.Y. July 28, 2015) (citing Wilder v. Bernstein, 975 F.Supp. 276, 287 n. 12 (S.D.N.Y.1997) ("As Congress explicitly limited the amendment to cases arising under § 1981, Casey still prohibits the award of expert fees in § 1983 cases."")). Bronsther summarizes that Plaintiff seeks $71,344.30 in expert fees. Bronsther Report at 108-09.

43 In addition to seeking recovery for expert fees, counsel *43 other than a single line for the full requested sum of $3,800.87 stating "veritext transcription fees."[18] See Master Decl., Ex. K.

18 Though Veritext is a Court Reporting Service, the item was billed on June 22, 2015. A review of the docket sheet shows no hearing was held or transcript released by the Court Reporters for the Southern District of New York on or within a month of June 22, 2015. Thus, without more, the Court cannot discern what this charge was for, whether it related to experts, the claims against the City, etc., and cannot discern whether it is properly recoverable in full.

As set forth above, Plaintiff cannot reasonably attribute the entire sum of the costs and fees for his claims against the Medical Defendants to the City. Bronsther summarizes $55,945.99 in expenses relating to claims exclusively against the Medical Defendants are claimed. Bronsther Report at 107-08.

To account for the expenses relating to experts, the expenses relating solely to the claims against the medical defendants, and unreasonable charges, the expenses requested will be reduced by 30%. Accordingly, a total of $104,340.92 in costs is awarded as follows: $94,665.01 for Smith's expenses, $7,015.30 for Norinsberg's expenses, and $2,660.61 for Cohen's expenses.

44 **b. Levine, Gilbert, and Gleason** *44

Levine, Gilbert, and Gleason's application neglects to request a total amount. See Mem. of Law in Supp. Pl.'s Fee App., ECF no. 572 ("LGG Br."). By affidavit, Gilbert requests $500 per hour and $4,630.45 for reimbursements made to Norinsberg. Gilbert Aff. at 4. By attached "itemized services" record, Gilbert swears to a total of 120.62 at a rate of $500 per hour, for a claimed total of $63,810.00, plus the $4,630.45 disbursement for a claimed total of $68,440.45. None of these calculations appear correct or consistent according to the information submitted.[19] By affidavit, Levine requests $600 per hour for less than 75 hours. Levine Aff. at 4. Also by attached "itemized services" record, Levine claims 74.32 hours, at $600 per hour, for a claimed total of $70,734.00. Levine's calculations are likewise appear inconsistent and incorrect according to
45 the information submitted.[20] Gleason's affidavit *45 seeks "*** [sic] hours at the rate of $500 per hour," $3,581.25 for an investigator, and $7,485 in expenses. Gleason Aff. at 7. Gleason's 18 pages of line item charges appear accurate.

19 Taking Gilbert's numbers at their face value, 120.62 hours at $500 per hour yields $60,310 in fees. Adding the claimed disbursements of $4,630, the Court arrives at a sum total of $64,940.45. Alternatively, calculating the hours as Gilbert has listed them yields 129.75 hours, yielding $64,875 in fees. Adding the expenses, the Court arrives at an alternate total of $69,505. Several of Gilbert's line item calculations are also incorrect or lack documentation of exercised billing judgment, though usually yielding total than the claimed time spent at the claimed rate would warrant. For example, multiple 1.5 hour line items are totaled at $500; 10.5 hours in the affidavit yields an amount of $5,165. 10.5 hours at a rate of $500 is accurately a total of $5,250.

20 Taking Levine's hours calculation at face value, 74.32 hours at the rate of $600 per hour totals $44,592. By the Court's calculation, Levine's itemized hours total 71.025. 71.025 hours at a rate of $600 per hour yields a total of $42,615. Levine's line items are also not consistently accurate and lack indication of exercised billing judgment, such as 1.5 hours yielding a $600 amount on 11/30/12 and $900 on 12/7/12, and .25 hours yielding $150 charge on 1/30 and a $140 charge the subsequent day.

**i. Reasonable Fees**

For the same reasons set forth supra §4(a) (i), a deduction of 30% is warranted for the rates sought by Levine, Gilbert, and Gleason. This reduction alone brings Gilbert and Gleason's rates to $350 per hour and Levine's rate to $420 per hour. However, all three attorneys point to minimal concrete examples of their experience prosecuting federal civil rights actions. See Gleason Aff. ¶¶ 7-9 (naming one case); Levine Aff. ¶ 5 (naming no cases); Gilbert Aff. (claiming no civil rights experience, naming no cases). Furthermore, Levine, Gilbert, and Gleason made minimal contribution to this case, representing Plaintiff for only four months and performing primarily review, summarization, and management work that do not command partner-level rates. See Levine
46 Aff. ¶ 7 ("your affirmant's work included breaking down *46 the prior attorneys' files...taking copious notes and then summarizing them in a memorandum to the file"); Gilbert Aff. ¶ 3, ("After being retained by plaintiff we undertook to familiarize ourselves with the plaintiff and his case. This involved reviewing..."), ¶ 8 ("familiarizing himself with plaintiff's case, from reviewing...to traveling to upstate New York on two occasions to meet personally with plantiff and his father, dealing with ancillary issues that were troubling plaintiff..."); Gleason Aff. ¶¶ 11-12 ("reviewing ... conferring ... engaging in extensive client contact necessitated by the myriad questions ... endeavoring to assemble the legal team[.]"). In Gilbert's own words, "[w]ith the completion of our review and analysis of the materials provided to our firm we had just begun the process of formulating our litigation plan when the decision was made to shift the responsibilities for the day to day management of the litigation to Nat Smith and the newer members of the team." Gilbert Aff. ¶ 8. Accordingly, rates of $325 per hour are appropriate for all three attorneys.

**ii. Reasonable Hours**

Many of the deductions warranted with respect to Primary Counsel's fee requests apply equally or more
47 forcefully to Levine, Gilbert, and Gleason's request. In particular and as *47 detailed above, because LGG only represented Plaintiff after Norinsberg had begun this litigation and for only a brief few months, Levine, Gilbert, and Gleason spent an inordinate amount of time reviewing material and familiarizing themselves with the case that would not have been necessarily absent Plaintiff's staffing choices. This factor alone warrants deduction of the lions share of the hours Levine, Gilbert, and Gleason claim. As discussed above, many of the calculations submitted by the LGG team are unreliable. Issues such as non-compensable tasks and inefficient or inexact billing practices resulting in inflation are also present. Some billing line items do not clearly apply to this case. See e.g., Gleason Aff., Ex. A at 20 ("Defended his deposition in the Floyd matter before MJ Freeman").

Accordingly, the Court has reviewed the hours claimed by line-item, Bronsther's summary estimates, and concludes 5 hours for Levine, 100 hours for Gleason, and 25 hours for Gilbert constitute hours reasonably expended.

**iii. Levine, Gilbert, and Gleason Fee Award**

Based on the conclusions set forth above, Levine, Gilbert, and Gleason are awarded attorney's fees as follows:
48 *48

| Counsel | Rate | Hours | Total |
|---|---|---|---|
| Harvey Levine | $325 | 5 | $ 1,625.00 |
| Peter Gleason | $325 | 100 | $32,500.00 |
| Richard Gilbert | $325 | 25 | **$ 8,125.00** |
| Total Fees | | | $42,250.00 |

**iv. Costs and Expenses**

Levine and Gilbert[21] seek to recover $4,630.45 paid to Norinsberg "for claimed disbursements for which request is herewith being made for reimbursement." Gilbert Aff. ¶ 6. These costs are recoverable, as the reimbursement to Norinsberg was for costs and expenses incurred before Levine, Gilbert, and Gleason began representing Plaintiff and thus any necessary deductions to the amount have already been applied to Norinsberg's line-item claims as set forth above.

21 Though claimed in the text of Gilbert's Affirmation, proof of the disbursement is provided in Levine's Affirmation. See Gilbert Aff. ¶ 6; Levine Aff. at 9-10.

The amount Gleason seeks in expenses is unclear.[22] In the text of his affirmation, Gleason requested $3,581.25 for investigator Vincent Parco, and what he totals as $7,485 in expenses. Gleason Aff. ¶ 19. He lists only two
49 expenses by line- *49 item in his billing record. See Gleason Aff., Ex. A. In his billing record, he summarizes $6,123 in expenses and $3,581.25 in costs for investigation. Gleason Aff., Ex. A at 20. Combined and properly calculated, these amounts total $9,704.25, a number Gleason does not request or reach elsewhere. The line-items listed as expenses do not precisely reflect the legible receipts provided. Compare Gleason Aff., Ex. A with Gleason Aff. Ex. C. Even were they accurate reflections of costs, the line item expenses total $3,397, an amount inconsistent with all the numbers Gleason provides. Even the receipts that Gleason submits are largely, and in some cases wholly, illegible. The errors, inconsistencies, and lack of verification call into substantial doubt the accuracy of the claimed expenses and they are denied on this basis.

22 In the text of his affirmation, Gleason requested $3,581.25 for an investigator, and what he totals as $7,485 in expenses. Gleason Aff. ¶ 19. --------

In addition, the specific expenses for which Gleason seeks reimbursement do not merit an award under the standard of this Circuit. See U.S. Football League, 887 F.2d at 416 (permitting attorney's fee award for "reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients" that are "incidental and necessary" to representation.). Gleason alleges Parco's work "resulted in impeachment material regarding individual defendants that would have been important had the matter gone to trial." Gleason Aff. ¶ 15. No detail is provided *50 as to what this information was, whether it applied to a Municipal Defendant or a Medical Defendant, or how that information was (or might have been) used in this litigation. The only indication in Mr. Parco's attached billing record is "Scope: Named Defendants & Identify person(s) at Schoolcraft home when he was removed to hospital." Gleason Aff., Ex. B. There being no basis to decide whether Parco's work was incidental and necessary to representation and whether the City is liable for the expense, this request is denied. The charges at Men's Warehouse, Best Buy, and the Apple Store are not clearly incidental to representation such that the City is responsible for their cost. Two cell phone lines in Gleason's name, paid for an entire year is likewise not at all necessary or reasonable. Gleason's requested costs are accordingly denied.

50

**c. Interest**

Smith and Norinsberg request 9% post-judgment interest on the award. Smith Reply at 37, Norinsberg Reply at 58. The Rule 68 Judgment provides:

> Acceptance of this offer of judgment also will operate to waive plaintiff's rights to any claim for judgment interest on the amount of the judgment, other than pre-judgment interest on any backpay amounts.

The plain language of the Rule 68 Judgment entitling Plaintiff to attorney's fees bars recovery of post-judgment interest, and *51 the request is accordingly denied.

51

## V. Conclusion

Based on the conclusions set forth above, Plaintiff's motion for attorney's fees and costs are granted in part and denied in part, Plaintiff's motion to strike is granted in part and denied in part, and Defendant's motion to strike is denied. The Norinsberg, Smith, and Cohen & Fitch teams are awarded a total of $1,046,777.59 and Levine, Gilbert, and Gleason are awarded a total of $46,880.45 as set forth above. Plaintiff's counsel is therefore awarded $1,093,658.04 in attorney's fees and costs.

It is so ordered. **New York**, **NY**
**September 1**, **2016**

**/s/** _____

**ROBERT W. SWEET**

**U.S.D.J.**

15-CV-19 (WFK) (RER)
United States District Court, E.D. New York.

# Hadid v. City of N.Y.

182 F. Supp. 3d 4 (E.D.N.Y. 2016)
Decided Apr 22, 2016

15–CV–19 (WFK) (RER)

04-22-2016

Bobby Farid Hadid, Plaintiff, v. The City of New York, et al., Defendants.

Nathaniel B. Smith, Law Office of Nathaniel B. Smith, John David Lenoir, New York, NY, for Plaintiff.
Anthony M. Disenso, Christopher Aaron Seacord, NYC Law Department, New York, NY, for Defendants.

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WILLIAM F. KUNTZ, II, United States District Judge

7 *7

Nathaniel B. Smith, Law Office of Nathaniel B. Smith, John David Lenoir, New York, NY, for Plaintiff.

Anthony M. Disenso, Christopher Aaron Seacord, NYC Law Department, New York, NY, for Defendants.

***DECISION & ORDER***

WILLIAM F. KUNTZ, II, United States District Judge:

On January 5, 2015, Plaintiff Bobby Farid Hadid ("Plaintiff") filed a Complaint against The City of New York, Raymond W. Kelly, David Cohen, Thomas Galati, William Bratton, John Miller, Charles Campisi, Christopher Broschart, Charles Hynes, Melissa Carvajal, and Elizabeth Moehle (collectively "Defendants") alleging violations of his rights pursuant to, *inter alia,* 42 U.S.C. §§ 1983 and 1985 for abuse of process, false arrest, malicious prosecution, and denial of Plaintiff s right to a fair trial. ECF No. 1 ("Complaint"). Defendants moved to dismiss the Complaint for lack of jurisdiction and failure to state a claim on October 2, 2015. ECF No. 37. On November 30, 2015, the Court granted in part and denied in part Defendants' motion. ECF No. 51. Plaintiff now moves for leave to amend the Complaint, or, in the alternative, for the Court to reconsider its November 30, 2015 decision. ECF No. 72. For the reasons that follow, Plaintiff's motion is DENIED in its entirety.

**BACKGROUND**

The court assumes the parties' familiarity with the underlying facts of this action. *See Hadid v. City of New York,* 15–CV–19, 2015 WL 7734098, at *1–3 (E.D.N.Y. Nov. 30, 2015) (Kuntz, J.).

Plaintiff filed the instant Complaint on January 5, 2015, asserting the following causes of action against Defendants: (1) Violation of First Amendment Rights under 42 U.S.C. § 1983, (2) Malicious and Fraudulent Prosecution under 42 U.S.C. § 1983, (3) Malicious Abuse of Process under 42 U.S.C. § 1983, (4) Conspiracy to Violate Plaintiff's Civil Rights under 42 U.S.C. § 1983, (5) Conspiracy to Violate Plaintiff's Civil Rights

under 42 U.S.C. § 1985(3), (6) Violation of Plaintiff s Right to a Fair Trial under 42 U.S.C. § 1983, (7) Violation of Substantive and Procedural Due Process under 42 U.S.C. § 1983, (8) Municipal Liability under 42 U.S.C. § 1983, (9) Malicious Prosecution under New York State law, (10) Malicious Abuse of Process under New York State law, and (11) False Arrest under New York State law. Complaint 76–130.

8 During a pre-motion conference on April 16, 2015, Defendants requested permission *8 to file a motion to dismiss this action in its entirety pursuant to Fed.R.Civ.P. 12(b)(6) and 12(b)(1). *See* ECF Minute Entry dated Apr. 16, 2015. The Court permitted Defendants to file their motion, but denied Defendants' request for a stay of discovery. *Id.* The Court set out an initial briefing schedule that required Defendants to file their fully-briefed motion to dismiss on or before July 17, 2015. *Id.* The Court granted Defendants an extension of time to prepare their initial moving papers, which they served on Plaintiff on May 29, 2015. ECF No. 18. The Court granted Plaintiff two extensions of time to prepare his opposition papers, which he served on Defendants on August 3, 2015. ECF Nos. 20, 22. The Court then granted Defendants two extensions of time to prepare their reply papers, pushing the filing date for the fully-briefed motion to October 2, 2015. ECF Nos. 30, 34.

During a discovery status conference before Magistrate Judge Ramon E. Reyes on May 5, 2015, Plaintiff requested permission to file an Amended Complaint beyond the period allowed as a matter of course under Fed.R.Civ.P. 15(a). *See* ECF No. 19 at 28–30; Fed.R.Civ.P. 15(a)(1)(B) (permitting amendment as a right twenty-one days after service of a 12(b) motion). Magistrate Judge Reyes, over Defendants' objection, entered a scheduling order allowing Plaintiff to file an Amended Complaint on or before August 15, 2015. ECF No. 17. At a subsequent discovery conference on August 13, 2015, Plaintiff sought to extend his time to amend the Complaint further. *See* ECF No. 27 at 20–23. Magistrate Judge Reyes denied the request, reasoning that extending the time to file Plaintiff's Amended Complaint would moot the pending motion to dismiss, which was almost fully briefed. *Id.* Plaintiff did not file an amended complaint on or before the August 15, 2015 deadline.

On October 2, 2015, Defendants filed the fully-briefed motion to dismiss. ECF No. 37. On November 30, 2015, the Court issued a Decision and Order granting Defendants' motion as to all claims except for Plaintiff's First Amendment retaliation claims occurring on or after January 5, 2012. ECF No. 51. On January 26, 2016, Plaintiff moved for leave to amend the Complaint to address certain pleading defects, or, in the alternative, for reconsideration of the Court's November 30, 2015 Decision and Order as to Plaintiff's second and ninth causes of action. ECF No. 72 ("Pl.'s Mot."). For the reasons stated below, the Court hereby DENIES Plaintiff's motion.

**ANALYSIS**

## I. Motion for Leave to Amend

### A. Legal Standard

Federal Rule of Civil Procedure 15(a) permits a court to grant leave to amend "freely" when "justice so requires." The Court retains "sound discretion" over the decision, however, and may deny leave for "good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *McCarthy v. D un & Bradstreet Corp.,* 482 F.3d 184, 200 (2d Cir.2007). An amendment is futile "if it appears that plaintiff cannot address the deficiencies identified by the court and allege facts sufficient to support the claim." *Panther Partners Inc. v. Ikanos Commc'ns, Inc.,* 347 Fed.Appx. 617, 622 (2d Cir.2009) (citation omitted). Undue prejudice exists where "an amendment would ‘require the opponent to expend significant additional resources to conduct discovery and prepare for trial’ or ‘significantly delay the resolution of a dispute.’ " *Ruotolo v. City of New York,* 514 F.3d 184, 192 (2d Cir.2008) (quoting *Block v. First Blood Assocs.,* 988 F.2d 344, 350 (2d
9 Cir.1993) ).*9 When a plaintiff seeks to amend his or her complaint after the deadline imposed by a scheduling

order, the Court must balance the Rule 15(a) standard against the Rule 16(b) mandate that a scheduling order "shall not be modified except upon a showing of good cause." *Grochowski v. Phoenix Const.,* 318 F.3d 80, 86 (2d Cir.2003) (citing Fed.R.Civ.P. 15(a), 16(b) ); *see Werking v. Andrews,* 526 Fed.Appx. 94, 96 (2d Cir.2013) ("[A] party must show 'good cause' to amend his or her complaint if the motion is filed after the deadline imposed by the district court in its scheduling order ..."); *Parker v. Columbia Pictures Indus.,* 204 F.3d 326, 340 (2d Cir.2000) (Sotomayor, J.) ("[D]espite the lenient standard of Rule 15(a), a district court does not abuse its discretion in denying leave to amend the pleadings after the deadline set in the scheduling order where the moving party has failed to establish good cause."). To demonstrate good cause, a party must show that "despite its having exercised diligence, the applicable [amendment] deadline could not have been reasonably met." *Perfect Pearl Co. v. Majestic Pearl & Stone, Inc.,* 889 F.Supp.2d 453, 457 (S.D.N.Y.2012) (Engelmayer, J.). "A party fails to show good cause when the proposed amendment rests on information that the party knew, or should have known, in advance of the deadline." *Id.* (citations omitted).

While conducting a Rule 16 good cause analysis, the Court may consider "other relevant factors including ... whether allowing the amendment of the pleading at this stage of litigation will prejudice [the non-moving party]." *Kassner v. 2nd Ave. Delicatessen Inc.,* 496 F.3d 229, 244 (2d Cir.2007). "Absence of prejudice to the non-moving party, however, is not alone sufficient to satisfy the good cause requirement of Rule 16(b)." *Int'l Media Films, Inc. v. Lucas Entm't, Inc.,* 07–CV–1178, 2008 WL 781823, at *2 (S.D.N.Y. Mar. 20, 2008) (Maas, J.).

## B. Discussion

### 1. Good Cause

Plaintiff argues that a file obtained on December 3, 2015, from the New York Police Department ("NYPD") Advocate's Office reveals information about an investigation pertinent to Plaintiff's case that should have been previously disclosed under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Pl.'s Mot. at 8–9. According to Plaintiff, this file constitutes good cause to amend the Complaint, because it reveals conduct of the NYPD and the King's County District Attorney's Office ("KCDA") relevant to Plaintiff's proposed additional *Monell* claims. *Id.*

Defendants argue that Plaintiff has failed to put forward any basis for a finding that good cause exists to amend the Complaint. ECF No. 73 ("Opp.") at 17. Defendants argue that Plaintiff was put on notice of the Complaint's deficiencies once he was served with Defendants' initial moving papers on May 29, 2015, and that Plaintiff had ample time and opportunity to file an Amended Complaint in advance of the August 15, 2015 deadline set by Magistrate Judge Reyes in the May 5, 2015 scheduling order. *Id.* at 18. Defendants further argue that the information Plaintiff now seeks to amend into his Complaint—including allegations of personal retaliation by the NYPD and the facts providing a basis for Plaintiff's proposed *Monell* claims—were known to Plaintiff well in advance of the August 15, 2015 deadline. *Id.* at 18–19.

The Court agrees with Defendants. Plaintiff does not show the diligence required for a finding of good cause. Plaintiff "knew, or should have known" the facts constituting each of his proposed amendments *10 before the August 15, 2015 deadline. *Perfect Pearl,* 889 F.Supp.2d at 457. Plaintiff's NYPD retaliation claims would have been supported through his own experience, and yet Plaintiff provides no explanation for his failure to plead them in the original Complaint. Plaintiff also provides no explanation for his failure to plead his proposed *Monell* claims in the first instance, considering that the Complaint alleges that Defendants failed to disclose Brady material and manufactured false evidence. In fact, Plaintiff's opposition brief, filed two weeks in advance of the amendment deadline, explicitly expressed an intention to plead an additional *Monell* claim against the

KCDA. ECF No. 40 at 34 n.65. Plaintiff's opposition brief also referred to the "Blue Wall of Silence" theory of municipal liability that he now seeks to add into his proposed Amended Complaint. *Id.* at 33–34. Accordingly, the Court finds that Plaintiff knew the information that he now seeks to re-plead well in advance of the amendment deadline.

The Court disagrees with Plaintiff's argument that Magistrate Judge Reyes directed him not to file an Amended Complaint during the August 13, 2015 discovery conference. *See* ECF No. 75 ("Reply") at 6–7. The transcript shows that Plaintiff sought to file an Amended Complaint on a date after the fully briefed motion to dismiss was due. ECF No. 27 at 20–22. Magistrate Judge Reyes correctly denied this request on the grounds that it would waste judicial time and resources by mooting a fully-briefed motion. *Id.* Plaintiff could have amended as of right before August 15, 2015, but he instead chose to wait until after the Court had decided Defendants' motion to dismiss. Plaintiff's request is now judged in light of the changed circumstances, and the Court finds that he has not demonstrated good cause to amend.

## 2. Prejudice

Plaintiff argues that allowing his proposed amendments would not unduly prejudice Defendants because Defendants have long been on notice of Plaintiff s intention to amend. Pl.'s Mot. at 7. In support of this argument, Plaintiff points to his three prior requests for leave to amend: (1) on August 3, 2015, when Plaintiff requested leave to amend in his opposition papers to Defendant's motion to dismiss; (2) around August 13, 2015, when Plaintiff raised the issue of amendment before Magistrate Judge Reyes as the amendment deadline approached; and (3) in November 2015, when Plaintiff requested leave to amend promptly after the Court's decision on Defendants' motion to dismiss. *Id.* Plaintiff further argues that, because discovery is far from complete and no depositions have yet been scheduled, amendment would not serve to delay the litigation of this matter. *Id.*

Defendants argue that Plaintiff's proposed amendments would cause undue prejudice and delay this litigation. Opp. at 21. Contrary to Plaintiff's assertions, Defendants claim that discovery is largely complete. *Id.* at 22–23. In support of this, Defendants point to the transcript of the discovery conference held on December 22, 2015, when Magistrate Judge Reyes ordered that all interrogatories, electronically stored information discovery, and document discovery be completed by January 19, 2016. *Id.* Defendants argue that they expended considerable time and resources to comply with this deadline, and they believe that Plaintiff's addition of new defendants and three new *Monell* claims would require significant additional document discovery and would necessitate an
11 adjournment of the trial, which was scheduled to begin on April 11, 2016. *Id.* *11 On February 16, 2016, discovery in this action was extended through June 3, 2016, and trial was rescheduled to begin on July 5, 2016. *See* ECF No. 79. As such, Defendants' arguments regarding the proximity of trial no longer carry the same weight that they did at the time of briefing. Given the extension of discovery and the four-month adjournment of trial, undue prejudice and delay do not factor into today's denial of leave to amend.

## 3. Futility

Plaintiff argues that his proposed amendments do not fail for futility. Pl.'s Mot. at 7–8. Plaintiff insists that his proposed Amended Complaint would add factual allegations reflecting newly discovered information and would address pleading defects identified by the Court in its November 30, 2015 Decision and Order. *Id.* Specifically, Plaintiff claims that the information he obtained on December 3, 2015, from the NYPD Department Advocate's Office provides a factual basis for his proposed claims asserting *Brady* violations, *Monell* liability, conspiracy, and the inapplicability of absolute immunity to Defendant Carvajal. *Id.* at 8–9.

Defendants counter that many of Plaintiff s proposed claims are futile, because the Court has already dismissed with prejudice Plaintiff's proposed claims of false arrest and malicious abuse of process as time-barred. Opp. at 23. Defendants further argue that the Court's November 30, 2015 Decision and Order operates as an adjudication of all dismissed claims on the merits, preventing Plaintiff from re-pleading any such claims unless the Court grants Plaintiff's motion for reconsideration. *Id.* at 24.

Defendants also claim that Plaintiff has not pled facts sufficient to demonstrate the existence of a disclosure obligation under *Brady* . *Id.* at 25–26. Defendants insist that, even if a disclosure obligation existed, the alleged nondisclosure in Plaintiff's original criminal case could not rise to the level of a *Brady* violation for two reasons: (1) the nondisclosed investigation was conducted largely on an examination of Plaintiff s own records, and therefore cannot be considered "suppressed evidence" within the meaning of the *Brady* doctrine; and (2) any nondisclosure of evidence is immaterial as a matter of law, because Plaintiff was subsequently acquitted on appeal based on the insufficiency of the evidence at trial. *Id.* at 26–27.

Plaintiff replies that the existence of a *Brady* violation is a factual matter which cannot be addressed at the pleading stage, citing *Milanese v. Rust–Oleum Corp.,* 244 F.3d 104, 110 (2d Cir.2001). Reply at 8. Plaintiff maintains, in any event, that: (1) the alleged nondisclosed evidence was material to Plaintiff's perjury trial because it "went to the heart of the case," (2) the investigation at issue could be considered "suppressed evidence" under *Brady* because it included records from numerous third-party sources, and (3) the substance of the investigation could be used for impeachment purposes, making it *Brady* material according to *United States v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Reply at 9.

The Court first addresses the amendments designed to provide additional factual support for Plaintiff's claims of false arrest, malicious abuse of process, malicious prosecution, denial of right to a fair trial, due process, 42 U.S.C. § 1983 conspiracy, 42 U.S.C. § 1985(3) conspiracy, and municipal liability. These amendments fail for futility, as they were dismissed on the merits by the Court's November 30, 2015 Decision and Order. *See* Fed.R.Civ.P. 41(b) ("Unless the dismissal order states otherwise, a dismissal under this subdivision ... operates as an adjudication on the merits.").*12 All amended claims against Defendants Hynes, Moehle, and Carvajal also fail for futility. The Court previously ruled that these defendants are entitled to immunity and dismissed all claims against them. *See Hadid,* 2015 WL 7734098, at *5–7. A motion for reconsideration is the proper procedural mechanism for Plaintiff to re-assert these previously dismissed claims. *See In re Bisys Sec. Litig.,* 496 F.Supp.2d 384, 386 (S.D.N.Y.2007) (Rakoff, J.) ("Plaintiffs purport to be making this request under Fed.R.Civ.P. 15(a), relating to amended pleadings. Since, however, as the foregoing events make clear, the claims against [Defendant] were previously dismissed with prejudice, the Court will construe plaintiffs' request as a motion under Fed.R.Civ.P. 54(b), seeking revision of the dismissal with prejudice prior to final judgment being entered.").[1]

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[1] Plaintiff argues that, at minimum, the Court should grant him leave to re-plead claims based on the "continuing violation" doctrine, because the Court dismissed such claims only on the basis of insufficient factual allegations. Reply at 8. As explained in Section I.B.1, however, Plaintiff has not shown the requisite good cause to amend these claims.

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Plaintiff s new *Monell* claims, based on an alleged *Brady* violation, also fail for futility. Contrary to Plaintiff s assertion, *Milanese* does not stand for the proposition that the existence of a *Brady* violation may not be addressed by the Court at the pleadings stage. Rather, the Second Circuit held in *Milanese* that when a motion for leave to amend is made in response to a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the district court may deny leave to amend "if the proposed new claim cannot withstand a 12(b)(6) motion to dismiss for failure

to state a claim, *i.e.,* it appears beyond doubt that the plaintiff can plead no set of facts that would entitle him to relief." *Milanese,* 244 F.3d at 110. Here, Plaintiff alleges that the KCDA and the NYPD conducted an investigation of Plaintiff s history, failed to uncover any evidence of professional misconduct, and refused to disclose this lack of evidence during Plaintiff's perjury trial. *See* ECF No. 72–4. The Court finds that, as a matter of law, Plaintiff's allegations do not amount to a *Brady* violation. The *Brady* right pertains to the "suppression by the prosecution of evidence ... material either to guilt or to punishment," such as exculpatory witness statements, physical evidence, *et cetera.* 373 U.S. at 87, 83 S.Ct. 1194. The fact that an investigation uncovered *no* evidence is not, in and of itself, "evidence" giving rise to a disclosure obligation. *See United States v. Sessa,* 711 F.3d 316, 322 (2d Cir.2013) ("[T]here is 'no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.' " (quoting *Moore v. Illinois,* 408 U.S. 786, 795, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972) )). The proper means of addressing the insufficiency of the prosecution's evidence is to comment on and attack the lack of evidence, which Plaintiff's trial attorney did. *See* ECF No. 74–1 at 40.

The allegedly suppressed "evidence" also fails the materiality prong of the *Brady* test. Evidence is material if the introduction of the evidence could be reasonably expected to result in a different outcome at trial. *See Poventud v. City of New York,* 750 F.3d 121, 133 (2d Cir.2014) ("The touchstone of materiality is a reasonable probability of a different result [.]" (internal quotation marks and citation omitted)). Here, Plaintiff appealed his criminal conviction, and the state appellate court found that the evidence put forward by the prosecution was
13 insufficient to sustain a guilty verdict as a matter of law. *13 *People v. H adid,* 121 A.D.3d 811, 815, 993 N.Y.S.2d 754 (N.Y.App.Div.2d Dep't 2014). Plaintiff should have been acquitted irrespective of any suppressed exculpatory evidence, and the suppressed evidence at issue is therefore immaterial. Contrary to Plaintiff's insistence, it matters not whether the evidence "went to the heart of the case," came from third-party sources, or was useful impeachment information; what matters is that the evidence was not "material either to guilt or to punishment." *Brady,* 373 U.S. at 87, 83 S.Ct. 1194.

For the aforementioned reasons, Plaintiff's motion for leave to amend the Complaint is DENIED.

## II. Motion to Reconsider

### A. Legal Standard

"The decision to grant or deny a motion for reconsideration lies squarely within the discretion of the district court." *Murphy v. First Reliance Standard Life Ins. Co.,* 08–CV–3603, 2010 WL 2243356, at *3 (E.D.N.Y. June 1, 2010) (Hurley, J.) (citing *Devlin v. Transp. Comm'ns Union,* 175 F.3d 121, 132 (2d Cir.1999) ). Reconsideration "is generally not favored," and a court may properly grant it "only upon a showing of exceptional circumstances." *Marrero Pichardo v. Ashcroft,* 374 F.3d 46, 55 (2d Cir.2004). A court will not grant a motion for reconsideration "unless the moving party can point to controlling decisions or data that the court overlooked ... that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir.1995) ; *see also* Local Civil Rule 6.3 ("There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court has overlooked."). Moreover, a party may not use a motion for reconsideration to "relitigate an issue already decided" by advancing novel arguments that could have been raised previously. *Shrader,* 70 F.3d at 257 ; *see also Kalamas v. Consumer Solutions REO, LLC,* 09–CV–5045, 2011 WL 6026303, at *1 (E.D.N.Y. Nov. 30, 2011) (Feuerstein, J.) (holding that reconsideration should not be granted where the moving party "seeks to introduce additional facts not in the record on the original motion" or "advances new arguments or issues that could have been raised on the original motion")

## B. Discussion

Plaintiff insists that the Court, in ruling on Defendants' motion to dismiss, did not consider Plaintiff's argument that the presumption of probable cause arising from a grand jury indictment should be rejected in this case. Pl.'s Mot. at 10. Plaintiff argues that, because the Second Department reversed Plaintiff's New York state perjury conviction and "dismissed the indictment as a matter of law and fact," Defendants should be collaterally estopped from asserting the existence of probable cause in this action. *Id.* at 11. Plaintiff also urges the Court to reconsider its dismissal of Plaintiff s malicious prosecution claims on the basis of a file disclosed by the NYPD Advocate's Office to Plaintiff on December 3, 2015. *Id.* at 12. According to Plaintiff, this file shows that the KCDA conducted an investigation into Plaintiff's affairs during his New York state perjury case and refused to disclose the results to Plaintiff. *Id.* at 12–13. Plaintiff argues that this file constitutes new evidence of a *Brady* violation, demonstrating that the perjury prosecution was conducted in bad faith and justifying reconsideration of the Court's November 30, 2015 Decision and Order. *Id.* at 13.

Defendants counter that Plaintiff's arguments are a naked attempt to re-litigate Defendants' motion to dismiss,
14 noting that Plaintiff relies almost exclusively on arguments *14 made in his brief in opposition to that motion. Opp. at 10. Defendants argue that the Second Department, in Plaintiff's perjury trial, did not go so far as to find that Plaintiff's arrest or prosecution lacked probable cause; rather, it found that the evidence put forth by the prosecution was "legally insufficient to establish [Plaintiff's] guilt of perjury in the first degree beyond a reasonable doubt." *Id.* (citing *Hadid,* 121 A.D.3d at 813, 993 N.Y.S.2d 754 ). Such a finding, in Defendants' view, is insufficient to rebut the presumption of probable cause raised by Plaintiffs perjury indictment. *Id.* Furthermore, Defendants claim that Plaintiff's conviction in New York State Supreme Court does not undermine probable cause, but instead provides an alternative basis for the presumption of probable cause. *Id.* at 11 (citing *Mitchell v. Victoria Home,* 434 F.Supp.2d 219, 228 (S.D.N.Y.2006) (McMahon, J.) (holding that a conviction, even when later reversed, creates a rebuttable presumption of probable cause) and *Soto v. City of New York,* 132 F.Supp.3d 424, 455–56, 2015 WL 5569021, at *25 (E.D.N.Y.2015) (Brodie, J.) (holding that the dismissal of an indictment did not negate the presumption of probable cause)). Finally, Defendants argue that Plaintiff has not articulated a legitimate *Brady* violation and therefore does not merit reconsideration of the dismissal of his malicious prosecution claim. *Id.*

Plaintiff responds that Defendants' reliance on *Mitchell,* 434 F.Supp.2d at 228, is inapposite, because that case involved a reversal on the grounds that the trial court's conviction was against the weight of the evidence. Reply at 10. In this case, by contrast, Plaintiff argues that the Second Department dismissed the indictment as a matter of law because the prosecution could not establish the material elements of the crime of perjury, therefore rebutting the initial presumption of probable cause. *Id.* (citing *Cox v. County of Suffolk,* 827 F.Supp. 935, 939 (E.D.N.Y.1993) (Wexler, J.) ("[W]here a grand jury indictment is reviewed by a state judge and dismissed due to total lack of evidence in support of one of the elements of the crime charged, the presumption of probable cause raised by that indictment will fall.")).

The Court finds that Plaintiff's motion for reconsideration lacks merit. Plaintiff has not identified any controlling authority that this Court overlooked in its initial decision. Rather, Plaintiff has used this motion as an opportunity to re-hash issues already decided in the November 30, 2015 Decision and Order.

Plaintiff's reliance on *Cox,* 827 F.Supp. at 939, is misplaced. In *Cox,* a rape victim was prosecuted under an anti-sodomy statute despite the fact that prosecutors possessed written statements from both the rapist and the victim demonstrating that the victim was coerced into the act. *See id.* at 937. The rape victim was never convicted, and an appellate court dismissed the indictment because there was no evidence that the victim possessed the requisite *mens rea* for sodomy. *Id.* Here, by contrast, the Second Department did not dismiss

Plaintiff's indictment "due to *total lack of evidence* in support of one of the elements of the crime charged." *Id.* at 939 (emphasis added). Rather, the court reversed Plaintiff's conviction and dismissed the indictment because the totality of the evidence did not weigh in favor of conviction beyond a reasonable doubt. *See Hadid,* 121 A.D.3d at 814, 993 N.Y.S.2d 754 ("Accordingly, the evidence was legally insufficient to establish [Plaintiff's] guilt of the crime of perjury in the first degree."). Such a dismissal does not rebut the "general rule ... that a
15 Grand Jury Indictment is prima facie evidence of probable cause" under New York state law. *15 *Boose v. City of Rochester,* 71 A.D.2d 59, 69, 421 N.Y.S.2d 740 (N.Y.App.Div.4th Dep't 1979) ; *see Soto,* 2015 WL 5569021, at *25.

Furthermore, Plaintiff's conviction serves as an alternative basis for the presumption of probable cause. Here, as in *Mitchell,* Plaintiff was initially convicted before winning reversal on appeal. As the *Mitchell* court explained, "[a] conviction establishes the existence of probable cause which, even when the conviction is reversed on appeal, becomes a rebuttable presumption." 434 F.Supp.2d at 228. Because Plaintiff has not provided evidence that his conviction "was the result of fraud, perjury, or other unethical acts on the part of the defendant," id. he has failed to rebut this presumption.

Finally, for the reasons articulated in Section I.B.3, Plaintiff fails to articulate a cognizable *Brady* violation, and the Court will not grant reconsideration on such grounds.

Plaintiff's motion for reconsideration is accordingly DENIED.

**CONCLUSION**

For the reasons set forth above, Defendants' motion, ECF No. 72, is hereby DENIED in its entirety.

SO ORDERED.

No. 10 Civ. 6005RWS
United States District Court, S.D. New York.

# Schoolcraft v. City of N.Y.

133 F. Supp. 3d 563 (S.D.N.Y. 2015)
Decided Sep 18, 2015

No. 10 Civ. 6005RWS.

09-18-2015

Adrian SCHOOLCRAFT, Plaintiff, v. CITY OF NEW YORK, et al., Defendants.

Law Office of Nathaniel B. Smith, by: Nathaniel B. Smith, Esq., New York, NY, for the Plaintiff. Zachary W. Carter, Corporation Counsel of the City of New York, by: Suzanna P. Mettham, Esq., New York, NY, for the City Defendants. Martin Clearwater & Bell, LLP, by: Gregory J. Radomisli, Esq., New York, NY, for Defendant Jamaica Hospital Medical Center.

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SWEET, District Judge.

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Law Office of Nathaniel B. Smith, by: Nathaniel B. Smith, Esq., New York, NY, for the Plaintiff.

Zachary W. Carter, Corporation Counsel of the City of New York, by: Suzanna P. Mettham, Esq., New York, NY, for the City Defendants.

Martin Clearwater & Bell, LLP, by: Gregory J. Radomisli, Esq., New York, NY, for Defendant Jamaica Hospital Medical Center.

*OPINION*

SWEET, District Judge.

Plaintiff Adrian Schoolcraft ("Schoolcraft" or "Plaintiff"); Defendants Christopher Broschart, Timothy Caughey, Kurt Duncan, Elise Hanlon, Theodore Lauterborn, Michael Marino, Gerald Nelson, Frederick Sawyer, The City Of New York, Timothy Trainer ("City Defendants"); and Defendant Deputy Inspector Steven Mauriello ("DI Mauriello") have moved for reconsideration of portions of the Court's May 5, 2015 *Summary Judgment Opinion*. DI Mauriello seeks reconsideration of the dismissal of his state law counterclaims. Plaintiff's motion seeks reconsideration of the Court's rulings on the admissibility of an expert's testimony, on the availability of qualified immunity as a defense against Plaintiff's first amendment claim, and on dismissal of Plaintiff's first amendment claim with respect to his post-suspension speech. The City Defendants' motion seeks reconsideration of the Court's discussion of the collective knowledge doctrine and dismissal of Captain Lauterborn as a defendant. The City Defendants separately filed a motion to bifurcate Plaintiff's *Monell* claim.

For the reasons set out below, DI Mauriello's and City Defendants' reconsideration motions are granted in part and denied in part. Plaintiff's reconsideration and City Defendants' bifurcation motions are denied.

## Prior Proceedings

A detailed recitation of the facts of the underlying case is provided in this Court's opinion dated May 5, 2015, which granted in part and denied in part five motions for summary judgment and resulting in the instant motions. *See Schoolcraft v. City of New York,* 103 F.Supp.3d 465, 474–75, No. 10 CIV. 6005 RWS, 2015 WL 2070187, at *1 (S.D.N.Y. May 5, 2015) (hereinafter "*Summary Judgment Opinion* "). Familiarity with those
567 facts is assumed. The instant motions were marked fully submitted[1] on July 23, 2015.*567 ***Applicable Standard***

[1] Plaintiff's reply memorandum in support of his motion for reconsideration was submitted a day late, on July 24, 2015, based upon which the City Defendants, DI Mauriello and JHMC moved to strike it on July 29, 2015. Though the Court denies the Defendants' request, Plaintiff's reply memorandum has nevertheless been insufficient to persuade the Court to grant any of Plaintiff's requested relief.

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A motion for reconsideration is properly granted where "the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir.1995); *see also Farez–Espinoza v. Napolitano,* 08 Civ. 11060(HB), 2009 WL 1118098, at *3, 2009 U.S. Dist. LEXIS 35392, at *9 (S.D.N.Y. Apr. 27, 2009). Pursuant to Local Civil Rule 6.3 the Court may reconsider a prior decision to "correct a clear error or prevent manifest injustice." *Medisim Ltd. v. BestMed LLC,* 2012 WL 1450420, at *1, 2012 U.S. Dist. LEXIS 56800, at *2–3 (S.D.N.Y. Apr. 23, 2012) (citing *RST (2005) Inc. v. Research in Motion Ltd.,* 597 F.Supp.2d 362, 364–65 (S.D.N.Y.2009)).

Reconsideration of a court's prior order under Local Rule 6.3 "is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Ferring B.V. v. Allergan, Inc.,* No. 12 Civ. 2650(RWS), 2013 WL 4082930, at *1 (S.D.N.Y. Aug. 7, 2013) (quoting *Sikhs for Justice v. Nath,* 893 F.Supp.2d 598, 605 (S.D.N.Y.2012)). Accordingly, the standard of review applicable to such a motion is "strict." *CSX,* 70 F.3d at 257 (2d Cir.1995).

The burden is on the movant to demonstrate that the Court overlooked controlling decisions or material facts that were before it on the original motion and that might " 'materially have influenced its earlier decision.' " *Anglo Am. Ins. Group v. CalFed, Inc.,* 940 F.Supp. 554, 557 (S.D.N.Y.1996); *see also Farez–Espinoza v. Napolitano,* 08 Civ. 11060(HB), 2009 WL 1118098, at *3, 2009 U.S. Dist. LEXIS 35392, at *9 (S.D.N.Y. Apr. 27, 2009). Pursuant to Local Civil Rule 6.3 the Court may reconsider a prior decision to "correct a clear error or prevent manifest injustice." *Medisim Ltd. v. BestMed LLC,* 2012 WL 1450420, at *1, 2012 U.S. Dist. LEXIS 56800, at *2–3 (S.D.N.Y. Apr. 23, 2012) (citing *RST (2005) Inc. v. Research in Motion Ltd.,* 597 F.Supp.2d 362 (1996) (quoting *Morser v. AT & T Info. Sys.,* 715 F.Supp. 516 (S.D.N.Y.1989))); *see also Analytical Surveys, Inc. v. Tonga Partners, L.P.,* 684 F.3d 36, 52 (2d Cir.2012) ("[T]he standard for granting [a motion for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked."). A party seeking reconsideration may neither repeat "arguments already briefed, considered and decided," nor "advance new facts, issues or arguments not previously presented to the Court." *Schonberger v. Serchuk,* 742 F.Supp. 108, 119 (S.D.N.Y.1990) (citations omitted).

## DI Mauriello's Motion for Reconsideration is Denied in Part and Granted in Part

DI Mauriello seeks reinstatement of his state law counterclaims against Plaintiff for tortious interference with an employment relationship and prima facie tort. Under New York law, the elements of a claim for tortious interference with prospective business relations are: (1) business relations with a third party; (2) the defendant's

interference with those business relations; (3) that the defendant acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means; and (4) injury to the business relationship. *Nadel v. Play–By–Play Toys & Novelties, Inc.,* 208 F.3d 368, 382 (2d Cir.2000).

568 The *Summary Judgment Opinion* dismissed the tortious interference claim on the third prong, holding that *568 DI Mauriello had not established that Schoolcraft acted for the sole purpose of harming DI Mauriello and that DI Mauriello had not adequately pled that Schoolcraft's actions constituted "wrongful means." 103 F.Supp.3d at 525–26, 2015 WL 2070187, at *54. The Court also declined to consider several allegations made by DI Mauriello is his opposition briefing, holding that those allegations had not pled in Mauriello's Counterclaims. *Id.* at 526–27, 2015 WL 2070187, at *55. DI Mauriello takes issue with all of the above-summarized determinations in his reconsideration motion. *See generally* Mauriello Mem. in Supp't 5–22.

Upon reconsideration, tortious interference claim is reinstated. The *Summary Judgment Opinion* erroneously characterized the following contentions discussed in DI Mauriello's summary judgment motion briefing as "novel" allegations that had not been included in DI Mauriello's Counterclaims: Schoolcraft personally downgraded complaint reports, orchestrated the October 31 incident, misrepresented the status of the appeal of his 2008 Performance Evaluation, falsely denied being aware of the reason he was placed on restricted leave, accused Mauriello of placing him on restricted leave, contacted the media, falsely claimed he cared about the community served by the 81st Precinct, and falsely claimed he cared for his fellow officers, all in furtherance of his scheme to tortiously infer with Mauriello's career opportunities. *Summary Judgment Opinion,* 103 F.Supp.3d at 526–27, 2015 WL 2070187, at *55. However when further reviewed, several of these allegations were alleged in the Counterclaims. *See* Mauriello's Answer to SAC, Amended with Counterclaims, filed March 18, 2014 ("Mauriello Answer and Counterclaims"), 11–16. The Counterclaims alleged that: Schoolcraft personally downgraded complaint reports, orchestrated the October 31 incident, mischaracterized Mauriello's conduct in the press, and falsely claimed he was reporting on corrupt practices at the 81st Precinct out of concern for the community it served for his fellow officers, all in an effort to harm DI Mauriello and build a record in support of Schoolcraft's lawsuit. *Id.* These allegations, and the evidentiary record developed during discovery that substantiates them, are sufficient to satisfy the third prong of tortious interference claim on the basis of "wrongful conduct." Schoolcraft's immunity from suit under *Brandt v. Winchell* does not attach unless Schoolcraft's allegations against DI Mauriello are proven true, a question of fact to be determined at trial.

However, DI Mauriello has not met his burden with respect to reinstatement of his prima facie tort claim. DI Mauriello has asserted that "questions of fact exists with respect to whether Schoolcraft intentionally inflicted harm on Mauriello 'without excuse or justification and motivated solely by malice.' " Mauriello Mem. in Supp't 21. To survive summary judgment, a prima facie tort claim cannot rest upon a defendant's intentional and malicious conduct alone, but must further demonstrate that the defendant acted out of "disinterested malevolence." *Burns Jackson Miller Summit & Spitzer v. Lindner,* 59 N.Y.2d 314, 333, 464 N.Y.S.2d 712, 451 N.E.2d 459 (N.Y.1983). DI Mauriello alleged that Schoolcraft acted at least in part to generate support of his lawsuit against the NYPD. *See generally,* Mauriello Answer and Counterclaims, 13, ¶ 7. The existence of monetary self-interest defeats an assertion of disinterested malevolence. *See Margrabe v. Sexter & Warmflash, P.C.,* 353 Fed.Appx. 547, 549 (2d Cir.2009). In *Margrabe,* the Second Circuit dismissed a prima facie tort claim where the plaintiff contended that the defendant filed a defamation action in order to coerce the plaintiff into abandoning the plaintiff's a different action against the defendant for fees. *Id.* The Second Circuit
569 dismissed the prima facie tort because "it is clear that [the *569 defendant] had a monetary interest in initiating the defamation action." *Id.* Dismissal in *Margrabe* did not turn on whether the defamation action was

meritorious, it turned on whether disinterested malevolence was the sole basis for the suit. *Id.* As noted above, DI Mauriello acknowledged Plaintiff's motivation in bringing this case was not solely Schoolcraft's disinterested malevolence against DI Mauriello. Consequently, the prima facie tort claim remains dismissed.

## City Defendants' Motion for Reconsideration is Denied in Part and Granted in Part

City Defendants request modification of the *Summary Judgment Opinion's* discussion of the collective-knowledge doctrine and dismissal of Captain Lauterborn as a defendant. With respect to the collective-knowledge doctrine, the *Summary Judgment Opinion* stated that:

> The doctrine applies only where officers are in communication, sharing information relevant to the determination of exigent circumstances.... Here, the record does not establish whether other officers were aware of Dr. Lamstein's warning to Captain Lauterborn. *See* Facts ¶¶ 92, 123. Consequently, whether Dr. Lamstein made the statement to Captain Lauterborn, and whether Captain Lauterborn in turn communicated that information to his colleagues such that the collective knowledge doctrine may apply, present questions of fact barring summary judgment for the City Defendants.

103 F.Supp.3d at 502, 2015 WL 2070187, *31. City Defendants correctly note that the doctrine "permits courts to assess probable cause to arrest by looking at the collective knowledge of the police force," and does not require that the arresting officer know the precise facts justifying police action. *See* City Defs.' Mem. in Supp't 6 (citing *United States v. Valez,* 796 F.2d 24, 28 (2d Cir.1986)). Consequently, whether Captain Lauterborn communicated the information to his colleagues is not relevant to the applicability of the doctrine. However, City Defendants have not established that Dr. Lamstein's knowledge alone is enough for qualified immunity because "she is indisputably part of the investigation and was in 'some communication.' " City Defs.' Reply Mem. 2 (citing *United States v. Cruz,* 834 F.2d 47, 51 (2d Cir.1987)). *Cruz* referenced *officers* who partake in an investigation and engaged in some communication, and City Defendants have not established that Dr. Lamstein was an officer. *See id.*

With respect to Lieutenant Caughey, City Defendants correctly note that the Court held that "Schoolcraft's protected First Amendment right to report to IAB and QAD was not clearly established at the time it was made. Consequently, the First Amendment Claim cannot be pleaded against any officers in their individual capacities." *Summary Judgment Opinion,* 103 F.Supp.3d at 514, 2015 WL 2070187, at *42. Consistent with the *Summary Judgment Opinion's* qualified immunity holding, Lieutenant Caughey does not remain a defendant on the basis of the First Amendment claim.

In his opposition to City Defendants' motion, Plaintiff contends that Lieutenant Caughey should remain a defendant on the basis of to his state law claims for assault and intentional infliction of emotional distress (IIED). *See* Pl.'s Mem. in Opp'n 8–9. City Defendants counter that both claims fail as a matter of law as against Lieutenant Caughey. City Defs.' Reply Mem. 5–6. Under New York law, assault is the intentional placing of another person in reasonable apprehension of imminent harmful or offensive contact. *570 *United Nat. Ins. Co. v. Waterfront N.Y. Realty Corp.,* 994 F.2d 105, 108 (2d Cir.1993); *Okoli v. Paul Hastings LLP,* 117 A.D.3d 539, 985 N.Y.S.2d 556, 557 (2014). City Defendants contend that the record established only that Lieutenant Caughey arguably behaved in a menacing manner, but did not establish that Schoolcraft has a reasonable fear of an imminent touching. City Defs.' Reply Mem. 5. They further note that "Plaintiff's own statements, not put before the Court on summary judgment but available for submission should the Court desire it, make clear that Caughey never removed his gun from his holster during this interlude, whether he was touching his gun or not." *Id.* at n. 3. For the purposes of this motion, the factual record may not be expanded beyond that

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established in the *Summary Judgment Opinion*. *See Schonberger v. Serchuk,* 742 F.Supp. 108, 119 (S.D.N.Y.1990). Plaintiff's 56.1 Statement, filed together with his motion for summary judgment, referenced Schoolcraft's deposition transcript where he testified as follows:

> Q. Your Complaint states that Lieutenant Caughey was menacing and threatening to you, by keeping his hand on his gun on October 31, 2009; is that correct?
>
> A. Correct.
>
> Q. Did you believe he was going to shoot you?
>
> A. At the time, I believed his behavior was inappropriate. And I—I felt anything was possible.
>
> Q. Did you believe that anyone from the N.Y.P.D. was going to use their firearm against you on October 31, 2009?
>
> A. I don't recall specifically thinking that, no.
>
> ...
>
> A. I felt Caughey's behavior that day was menacing and threatening.
>
> Q. And you believed that he was threatening to kill you?
>
> A. I believe his behavior was menacing, and intimidating and threatening.

Schoolcraft Tr. 118:3–25–120:10 (referenced in Pl.'s 56.1 Statement SI 55, which Plaintiff cites in Pl.'s Mem. in Opp'n 24). When asked whether Schoolcraft was asked whether he feared that Lieutenant Caughey would injury him, he responded that "I don't recall any specific—any specific thing that I thought he would do to me." *Id.* at 122:8–12. "To survive a [summary judgment] motion ..., [a nonmovant] need[s] to create more than a 'metaphysical' possibility that his allegations were correct; he need[s] to come forward with specific facts showing that there is a genuine issue for trial." *Wrobel v. Cnty. of Erie,* 692 F.3d 22, 30 (2d Cir.2012) (internal quotations and citations omitted). Schoolcraft's testimony cannot be fairly read to support his contention that he had a reasonable fear of imminent harm. Consequently, Lieutenant Caughey does not remain a defendant on the basis of the assault claim.

City Defendants finally contend that Schoolcraft's intentional infliction of emotional distress (IIED) claim against Caughey fails as a matter of law. *See* City Defs.' Reply Mem. 7–8. To maintain a claim of IIED under New York law, Schoolcraft must establish "(1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress." *Bender v. City of New York,* 78 F.3d 787, 790 (2d Cir.1996). "[L]iability has been 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 community." *Howell v. New York Post Co.,* 81 N.Y.2d 115, 122, 596 N.Y.S.2d 350, 612 N.E.2d 699 (N.Y.1993) (internal quotations and
571 citations omitted). Schoolcraft contends that Caughey remains a defendant on the basis of the IIED claim. *571
However, as Schoolcraft detailed in his briefing in opposition to the City Defendants' motion for summary judgment, the outrageous conduct to which Schoolcraft was subjected began after he left the precinct on October 31, i.e., conduct as to which Lieutenant Caughey was not involved. *See* Pl.'s Mem. in Opp'n to Summary Judgment Motion 62–62 ("Taken as a whole, however, their conduct is outrageous: a police officer reporting misconduct is pulled out of his bed in the middle of the night by his superiors for reporting their misconduct; he is physically assaulted, thrown on the floor, stepped on and handcuffed; his home is searched

and evidence is destroyed; he is removed from his home handcuffed to a chair in the view of all his neighbors and taken to a psychiatric facility, where he is physically abused and incarcerated without any medical or legal basis as a "dangerous and mentally ill" person and released a week later, to be pursued relentlessly for the next six months at his family residence in upstate New York, his career in shambles."). Consequently, Lieutenant Caughey is dismissed as a defendant on this and the other claims discussed above.

## City Defendants' Motion for Bifurcation is Denied

City Defendants request bifurcation of the trial on Plaintiff's *Monell* claims. Federal Rule of Civil Procedure 42(b) provides that "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim ... or of any separate issue or any number of claims, or issues." Fed.R.Civ.P. 42(b). City Defendants request bifurcation in the interests of efficiency and to avoid prejudice, which they contend would result if a jury were presented extensive evidence of prior bad conduct. *See* City Defs.' Mem. in Supp't 12–20; City Defs.' Reply Mem. 6–9.

Plaintiff convincingly argues that there will be significant overlap between the evidence he will offer in support of his *Monell* claims and in support of the other claims that survived summary judgment. *See* Pl.'s Mem. in Opp'n 4–7. Consequently, efficiency considerations do not favor bifurcation. Moreover, the substantial prejudice which City Defendants contend will result from permitting the jury to hear evidence regarding quotas or the blue wall of silence, *id.* at 19, will be adequately mitigated through the ubiquitous and efficacious means of limiting instructions, jury charges and limiting instructions. Consequently, the motion to bifurcate is denied.

## Plaintiff's Motion for Reconsideration is Denied

Plaintiff requests reconsideration of the Court's rulings with respect to the admissibility of Dr. Halpren–Ruder's expert testimony, qualified immunity, and the first amendment claim for post-suspension conduct. *See generally* Pl.'s Mem. in Supp't 2–6.

With respect to the admissibility of Dr. Ruder's report, the Court held that the testimony evaluating the quality of care provided to Schoolcraft at the JHMC emergency department was inadmissible for lack of sufficient foundation. *Summary Judgment Opinion,* 103 F.Supp.3d at 537–38, 2015 WL 2070187, at *67 (noted that Dr. Ruder referenced guidelines from a different jurisdiction not in effect at the time of Schoolcraft's hospitalization). Plaintiff contends that, in fact, Dr. Ruder testified that the basis for his evaluation of the JHMC's actions were "universally applied standards of care regarding involuntary psychiatric commitment of patients." Pl.'s Reply Mem. 7 (citing to Halpren–Ruder Dep. 85:01–25). But this portion of the deposition dealt
572 with Dr. Ruder's evaluation of JHMC's EMTs' conduct in deciding to transport Schoolcraft to the hospital, *572 not with JHMC's quality of care once Schoolcraft arrived. *See* Halpren–Ruder Dep. 79:9–85:22. Moreover, in his briefing in opposition to JHMC's motion for summary judgment, Plaintiff did not address JHMC's argument that faulted Dr. Ruder for relying on the guidelines. *See* Pl.'s Mem. in Opp'n of Summary Judgment Motion, 117–119 (limiting discussion of admissibility of expert testimony to the testimony of a different medical expert, Dr. Lubit). As noted above, a party seeking reconsideration may neither repeat arguments already briefed, considered and decided, nor advance new facts, issues or arguments not previously presented to the Court. *Schonberger v. Serchuk,* 742 F.Supp. 108, 119 (S.D.N.Y.1990) (internal quotations and citations omitted). Plaintiff cannot now advance arguments not previously presented to the Court in the Summary Judgment motion. Consequently, Dr. Ruder's testimony remains inadmissible.

Plaintiff next seeks reconsideration of the Court's holding with respect to qualified immunity. *See generally* Pl.'s Mem. in Supp't 3. Plaintiff reiterates the arguments put forth in his letter in response to City Defendants' summary judgment reply briefing. *Id.* (including citations to *Golodner v. Berliner,* 770 F.3d 196, 206 (2d

Cir.2014)). Plaintiff's objection that City Defendants made their qualified immunity argument in their reply briefing was, and remains, unpersuasive because entry of Second Circuit's decision in *Matthews v. City of New York,* 779 F.3d 167, 172 (2d Cir.2015), occurred after the City Defendants' memorandum in support was filed. It was on the basis of *Matthews,* not *Golodner,* that the Court reversed its earlier ruling on this issue and held, for the first time, that Schoolcraft's First Amendment claim extends to his presuspension speech. *Summary Judgment Opinion,* 103 F.Supp.3d at 508–10, 2015 WL 2070187, at *36–37. As noted in the *Summary Judgment Opinion,* it cannot be said that the right was clearly established, since the Court ruled in 2012 that that same right had not been established. *Id.* at 509–10, 2015 WL 2070187, at *37. Consequently, the qualified immunity holding remains unaltered.

Finally, Schoolcraft requests reconsideration of the dismissal of his first amendment claim related to his post-suspension conduct. Pl.'s Mem. in Supp't 4–6. Schoolcraft notes that Second Circuit in *Dorsett v. County of Nassau* determined that a first amendment claim can be based upon certain other types of "concrete harm," not solely upon a chilling effect. 732 F.3d 157, 160 (2d Cir.2013) (noting that that a loss of a government contract, additional scrutiny at border crossings, revocation of building permits, and refusal to enforce zoning laws are all adequate cognizable harms even in the absence of a chilling effect).

In his summary judgment briefing, Plaintiff failed to argue that he could pursue a claim without establishing a chilling effect or adverse employment action. *See* Pl.'s Mem. in Opp'n of Summary Judgment Motion, 19–27. Plaintiff's summary judgment contention was that a chilling effect occurred due to his placement in custody for mental health evaluation at Jamaica Hospital Medical Center. *Id.* at 27 (citing *Kerman v. City of New York,* 261 F.3d 229, 241–242 (2d Cir.2001), which required a chilling effect on plaintiff's speech). It is only now, in his reconsideration motion, that Plaintiff introduces the test as set out in *Dorsett*.

Moreover, only limited sorts of concrete harms will substitute for chilling effect in retaliation cases and, as a general matter, chilling effect is still required. *Zherka v. Amicone,* 634 F.3d 642, 645 (2d Cir.2011) (noting that other forms of harm have been recognized in limited contexts *573 and that "[d]espite these limited exceptions, as a general matter, First Amendment retaliation plaintiffs must typically allege 'actual chilling.' "). Such contexts include imposition of several traffic tickets soon after protected speech, officers' pushing and deploying pepper spray after protected speech, or imposition of criminal charges after protected speech. *See Smith v. Campbell,* 782 F.3d 93, 100 (2d Cir.2015); *Prince v. Cnty. of Nassau,* 563 Fed.Appx. 13, 17 (2d Cir.2014); *Pluma v. City of New York,* No. 13 CIV.2017 LAP, 2015 WL 1623828, at *7 (S.D.N.Y. Mar. 31, 2015); *Higginbotham v. City of New York,* No. 14–CV–8549 PKC RLE, 105 F.Supp.3d 369, 382–83, 2015 WL 2212242, at *11 (S.D.N.Y. May 12, 2015). However, they do not extend to allegations that defendants cursed at plaintiff on several occasions and acted aggressively towards him, or that defendants per se defamed defendant, or to generalized allegations of stalking. *See Zherka,* 634 F.3d at 645; *Crichlow v. Fischer,* No. 12–CV–7774 NSR, 2015 WL 678725, at *4 (S.D.N.Y. Feb. 17, 2015); *Longinott v. Bouffard,* No. 11 Civ. 4245(VB), 2012 WL 1392579, at *4 (S.D.N.Y. Apr. 17, 2012).

Plaintiff has not established that the NYPD visits are the limited sort of concrete harm accepted by the courts. Other than that on one occasion, the NYPD officers did not interact with Schoolcraft while in his Jamestown residence. *Summary Judgment Motion,* 103 F.Supp.3d at 489–99, 2015 WL 2070187, at *27. The type of conduct about which Plaintiff complains is akin to non-actionable "surveillance activities conducted near but outside the curtilage of one's home—i.e., an area to which the intimate activity associated with the sanctity of one's home and the privacies of life is extended." *See United States v. Hayes,* 551 F.3d 138, 145 (2d Cir.2008) (internal citation and quotation marks omitted). Where officers are "physically located in public places such as Plaintiff's workplace or public streets adjacent to or near Plaintiff's home, without intruding upon the curtilage

of Plaintiff's home," a Plaintiff's right to privacy is not violated. *Paige v. New York City Police Dep't,* No. 10–CV–3773 SLT LB, 2012 WL 1118012, at *4 (E.D.N.Y. Mar. 30, 2012); *see also Hayes,* 551 F.3d at 145 (police may use drug sniffing dogs in front of suspect's home without a warrant); *Esmont v. City of New York,* 371 F.Supp.2d 202, 212 (E.D.N.Y.2005) ("Unobstructed, open areas in front of a residence are not entitled to Fourth Amendment protection."). Plaintiff has not demonstrated that the NYPD's visits to Schoolcraft's upstate residence rise to the level of the concrete harm contemplated by *Dorsett.*

Though Plaintiff contends that the NYPD's conduct on October 31, 2009 constitutes actionable harm under *Dorsett,* he does not attempt to tie that harm with constitutionally-protected speech that has not already been held to be protected *See* Pl.'s Reply Mem. 17–18. In the *Summary Judgment Opinion,* the Court has already held that "Schoolcraft's First Amendment claim with respect to his pre-suspension speech to IAB and QAD survives summary judgment." 103 F.Supp.3d at 513, 2015 WL 2070187, at *41. Therefore, Plaintiff has not demonstrated how applying *Dorsett* will "reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir.1995).

Plaintiff's first amendment claim with respect to his post-suspension speech remains dismissed.

## Conclusion

Based on the conclusions set forth above, DI Mauriello's counterclaim for tortious interference is reinstated and
574 Lieutenant *574 Caughey is dismissed as a defendant.

It is so ordered.

# Airday v. City of N.Y.

131 F. Supp. 3d 174 (S.D.N.Y. 2015)
Decided Sep 15, 2015

No. 14 Civ. 8065.

09-15-2015

George AIRDAY, Plaintiff, v. The CITY OF NEW YORK, Keith Schwam, and David M. Frankel, Defendants.

Law Office of Nathaniel B. Smith, by: Nathaniel B. Smith, Esq., New York, NY, for Plaintiff. Zachary W. Carter, Esq., Corporation Counsel of the City of New York, by: Don H. Nguyen, Esq., New York, NY, for Defendants.

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SWEET, District Judge.

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Law Office of Nathaniel B. Smith, by: Nathaniel B. Smith, Esq., New York, NY, for Plaintiff.

Zachary W. Carter, Esq., Corporation Counsel of the City of New York, by: Don H. Nguyen, Esq., New York, NY, for Defendants.

*OPINION*

SWEET, District Judge.

Defendants the City of New York ("the City"), Keith Schwam ("Schwam") and David Frankel ("Frankel") (collectively, the "Defendants") have moved pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the Complaint of plaintiff George Airday ("Airday" or the "Plaintiff") alleging violations of 42 U.S.C. §§ 1983 and 1988, and the First, Fifth and Fourteenth Amendments of the United States Constitution. Plaintiff's claims arise out of the denial of renewal of his five-year term as New York City Marshall in alleged retaliation for his criticism of a parking violation enforcement program called the "Paylock Booting Program." Plaintiff alleges: (1) retaliation against him in violation of his First Amendment rights; (2) violation of his procedural and substantive due process rights; and (3) violation of his rights to equal protection. Based on the conclusions set forth below the motion is granted in part and denied in part.

## Prior Proceedings

The Plaintiff filed his Complaint containing the following allegations. Airday was a City Marshal for 29 years from January 1984 through December 2013. *See* Compl. ¶¶ 11–17. A City Marshal is a public officer who operates his or her own business enforcing judgments and collecting fees upon execution of those judgments on behalf of judgment-creditors, who are his clients or customers. As a City Marshal, Airday satisfactorily performed his duties over the course of his career, and his five-year term of office was regularly renewed, consistent with the established practice of renewing the terms of the other City Marshals. *Id.* ¶¶ 11–15.

In 2010, Mayor Bloomberg and his Administration decided to take steps to "privatize" the City's system for collecting unpaid parking tickets by replacing City Marshals with a private company known as "Paylock." *Id.* ¶¶ 20–25. Under this program, which was to be run by the New York City Department of Finance ("DOF") under the authority of Frankel, as DOF Commissioner, City Marshals would no longer enforce judgments by towing scofflaw vehicles. *Id.* ¶ 25. Instead, private employees of a private company would affix a metal "boot" to a wheel of the scofflaw vehicle, and the owner would have to pay Paylock by credit card in order to release the boot. *Id.* The Paylock proposal was a significant threat to the established operations of at least twenty City Marshals, including Airday, who focused significant portions of their operations on the DOF's existing Scofflaw Program. *See id.* ¶ 22. As a result, Airday and other City Marshals began investigating the propriety of the Paylock proposal, including the legality of a private and non-public no-bid contract as potentially violative of applicable competitive biddings laws. *Id.* ¶¶ 24, 32.

After reviewing the Paylock proposal at the office of DOF, Airday identified several serious issues, including: (a) how Paylock was chosen by the City and whether a no-bid contract was appropriate and legal; (b) who would be in charge under the proposal for tracking fines paid to Paylock; (c) who would be responsible for supervising Paylock; (d) what fees would be charged to the vehicle owners; (e) what would be the City Marshal's law enforcement and administrative roles, if any, in the booting process; (f) what would Paylock's fee
178 be under the proposed system; *178 (g) whether a vehicle could be legally "unbooted" upon payment of the outstanding fines and judgments and left operational on City streets where the vehicle's registration status had expired and the vehicle could not under law be parked or operated on public streets; and (h) whether it was appropriate to omit or disregard necessary and legal guidelines from the Paylock booting program. *Id.* ¶ 36.

Airday disseminated his criticisms of the Paylock program to other City Marshals and to the Marshal's Association of the City of New York, Inc. (the "Marshal's Association"). *Id.* ¶ 37. The Marshal's Association is a not-for-profit corporation organized under the laws of New York for the benefit of City Marshals. *See id.* Airday also shared his criticisms with New York City's Department of Investigations ("DOI"), which had oversight responsibility for City Marshals and was supervised by Schwam. *Id.* ¶¶ 30, 37.

Schwam and Frankel purportedly punished Airday for voicing his criticism of Paylock, thereby sending a message to the other City Marshals not to oppose the Paylock proposal or expose any issues pertaining to it. *Id.* ¶ 38. On January 18, 2012, Airday was arrested for possession of a gun in violation of a protective order issued against him arising from what Airday contends was a false allegation of domestic violence by his former girlfriend. *Id.* ¶ 39. The next day, Schwam, in his capacity as DOF Director of the Marshal's Bureau, wrote Airday a letter demanding that he resign as a City Marshal and purporting to unilaterally suspend Airday as a City Marshal. *Id.* ¶¶ 40–47. That same day, Frankel, acting as the DOI Commissioner, removed Airday from the DOF Scofflaw Program, thereby damaging and disrupting his business operations. *Id.* ¶ 47.

According to Airday, both Schwam and Frankel took these actions against Airday without a factual basis for believing that the criminal allegations against him were true and despite the fact that several other City Marshals have been accused of far more serious misconduct and were not similarly disciplined. *Id.* ¶¶ 46, 48.

The Paylock contract was signed by Frankel's office in February of 2012 in violation of the competitive bidding laws. *Id.* ¶¶ 51–52. Airday contends that the other City Marshals who were part of the Marshal's Association and directly affected by the Paylock program ceased their opposition the Paylock program. *Id.* Absent any opposition or a request for public debate on the issue, a public hearing before the City Council was dispensed with and the Paylock program entered into effect. *Id.* ¶¶ 53–55.

Six months after learning of the criminal charges against Airday, Schwam successfully petitioned the First and Second Departments to temporarily suspend Airday. *Id.* ¶ 59. As a result, Airday was required to shut down his office entirely and terminate his employees. *Id.* ¶ 60. While other City Marshals had engaged in more serious misconduct, Airday was singled out for the harshest retribution because of his outspoken opposition to the Paylock program. *Id.* ¶¶ 46, 48, 59, 67.

Although Airday was fully exonerated later that year of the criminal charges against him, Schwam and Frankel maintained the DOF ban against him, the DOI's investigation into Airday's conduct, and disciplinary charges against him. *Id.* ¶¶ 61–67. In mid–2013, Airday agreed in good faith to settle those charges and was restored to office on June 5, 2013, but Schwam unilaterally inform Airday six months later that his term expired, that he would not be held over, and that he was no longer a City Marshal. *Id.* ¶ 68–71.

179 Schwam's actions were was taken shortly before Mayor Bloomberg was scheduled *179 to leave office and Schwam was slated to leave his position at DOI to join a private Bloomberg company. *Id.* ¶ 76. Had Schwam not acted, Airday would have remained in office as a holdover City Marshal in accordance with the long-established practice of continuing the offices of City Marshals after the expiration of their five-year terms of office. *Id.* ¶¶ 11–15.

## The Applicable Standard

Under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 663, 129 S.Ct. 1937 (quoting *Twombly,* 550 U.S. at 556, 127 S.Ct. 1955). In other words, the factual allegations must "possess enough heft to show that the pleader is entitled to relief." *Twombly,* 550 U.S. at 557, 127 S.Ct. 1955 (internal quotation marks omitted).

Though the court must accept the factual allegations of a complaint as true, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937 (quoting *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955).

In considering a motion to dismiss, "a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.,* 622 F.3d 104, 111 (2d Cir.2010).

## The First Amendment Retaliation Claim is Dismissed

To establish a violation of First Amendment speech rights, Plaintiff must establish that: (1) the speech at issue was protected; (2) he suffered an adverse employment action; and (3) there was a causal connection between the protected speech and the adverse employment action. *Pearson v. Bd. of Educ.,* 499 F.Supp.2d 575, 588 (S.D.N.Y.2007). Because Plaintiff is a public servant and an officer of the Civil Court of New York City, *see* Article 16 of the New York City Civil Court Act, §§ 1601 et seq., to establish that his speech was protected, he must demonstrate that his statements were made "as a citizen [speaking] upon matters of public concern, [and not] as an employee upon matters only of personal interest." *Connick v. Myers,* 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). First, the Court must determine whether Plaintiff was speaking "as a citizen," or whether he was acting pursuant to his official job duties. *Garcetti v. Ceballos,* 547 U.S. 410, 420–22, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); *see also Sousa v. Roque,* 578 F.3d 164, 168 (2d Cir.2009). Whether the

employee spoke solely as an employee and not as a citizen is also largely a question of law for the court. *Connick,* 461 U.S at 148 n. 7, 103 S.Ct. 1684. If Plaintiff was acting pursuant to his official duties, then he was not speaking as a citizen and his speech is not entitled to First Amendment protection. *See Garcetti,* 547 U.S. at 421, 126 S.Ct. 1951. If, on the other hand, he was speaking as a citizen, then "[w]hether [his] 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." *Connick,* 461 U.S. at 147–48, 103 S.Ct. 1684.

The inquiry into whether a public employee spoke pursuant to her official duties is both objective and "a practical one." *Weintraub v. Bd. of Educ.,* 593 F.3d 196, 202 (2d Cir.2010) (citing *Garcetti,* 547 U.S. at 424,
180 126 S.Ct. 1951). The Circuit *180 held that "under the First Amendment, speech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description or in response to a request by the employer." *Id.* at 203. Although no single factor is dispositive, courts consider several factors when attempting to determine if a public employee spoke pursuant to his official duties, including: (1) the plaintiff's job description; (2) the persons to whom the speech was directed; (3) whether the speech resulted from special knowledge gained through the plaintiff's employment; (4) whether the speech occurs in the workplace; and (5) whether the speech concerns the subject matter of the employee's job. *Frisenda v. Inc. Vill. of Malverne,* 775 F.Supp.2d 486, 506 (E.D.N.Y.2011).

In the instant matter, each of the factors that courts regularly consider in determining whether public employees spoke as citizens or, rather, pursuant to their official job duties, weighs in favor of a finding that Plaintiff spoke pursuant to his job duties and not as a citizen.

First, the speech in which Plaintiff purportedly engaged falls squarely within his job description as a City Marshal and concerned the subject matter of his job. Plaintiff was actively involved in the City's Scofflaw Program and admitted that his job duties entailed the "enforce[ment] [of] parking and related fines and judgments against vehicles and their owners ... by towing vehicles, enforcing and collecting on the unpaid fines and judgments and otherwise taking responsibility for the care, custody and control of the vehicles." *See* Compl. ¶ 21. Notably, all of the inquiries Plaintiff allegedly made concerned the Paylock Booting Program's implementation, operation, and the effect the Program would have on the manner in which he performed his duties. Plaintiff's alleged inquiries concerning how the Paylock Booting Program was selected, who would be in charge of tracking fines, who would supervise Paylock, what fees would be charged to vehicle owners, what the City Marshals' new role would be under the program, what Paylock's fee would be, and the circumstances under which a vehicle could be unbooted, all fell within the scope of his job duties, and concerned the subject matter of his job. *See Weintraub,* 489 F.Supp.2d at 221 ("[P]ublic employees who convey complaints or grievances about a matter pertaining to their official duties to their supervisors do so in their capacities as employees rather than citizens, even when the subject matter of their speech touches upon a matter of public concern, and that such speech is not protected by the First Amendment.").

Second, the Plaintiff failed to allege the person or persons to whom he directed his speech. Compl. ¶¶ 32–36. Plaintiff has alleged in his Complaint that "after reviewing the document in the office of the DOF, [he] disseminated his analysis and criticisms of the proposed Paylock [B]ooting [P]rogram." *Id.* ¶ 35. Plaintiff has not alleged the individual or individuals to whom he conveyed his alleged "criticisms." *Id.* ¶ 36. Plaintiff maintains that, throughout the remainder of 2011, he and other City Marshals continued to be outspoken about the Paylock Booting Program, and shared their critical views with other City Marshals, the Marshals' Association of the City of New York, Inc. and with DOI. *See id.* at ¶ 37. However, there are no allegations that Airday's speech was made to the public at large, to the media, to elected officials, or even to officials within DOF or DOI such as Frankel or Schwam. Airday's complaints about the Paylock Booting Program were not

expressed to anyone beyond his own colleagues, the Marshals' Association, and unidentified individuals at
181 DOI. These allegations support a conclusion that Airday engaged in speech as a *181 public servant pursuant to his job duties, not as a citizen.

Third, Airday's inquiries resulted from knowledge which he acquired through the performance of his duties as a City Marshal. The impending changes and all of his inquiries related to the impact the implementation of the program on his previous job duties were uniquely applicable to a City Marshal in the Scofflaw Program. *See Frisenda,* 775 F.Supp.2d at 507 ("[T]aken together, all of these undisputed facts paint a clear picture of an employee speaking out about his views regarding how best to perform his job duties, rather than of someone attempting to make a 'contribution[ ] to the civic discourse.' ") (quoting *Garcetti,* 547 U.S. at 422, 126 S.Ct. 1951).

In addition, there is no "civilian analog" to his speech. The *Garcetti* Court noted that speech by a public employee retains some possibility of First Amendment protection when it "is the kind of activity engaged in by citizens who do not work for the government," 547 U.S. at 423, 126 S.Ct. 1951, "namely 'mak[ing] a public statement, discuss[ing] politics with a coworker, writ[ing] a letter to newspapers or legislators, or otherwise speak[ing] as a citizen.' " *Davis v. McKinney,* 518 F.3d 304, 312 (5th Cir.2008) (quoting *Spiegla v. Hull,* 481 F.3d 961, 967 (7th Cir.2007)). Here, Plaintiff's speech was allegedly conveyed exclusively to other City Marshals and unnamed individuals at DOF and DOI, and the Complaint does not allege that he directed his speech to the public at large, the media, elected officials, or even the individually named Defendants.

Since Airday's speech concerning the implementation of the Paylock Booting Program was made in his role as a public servant, and pursuant to his official job duties, the Court need not reach the issue of whether his speech, as pled in the Complaint, related to a matter of public concern. *Weintraub,* 593 F.3d at 201 (explaining that, as "Weintraub's speech was not protected by the First Amendment ... there is no cause for us to address whether it related to a 'matter of public concern' ") (citing *Garcetti,* 547 U.S. at 421, 126 S.Ct. 1951 (finding "the controlling factor" to be whether the employee-speech at issue was pursuant to official duties and declining to examine whether it related to an issue of public concern)); *Frisenda,* 775 F.Supp.2d at 504 n. 11 (explaining that "this Court need not address the 'matter of public concern' requirement in the instant case as it ... because the undisputed facts demonstrate as a matter of law that plaintiff was not speaking as a citizen, but rather as an employee pursuant to his official duties, in connection with that speech"). The Complaint fails to plead facts that could demonstrate a plausible claim that he engaged in protected speech.

In his opposition, the Plaintiff has noted a distinction between independent contractor and public employee for the purposes of First Amendment analysis. *See* Pl.'s Mem. in Opp'n 12–13 ("[Plaintiff] was not a City employee and therefore all the reasons for limiting the scope of a governmental employee's protected speech in the workplace do not apply."). Even assuming that Airday could be deemed an independent contractor, rather than a government employee, he is not relieved of his obligation to state a First Amendment claim that is consistent with *Garcetti.* A plaintiff must, in any event, plausibly plead that he was speaking as a citizen upon matters of public concern instead of as an employee or contractor pursuant to his or her official duties. *See Garcetti,* 547 U.S. at 421, 126 S.Ct. 1951; *Pickering v. Bd. of Educ.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Indeed, the same First
182 Amendment *182 analytical framework applies to both employees and independent contractors. *See Lakner v. Lantz,* 547 Fed.Appx. 13, 2013 WL 5567451 at *6 (2d Cir.2013); *Fahs Construction Group Inc. v. Gray,* 725 F.3d 289 (2d Cir.2013) (plaintiff's claims were not akin to speech by a citizen upon matters of public concern, but rather were speech made by an employee or contractor upon matters only of personal interest). In *Lakner,*

the Second Circuit addressed, and rejected, the argument that an independent contractor is entitled to some different level of First Amendment protection not afforded to a "traditional" government employee, finding that:

> [T]he fact that Lakner's prior relationship with DOC was as an independent contractor rather than as an employee does not alter the [First Amendment] analysis.
>
> Although there are various differences between employees and independent contractors, these differences "can be accommodated by applying [the] existing framework for government employee cases to independent contractors."

*See Lakner,* 547 Fed.Appx. at 16. Thus, Plaintiff in the instant case cannot distinguish *Garcetti* based on Plaintiff's alleged status as an independent contractor.

Courts have applied *Garcetti* in the government contractor context. *See, e.g., Fergus v. New York City Health and Hosp. Corp.,* 11 Civ. 2419 (WHP), 2011 WL 5007000, at *9 (S.D.N.Y. October 14, 2011); *see also Castro v. County of Nassau,* 739 F.Supp.2d 153, 178–80, n. 18 (E.D.N.Y.2010) (It is well settled that, even though he was a contract employee, the standards for public employees also apply to individuals who work as contractors for government agencies.); *Ansell v. D'Alesio,* 485 F.Supp.2d 80, 84–85 (D.Conn.2007) (same); *Decotiis v. Whittemore,* 635 F.3d 22, 30–35, and 36 n. 16 (1st Cir.2011).

Thus, the First Amendment analysis remains the same for independent contractors. Plaintiff must plausibly plead that he spoke as "a citizen upon matters of public concern [rather than] as an employee or contractor upon matters of personal interest." *See Fahs Construction Group Inc.,* 11 Civ. 2419, at *18, 2012 WL 6097293 (WHP) (S.D.N.Y.2012), aff'd 725 F.3d 289 (2d Cir.2013); *Weintraub v. Bd. of Educ.,* 489 F.Supp.2d 209, 221 (E.D.N.Y.2007) aff'd, 593 F.3d 196 (2d Cir.2010). Otherwise, as is the case here, the First Amendment does not protect that speech.

Plaintiff's purported speech is not the "kind of activity engaged in by citizens who do not work for the government." *See Garcetti,* 547 U.S. at 423, 126 S.Ct. 1951. The Complaint's allegations establish that (1) plaintiff's speech fell within his job description and concerned the subject matter of his job; (2) plaintiff's speech was communicated within the confines of his employment, colleagues, and workplace; (3) plaintiff's speech resulted from knowledge obtained through his employment; and (4) there was no civilian analogue to the purported speech. Consequently, the First Amendment claim is dismissed.

## The Procedural Due Process Claim Survives in Part

The Complaint alleges a procedural due process claim with respect to both his 2012 suspension and the Defendants' failure to renew his office in 2013 premised on a protected property or, alternatively, on liberty interest with. Compl. ¶ 84–86; Pl.'s Mem. in Opp'n 18. In addressing the suspension, Defendants note that it was the Appellate Divisions of the First and Second Department of the New York State Supreme Court, rather than the Defendants, that suspended Airday. *See* Def.'s Mem. in Supp't 17 citing Compl. ¶ 56. Airday,
183 analogizing to malicious prosecution claims under § 1983, responds *183 that Schwam is responsible for "present[ing] bogus charges to a judicial body" and that the causal link between Schwam's actions and Airday's damage is therefore unbroken. Pl's Mem. in Opp'n 17 (citing *Cameron v. City of New York,* 598 F.3d 50, 63–64 (2d Cir.2010)). Plaintiff's analogy is unpersuasive in that it selects one feature of the malicious prosecution doctrine and applies it to the instant, distinguishable, due process claim. Were this a malicious prosecution claim, the Plaintiff would need to plead that the disciplinary charges were false, brought without probable cause, and that the matter was terminated in Airday's favor. *See, e.g., Cameron,* 598 F.3d at 63. Instead, the

Plaintiff here avers that he paid a $7,500 fine and entered a stipulation in order to conclude the pending charges. Compl. ¶ 68. Moreover, the Complaint does not establish the Plaintiff's property or liberty interest with respect to the suspension. Public employees must be able to point to state law, a collective bargaining agreement, or some other regulation creates that a property interest for the purposes of a due process claim. *See, e.g., Ciambriello v. Cnty. of Nassau,* 292 F.3d 307, 314, 316 (2d Cir.2002) (in order to have a cognizable property or liberty interest in a specific rank or position, a public employee must but only where the employee has a state law, collective bargaining agreement provision, or some other specific guarantee protecting him against demotion). Here, the Complaint does not reference a regulation, policy, agreement or law that would entitle Airday to a hearing prior to the Defendants' decision to pursue suspension proceedings with the Appellate Divisions. *See* Compl. ¶ 59 (only describing Schwam's suspension request as "an abuse of his power and position under state law."). The Plaintiff's briefing in opposition to the instant motion focused on the property and liberty interests associated with Airday's termination, rather than with his suspension. *See, e.g.,* Pl.'s Mem. in Opp'n 18–19 (contending that an implied in fact contract existed which obligated Defendants to renew Airday's office). In the absence of a valid property or liberty interest, Airday's claim with respect to the suspension is dismissed.

Conversely, the procedural due process claim with respect to the Defendants' refusal to renew his office in 2013 survives on a property interest theory. The Complaint alleges the Defendants' decision to not reappoint Airday ran contrary to "established policies and practices regarding the re-appointment of City Marshalls," which the Plaintiff characterizes as a *See* Compl. ¶ 71. To be sure, City Marshals are statutorily subject to five year terms, N.Y.C. Civil Court Act § 1601, and "mutual understandings and customs could not create a property interest ... when they are contrary to the express provisions of regulations and statutes." *Baden v. Koch,* 638 F.2d 486, 492 (2d Cir.1980); *see also Hawkins v. Steingut,* 829 F.2d 317, 322 (2d Cir.1987); *Schwartz v. Mayor's Committee on the Judiciary,* 816 F.2d 54 (2d Cir.1987). Here, however, the Plaintiff alleges that the Defendants' refusal to renew his office ran "contrary to established policies and practices regarding the reappointment of City Marshals." Compl. ¶ 71. These allegations are sufficient to demonstrate an issue of fact with respect to whether the parties shared a mutual understanding of renewal of the position following expiration.

Finally, the liberty interest theory is inapplicable here. Though the Plaintiff contends that "Airday's liberty interest in his chose profession were also violated by the ... termination," Pl.'s Mem. in Opp'n 19, "a decision not to reemploy, standing alone, does not deprive an employee of liberty." *Donato v. Plainview–Old Bethpage Cent. Sch. Dist.,* 96 F.3d 623, 630 (2d Cir.1996) (citing *Bd. of Regents of State*

184 *184

*Colleges v. Roth,* 408 U.S. 564, 573, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)) (internal quotations omitted). Rather, a plaintiff must allege aggravating circumstances, such as "when the state fires an employee and publicly charges that she acted dishonestly or immorally," *Donato,* 96 F.3d at 630, or effectively forecloses an employee's ability to "take advantage of other employment opportunities." *Roth,* 408 U.S. at 573, 92 S.Ct. 2701; *see also Kartseva v. Dep't of State,* 37 F.3d 1524, 1528 (D.C.Cir.1994) (holding that a liberty interest may be implicated where government refusal to rehire "formally or automatically excludes" the plaintiff from other government opportunities or broadly inhibits the plaintiff from working in a chosen profession). The Complaint does not contain such aggravating circumstances. Cf. *id.* (where the basis for the plaintiff's discharge was the government's warning that "several significant counterintelligence concerns raised during the conduct of background investigations and pre-employment screening conducted on [the plaintiff] by other U.S. Government agencies," which the DC Circuit held may constitute the requisite aggravating circumstances).

In sum, the procedural due process claim, based on either a property or a liberty interest theory, fails with respect to the suspension. Conversely, Plaintiff's procedural due process claim survives with respect to Defendants' decision to not renew his office in 2013.

## The Substantive Due Process Claim is Dismissed

Airday asserts that his suspension and termination also constituted violations of his substantive due process rights. Compl. ¶¶ 87–90. However, "where another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of "substantive due process." " *Kia P. v. McIntyre,* 235 F.3d 749, 757–58 (2d Cir.2000) (citing *Conn v. Gabbert,* 526 U.S. 286, 293, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999)) (internal quotations omitted); *see also Arteta v. Cnty. of Orange,* 141 Fed.Appx. 3, 8 (2d Cir.2005). Here, "what would serve to raise defendant's actions beyond the wrongful to the unconscionable and shocking are facts which, if proven, would constitute, in themselves, specific constitutional violations." *Velez v. Levy,* 401 F.3d 75, 94 (2d Cir.2005). Specifically, Defendants' conduct with respect to Airday's post would constitute an equal protection, procedural due process, or first amendment violation. Consequently, the substantive due process claim does not survive independently of those causes of action.

## The Equal Protection Claim is Dismissed

Airday has not alleged that he was singled out because of his race or gender or any other protected characteristic or suspect classification. Consequently, he has failed to allege membership in a protected class, and can only bring an equal protection claim under two theories: selective enforcement or 'class of one.' *See Best v. New York City Dep't of Correction,* 14 F.Supp.3d 341, 351 (S.D.N.Y.2014); *Rankel v. Town of Somers,* 999 F.Supp.2d 527, 544 (S.D.N.Y.2014). Both selective enforcement and class of one theories require a showing that Plaintiff was treated differently from other similarly-situated individuals. *Id.*

Plaintiff has failed to allege that he was treated differently from similarly situated individuals. The Complaint does not contain any allegations concerning the conduct of these other City Marshals that he considers to be more serious than his own. The absence of any allegations from which one could compare Plaintiff to these
185 *185 "other" unidentified City Marshals, requires dismissal of the equal protection claim.

Plaintiff's class of one theory fails on several other grounds. The Supreme Court has held that there is no cause of action for a "class of one" in the government employee context. *See Engquist v. Or. Dep't of Agric.,* 553 U.S. 591, 605, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008). Courts within this Circuit also bar "class of one" equal protection claims brought by government contractors. *Seymour's Boatyard, Inc. v. Town of Huntington,* 08 Civ. 3248, 2009 WL 1514610 (E.D.N.Y. June 1, 2009); *JAV Auto Center, Inc. v. Behrens,* 05 Civ. 6503, 2008 WL 9392107, at *5 (S.D.N.Y. Oct. 8, 2008) ("If Plaintiffs were independent contractors providing services to the Authority, *Engquist* would plainly apply, because public agencies have the same need for flexibility and discretion in dealing with their contractors as they do with their employees."). Moreover, "[i]n order to succeed on a 'class of one' claim, the level of similarity between plaintiffs and the persons with whom they compare themselves must be extremely high." *Neilson v. D'Angelis,* 409 F.3d 100, 104 (2d Cir.2005) (citing *Purze v. Village of Winthrop Harbor,* 286 F.3d 452, 455 (7th Cir.2002)) *overruled on other grounds by Appel v. Spiridon,* 531 F.3d 138 (2d Cir.2008); *accord Mosdos Chofetz Chaim, Inc. v. Vill. of Wesley Hills,* 815 F.Supp.2d 679, 697 (S.D.N.Y.2011) ("An extremely high level of similarity is required in the 'class of one' context because plaintiffs asserting those claims are attempting to prove that the government's treatment was arbitrary and irrational."). Since Plaintiff has failed to adequately identify the comparable individuals, his claim also fails to identify the extremely high level of similarly required.

Finally, to the extent that Airday claims he was singled out because of his speech, that conduct is a part of his dismissed First Amendment claim and cannot suffice as a basis for the equal protection claim. *See Mental Disability Law Clinic v. Hogan,* 519 Fed.Appx. 714 (2d Cir.2013).

## Conclusion

Based on the conclusions set forth above, the motion to dismiss with respect to the first amendment and equal protection claims is granted, and the motion is denied with respect to the procedural due process claim. Leave to replead within 20 days is granted.

It is so ordered.

No. 10 Civ. 6005(RWS)
United States District Court,S.D. New York.

# Schoolcraft v. City of N.Y.

103 F. Supp. 3d 465 (S.D.N.Y. 2015)
Decided May 5, 2015

No. 10 Civ. 6005(RWS).

05-05-2015

Adrian SCHOOLCRAFT, Plaintiff, v. CITY OF NEW YORK, et al., Defendants.

Law Office of Nathaniel B. Smith, by: Nathaniel B. Smith, Esq., New York, NY, for the Plaintiff. Zachary W. Carter, Corporation Counsel of the City of New York, by: Ryan Shaffer, Esq., New York, NY, for the City Defendants. Scoppetta Seiff Kretz & Abercrombie, LLP, by: Walter A. Kretz, Jr., Esq., New York, NY, for Defendant Stephen Mauriello. Martin Clearwater & Bell, LLP, by: Gregory J. Radomisli, Esq., New York, NY, for Defendant Jamaica Hospital Medical Center. Callan, Koster Brady & Brennan, LLP, by: Matthew Joseph Koster, Esq., New York, NY, for Defendant Lillian Aldana–Bernier. Ivone, Devine & Jensen, LLP, by: Brian E. Lee, Esq., Lake Success, NY, for Defendant Isak Isakov.

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OpinionSWEET, District Judge.

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Law Office of Nathaniel B. Smith, by: Nathaniel B. Smith, Esq., New York, NY, for the Plaintiff.

473 Zachary W. Carter, Corporation Counsel of the City of New York, by: *473 Ryan Shaffer, Esq., New York, NY, for the City Defendants.

Scoppetta Seiff Kretz & Abercrombie, LLP, by: Walter A. Kretz, Jr., Esq., New York, NY, for Defendant Stephen Mauriello.

Martin Clearwater & Bell, LLP, by: Gregory J. Radomisli, Esq., New York, NY, for Defendant Jamaica Hospital Medical Center.

Callan, Koster Brady & Brennan, LLP, by: Matthew Joseph Koster, Esq., New York, NY, for Defendant Lillian Aldana–Bernier.

Ivone, Devine & Jensen, LLP, by: Brian E. Lee, Esq., Lake Success, NY, for Defendant Isak Isakov.

*Opinion*

SWEET, District Judge.

474 *474 Plaintiff Adrian Schoolcraft ("Schoolcraft" or "Plaintiff"); Defendants Christopher Broschart, Timothy Caughey, Kurt Duncan, Elise Hanlon, Theodore Lauterborn, Michael Marino, Gerald Nelson, Frederick Sawyer, The City Of New York, Timothy Trainer ("City Defendants"); Defendant Deputy Inspector Steven Mauriello ("DI Mauriello"); Defendant Jamaica Hospital Medical Center ("Jamaica Hospital" or "JHMC"); Defendant Dr. Lillian Aldana–Bernier ("Dr. Bernier"), and Defendant Dr. Isak Isakov ("Dr. Isakov") (collectively "the Attending Physicians"); all move for summary judgment pursuant to Rule 56 of the Federal
475 Rules of Civil Procedure. Based upon the facts and conclusions set forth below, the parties' motions *475 are granted in part and denied in part.

## I. *PRIOR PROCEEDINGS*

Plaintiff initiated this action alleging Section 1983 and a number of state law causes of action, by filing a summons and complaint on August 10, 2010. Plaintiff filing an Amended Complaint on September 13, 2010, in response to which Jamaica Hospital filed a motion to dismiss. The Court dismissed Schoolcraft's Section 1983 claim against Jamaica Hospital with leave to replead, and retained supplemental jurisdiction with respect to the state law claims against Jamaica Hospital. *Schoolcraft v. City of New York,* No. 10 CIV. 6005 RWS, 2011 WL 1758635 (S.D.N.Y. May 6, 2011).

On May 9, 2012, Schoolcraft submitted a motion seeking leave to amend his complaint to, *inter alia,* include a First Amendment claim under 42 U.S.C. § 1983 relating to his internal reporting of improper conduct at the 81st Precinct. That request was denied in this Court's Opinion dated June 14, 2012 on the basis that Schoolcraft's internal reporting was made in his capacity as a public employee, and therefore not protected under the First Amendment. *Schoolcraft v. City of New York,* No. 10 CIV. 6005 RWS, 2012 WL 2161596 (S.D.N.Y. June 14, 2012). On June 20, 2012, Plaintiff submitted a letter to the Court requesting reconsideration. The motion to reconsider was also denied in the Court's Opinion dated July 20, 2012 on the basis that Plaintiff, in his briefing regarding the motion to amend, never raised the issue of protected speech made after his suspension on October 31, 2009 and did not raise the argument that he had no duty to report misconduct following his suspension. *Schoolcraft v. City of New York,* No. 10 CIV. 6005 RWS, 2012 WL 2958176

(S.D.N.Y. July 20, 2012). On August 1, 2012, Plaintiff wrote to the Court requesting leave to amend his complaint to add a First Amendment claim relating to the NYPD's alleged harassment after October 31, 2009 and for unlawful seizure and detention on October 31, 2009. The Court granted him leave to plead a First Amendment claim with respect to the instances of harassment and suspension. *Schoolcraft v. City of New York,* No. 10 CIV. 6005 RWS, 2012 WL 3960118 (S.D.N.Y. Sept. 10, 2012).

On October 1, 2012, Schoolcraft filed a Second Amended Complaint ("SAC") that included the First Amendment claim. DI Mauriello filed a motion seeking leave to amend his answer and assert counterclaims against Schoolcraft on September 24, 2013. The Court denied his request as part of an Opinion filed November 21, 2013. *Schoolcraft v. City of New York,* 296 F.R.D. 231, 233 (S.D.N.Y.2013). DI Mauriello moved for reconsideration, and the Court granted his motion on March 14, 2014. *Schoolcraft v. City of New York,* 298 F.R.D. 134, 136 (S.D.N.Y.2014). On March 18, 2014, DI Mauriello filed his amended Answer and Counterclaims.

The SAC remained the operative complaint through the end of 2014, including for the extensive period of fact and expert discovery. On December 4, 2014, Plaintiff moved for permission to amend the SAC. While that motion was pending, all parties moved for summary judgment.

Plaintiff received leave to file a Third Amended Complaint ("TAC") on January 16, 2015. *Schoolcraft v. City of New York,* 81 F.Supp.3d 295, 298-99, No. 10 CIV. 6005 RWS, 2015 WL 252413, at *1 (S.D.N.Y. Jan. 16, 2015). Subsequently, all parties save Plaintiff filed amended motions for summary judgment. The motions were heard on submission and marked fully submitted on March 6, 2015.

Subsequently, Plaintiff requested that a reply affidavit from Dr. Bernier be stricken, which City Defendants
476 opposed, and *476 DI Mauriello requested that he be allowed to reopen discovery to obtain information regarding Plaintiff's involvement in a film relating to the substance of this case.

## II. *FACTS*

The facts are principally derived from Schoolcraft's and Defendants' Statements of Undisputed Facts submitted in support of their motions for summary judgment pursuant to Local Rule 56.1, read in conjunction with the parties' responses to the 56.1 Statements.[1]

[1] As part of Plaintiff's submissions in support of his and in opposition to Defendants' summary judgment motions, Plaintiff generated two consolidated documents. The first, "Plaintiff's Rule 56.1 Statement Consolidated with Defendants' Responses," filed March 6, 2015 (hereinafter cited as "Pl.'s Consol. 56.1 Statement"), contains all of Plaintiff's 56.1 facts along with all of Defendants' responses to each fact. This document also contains a section entitled "Additional Material Facts As To Which Mauriello Contends There Exist Genuine Issues To Be Tried, Thus Requiring Denial Of Plaintiff's Motion For Summary Judgment: Mauriello's Counterclaims." References to statements contained in that section will be cited as "Pl.'s Consol. 56.1 Statement Mauriello Countercl."The second consolidate document, "Plaintiff's Rule 56.1 Responsive Statement," filed February 11, 2015, contains all Defendants' 56.1 statements along with all of Plaintiff's responses. For the sake of simplicity, references to Defendants' 56.1 statements will cite to the portion of the Plaintiff's Rule 56.1 Responsive Statement, rather than Defendants' individual filings. Each citation will begin with the name of the Defendant, followed by "Consol. 56.1 Statement" (e.g., the portion of Plaintiff's Rule 56.1 Responsive Statement corresponding to the City's 56.1 Statement will be referred to as "City's Consol. 56.1 Statement").

Denials that the evidence cited in support of a particular statement does not support that statement, in instances where the evidence uncontrovertibly does support that statement, are treated as admissions. Denials without support or explanation are treated as admissions. Statements characterized as "additional undisputed facts" included in Dr. Bernier's responses to Schoolcraft's 56.1 statements but absent from Dr. Bernier's 56.1 Statement are considered in dispute. (*Compare* Dr. Bernier's Response to Plaintiff's Rule 56.1 Statement and Statement of Additional Undisputed Facts, pp. 41–53, ¶¶ 1–53 *with* Dr. Bernier's Statement Pursuant to Local Civil Rule 56.1.) Finally, the inclusion of statements in this Opinion that were challenged on admissibility grounds by the parties reflect a ruling that the admissibility challenge is overruled.

The following facts are not in material dispute except as noted below.

**A. *Schoolcraft's Career with NYPD***

1. On July 1, 2002, Schoolcraft joined the New York City Police Department ("NYPD"), and for most of his career, he was assigned as a Patrol Officer in the 81st Precinct, which is located in the Bedford Stuyvesant neighborhood of Brooklyn. (Pl.'s Consol. 56.1 Statement, ¶ 1.)

2. The 81st Precinct is one of ten precincts that are located in the geographical area known as "Patrol Borough Brooklyn North" ("PBBN"). All Defendants save DI Mauriello admit that, as a Patrol Officer, Schoolcraft was a fine officer who ably and satisfactorily performed his duties and received satisfactory or better performance reviews for most of his career. (Pl.'s Consol. 56.1 Statement, ¶ 2.)

3. In October of 2006, the NYPD assigned DI Mauriello to be the Executive Officer of the 81st Precinct. As the Executive Officer, DI Mauriello was the second in command at the 81st Precinct. According to DI Mauriello,
477 he requested that transfer because it was his stated desire to earn an appointment as a Commanding *477 Officer as well as a promotion to Inspector and perhaps Assistant Chief. (Pl.'s Consol. 56.1 Statement, ¶ 3.)

4. After being the Executive Officer at the 81st Precinct for one year, DI Mauriello was promoted to Commanding Officer of the 81st Precinct on December 1, 2007, and he later received a promotion to the title of Deputy Inspector ("DI"). (Pl.'s Consol. 56.1 Statement, ¶ 8.)

**B. *Schoolcraft's 2008 Performance Review***

4. During the course of second, third, and fourth quarters of 2008, Schoolcraft's performance reviews referenced his low "activity" and his failure to meet activity standards. (Pl.'s Consol. 56.1 Statement, ¶ 10.)

6. Schoolcraft received a failing evaluation of 2.5 in his 2008 performance evaluation, which was delivered in January of 2009. (Pl.'s Consol. 56.1 Statement, ¶ 11.)

7. DI Mauriello's 2008 performance evaluation recommended that Schoolcraft be transferred. (Pl.'s Consol. 56.1 Statement, ¶ 12.)

8. Schoolcraft objected to this evaluation and informed his superiors that he wanted to appeal the failing evaluation. (Pl.'s Consol. 56.1 Statement, ¶ 13.)

9. At around this time, a poster appeared on Schoolcraft's locker containing the words: "IF YOU DON'T LIKE YOUR JOB, THEN MAYBE YOU SHOULD GET ANOTHER JOB." (Pl.'s Consol. 56.1 Statement, ¶ 15.)

10. Another handwritten note that later appeared on his locker stated: "shut up, you idiot." (Pl.'s Consol. 56.1 Statement, ¶ 16.)

11. Schoolcraft believes that he was isolated from his fellow officers in the 81st Precinct. (City's Consol. 56.1 Statement, ¶ 11).

12. The appeal process involved the transmission of paperwork to the next level of the command structure, which was the Brooklyn North Patrol Borough, headed by Defendant Assistant Chief Gerald Nelson and Defendant Deputy Chief Michael Marino. (Pl.'s Consol. 56.1 Statement, ¶ 14.)

13. On February 25, 2009, Schoolcraft met with several supervisors at the 81st Precinct (the "February Appeal Meeting"), including DI Mauriello, and his new Executive Officer, Defendant Captain Theodore Lauterborn. (Pl.'s Consol. 56.1 Statement, ¶ 17.)

14. At the February Appeal Meeting, Schoolcraft did not expressly discuss illegal quotas and crime misclassification. Instead, he spoke about not knowing how much activity was needed and that the numbers on his evaluation were not adding up correctly. (Mauriello's Consol. 56.1 Statement, ¶ 1.)

15. During the February Appeal Meeting, Schoolcraft confirmed his intent to appeal the failing 2008 performance evaluation and repeatedly asked for information about what numbers were required of him. (Pl.'s Consol. 56.1 Statement, ¶ 18.)

16. At the end of the February Appeal Meeting, another of the 81st Precinct supervisors, Sergeant Steven Weiss specifically asked Schoolcraft if he was recording the meeting. (Pl.'s Consol. 56.1 Statement, ¶ 19.)

17. In or around early March of 2009, DI Mauriello attended a meeting at the main office for Patrol Borough Brooklyn North with Deputy Chief Marino and Sergeant Weiss from the 81st Precinct (the "March Evaluation Meeting"). DI Mauriello discussed, *inter alia,* Schoolcraft's appeal of his failing 2008 evaluation and DI Mauriello's wish to transfer Schoolcraft out of the Precinct. (Pl.'s Consol. 56.1 Statement, ¶ 20.)

478 *478 18. During the March Evaluation Meeting, DI Mauriello requested that Schoolcraft be transferred, and Deputy Chief Marino denied that request at that time for lack of paperwork. (Pl.'s Consol. 56.1 Statement, ¶ 21.)

19. On March 11, 2009, a labor attorney representing Schoolcraft, James A. Brown, Esq., wrote DI Mauriello a letter regarding Schoolcraft's appeal of his failing evaluation. Among other things, the letter stated: "We are concerned that our client's negative evaluation is based not on the factors set forth in Patrol Guide 205–48, but rather on his alleged lack of 'activity' related to his number of arrests and summons issued." (Pl.'s Consol. 56.1 Statement, ¶ 22.)

20. After receiving the letter, DI Mauriello told Assistant Chief Nelson about it and forwarded it to Patrol Borough Brooklyn North as part of the appeal process. (Pl.'s Consol. 56.1 Statement, ¶ 23.)

**C. *March 2009 Disciplinary Incident***

19. On or about March 16, 2009, while Schoolcraft was on patrol, Sergeant Weiss issued a command discipline to Schoolcraft for being "off post" and having "unnecessary conversation" with another patrol officer. (Pl.'s Consol. 56.1 Statement, ¶ 24.)

22. Schoolcraft believed that he was being punished for the letter from his labor attorney and for appealing his evaluation. (Pl.'s Consol. 56.1 Statement, ¶ 25.)

23. Schoolcraft made a formal request on his radio that the Duty Captain for Patrol Borough Brooklyn North respond to the scene. (Pl.'s Consol. 56.1 Statement, ¶ 25.)

24. In response to Schoolcraft's radio request, Captain Lauterborn, who was serving as Duty Captain at the time, had Schoolcraft brought back to the 81st Precinct. According to Schoolcraft's recording of the meeting with Captain Lauterborn, Captain Lauterborn told Schoolcraft that after the February Appeal Meeting. Captain Lauterborn said that Schoolcraft should not be surprised by the fact that he was going to get a lot more "supervision" by the 81st Precinct supervisors and that the 81st Precinct supervisors were now paying "closer attention" to him as a result of Schoolcraft's performance. (Pl.'s Consol. 56.1 Statement, ¶ 26.)

25. During his conversation with Captain Lauterborn, Schoolcraft explained his feelings as follows: "I just feel my safety and the public's safety is being compromised because of the acts of retaliation ... because of [the] appeal." (Mauriello's Consol. 56.1 Statement, ¶ 6.)

26. Captain Lauterborn also told Schoolcraft that "this is gonna go on;" that he had "a long road ahead" of him; that going forward, he needed to "cross your t's and dot your i's;" and that the "supervision" was "coming down hard" on him not just in the past two nights but since the day he walked out of the February Appeal Meeting. (Pl.'s Consol. 56.1 Statement, ¶ 27.)

**D.** ***Psychological Evaluation, Restricted Duty Placement***

27. Schoolcraft believes that he was the victim of a conspiracy to falsely portray him as psychologically unbalanced. (City's Consol. 56.1 Statement, ¶ 12.)

28. On or about March 16, 2009, Sergeant Weiss began reviewing police procedures on how to have Schoolcraft psychologically evaluated. (Pl.'s Consol. 56.1 Statement, ¶ 28.)

29. Shortly after that, Sergeant Weiss contacted the NYPD's Early Intervention Unit and reported that he was "concerned" about the level of Office Schoolcraft's "mental distress." (Pl.'s Consol. 56.1 Statement, ¶ 29.)

479 *479 30. Sergeant Weiss also did Internet research on Schoolcraft and found a news article in a local upstate newspaper about a burglary at his father's home and forwarded that article to the Early Intervention Unit. (Pl.'s Consol. 56.1 Statement, ¶ 30.)

31. On April 3, 2009, Schoolcraft went to a hospital emergency room because of chest pain and received an injection of medication commonly used to treat anxiety. The hospital also gave Schoolcraft a prescription for two more doses of the same medication in pill form. (Mauriello's Consol. 56.1 Statement, ¶ 8.)

32. On April 6, 2009, Schoolcraft went to see his private physician, Dr. Sure, who indicated Schoolcraft should not return to work until April 14, 2009. (Mauriello's Consol. 56.1 Statement, ¶ 9.)

33. On April 6, 2009, Dr. Sure wrote a letter to the NYPD excusing Schoolcraft from work for eight days. (City's Consol. 56.1 Statement, ¶ 15.)

34. As required by NYPD procedures, after being out sick on the advice of Dr. Sure, Schoolcraft then had to be seen by an NYPD doctor before returning to work. (Mauriello's Consol. 56.1 Statement, ¶ 10.)

35. Dr. Catherine Lamstein–Reiss ("Dr. Lamstein"), an NYPD psychologist, testified that she was consulted in connection with placing Schoolcraft on restricted duty on April 13, 2009. She concluded that Schoolcraft was suffering from the physical manifestations of stress. Based on that opinion, she recommended cognitive behavioral therapy or stress management training to improve coping skills and to reduce the physical symptoms of stress. (Pl.'s Consol. 56.1 Statement, ¶ 32.)

36. According to Dr. Lamstein, Schoolcraft complained that he had recently received a poor performance evaluation and that his superiors had met with him in an effort to have Schoolcraft be a more active police officer. (Mauriello's Consol. 56.1 Statement, ¶ 22.)

37. Dr. Lamstein indicated in her Consultation Report a diagnosis of "stress/anxiety" and recommended "psychotherapy", specifically cognitive behavioral therapy "to improve coping skills [and] reduce physical symptoms of stress." Dr. Lamstein indicated that she was concerned that Schoolcraft's primary care physician had recently prescribed a medication known for being anti-psychotic, but still noted his prognosis was "good, with treatment." (Mauriello's Consol. 56.1 Statement, ¶ 14.)

38. Dr. Lamstein also indicated in her notes that she urged Schoolcraft to see a psychologist. Schoolcraft disputes this, contending that she "suggested books on the topic of stress management, and therapies such as yoga." (Mauriello's Consol. 56.1 Statement, ¶ 16.)

39. Schoolcraft was placed on restricted duty without any law enforcement or patrol duties, and his gun and shield were removed on April 13, 2009. (Pl.'s Consol. 56.1 Statement, ¶ 31.)

40. As a result of being placed on restricted duty, Schoolcraft was assigned to work at the 81st Precinct as the Telephone Switchboard operator, essentially taking calls to the Precinct and handling walk-ins from members of the public. (Pl.'s Consol. 56.1 Statement, ¶ 34.)

41. Schoolcraft held that position from April 2009 through the end of October 2009. (Pl.'s Consol. 56.1 Statement, ¶ 35.)

42. All defendants save DI Mauriello admit that while on restricted duty, Schoolcraft continued his attempts to challenge his failing 2008 performance evaluation. (Pl.'s Consol. 56.1 Statement, ¶ 36.)

43. Schoolcraft returned to see Dr. Lamstein on July 27, 2009. (Mauriello's Consol. 56.1 Statement, ¶ 17.)

480 *480 44. Schoolcraft returned again to see Dr. Lamstein on October 27, 2009. (Mauriello's Consol. 56.1 Statement, ¶ 18.)

45. Dr. Lamstein concluded that Schoolcraft should continue on restricted duty on July 27, 2009 and on October 27, 2009. (Mauriello's Consol. 56.1 Statement, ¶ 19.)

46. Dr. Lamstein testified that she repeated her recommendation that Schoolcraft see a psychologist on October 27, 2009. (Mauriello's Consol. 56.1 Statement, ¶ 20.)

47. Schoolcraft testified that he did not recall seeing a psychologist subsequent to his meetings with Dr. Lamstein. (Mauriello's Consol. 56.1 Statement, ¶ 21.)

**E. *Schoolcraft's Report to Internal Affairs and NYPD's Response***

48. On August 20, 2009, Schoolcraft reported to the Internal Affairs Bureau ("IAB" of "Internal Affairs") on "corruption involving the integrity control program" at the 81st Precinct by the Integrity Control Officer, Defendant Lieutenant Timothy Caughey and Assistant Integrity Control Officer, Sergeant Weiss. (Pl.'s Consol. 56.1 Statement, ¶ 38.)

49. On August 31, 2009, a former member of the NYPD, David Durk, reported that Schoolcraft was the victim of retaliation by his supervisors. (Pl.'s Consol. 56.1 Statement, ¶ 39.)

50. On September 2, 2009, Schoolcraft spoke with IAB and reported that DI Mauriello was pressuring his staff to downgrade or suppress crime reporting and that under the direction of DI Mauriello, police officers were being directed to make arrests and issue summonses "in violation of people's civil rights." (Pl.'s Consol. 56.1 Statement, ¶ 40.)

51. According to the IAB report, Schoolcraft also stated that he received his failing evaluation "because he doesn't believe in summons and arrest quotas" and that police officers "are being forced to sign the training log even though they don't get the necessary training." (Pl.'s Consol. 56.1 Statement, ¶ 41.)

52. On October 7, 2009, Schoolcraft met with investigators from the NYPD's Quality Assurance Division ("QAD"). At the meeting, Schoolcraft made assertions about the nature of the alleged downgrading and suppression of major crime reporting at the 81st Precinct. (Pl.'s Consol. 56.1 Statement, ¶ 42.) In a recorded conversation between Schoolcraft and his father discussing the QAD meeting, Schoolcraft stated that "this is the way to fuck [DI Mauriello] over." (Pl.'s Consol. 56.1 Statement Mauriello Countercl. ¶ 1.) At the actual meeting, Schoolcraft stated he was not looking to "burn anyone" or "for vengeance," and that "this isn't because I don't like Inspector Mauriello, he is a jovial guy." (Pl.'s Consol. 56.1 Statement Mauriello Countercl. ¶ 2.)

53. While QAD undertook to conduct an investigation into those allegations, it also referred Schoolcraft's other misconduct allegations to IAB. (Pl.'s Consol. 56.1 Statement, ¶ 43.)

54. During his recorded interviews with internal investigators at the NYPD, Schoolcraft told NYPD investigators that he was not reporting the alleged reporting abuses anonymously. (City's Consol. 56.1 Statement, ¶ 93.)

55. According to an IAB report, on September 2, 2009, Schoolcraft told IAB that, "he doesn't feel he is being retaliated against from the Members of his Command and has no problems with his supervisors and peers." (Mauriello's Consol. 56.1 Statement, ¶ 27.)

56. In addition, towards the end of October, an 81st Precinct Sergeant told DI Mauriello that QAD was calling
481 down officers and DI Mauriello called up an Inspector *481 from QAD, who confirmed that there was an investigation.

57. Additionally, Captain Lauterborn testified that he allegedly received complaints from other officers interviewed by QAD that Schoolcraft was asking them questions about their QAD interviews and informed DI Mauriello[2] about Schoolcraft's alleged conduct. (Pl.'s Consol. 56.1 Statement, ¶ 46.)

[2] Mauriello denies knowledge of the QAD investigation prior to October 31, 2009. (*See* Pl.'s Consol. 56.1 Statement, ¶ 48.)

58. Captain Lauterborn testified that he learned from DI Mauriello of a QAD investigation of the 81st Precinct. (Pl.'s Consol. 56.1 Statement, ¶ 45.)

59. Captain Lauterborn testified that certain supervisors at the 81st Precinct, including DI Mauriello,[3] knew that Schoolcraft's memo book contained the name of an IAB officer prior to October 31, 2009. On October 19th Lieutenant Caughey, as Integrity Control Officer, issued a written order to all officers in the command that all inquiries from IAB must be reported to the Integrity Control Officer. (Pl.'s Consol. 56.1 Statement, ¶ 49.)

[3] Mauriello denies knowledge of the QAD investigation prior to October 31, 2009. (*See* Pl.'s Consol. 56.1 Statement, ¶ 49.)

**F.** ***October 31, 2009—Schoolcraft's Tour of Duty***

60. Schoolcraft recorded his entire tour of duty on October 31, 2009. (Mauriello's Consol. 56.1 Statement, ¶ 35.)

61. October 31, 2009 was the last day that Schoolcraft reported to the 81st Precinct. He worked the day tour and conducted his regular duties at the Telephone Switchboard desk before leaving work early. (Pl.'s Consol. 56.1 Statement, ¶ 50.)

62. In conversation with colleagues, Schoolcraft stated, "look at what they did to me ... they fucked me over on my evaluation." Schoolcraft also said that he asked supervisors to put it in writing to which they responded, "no, go fuck yourself. That's your buddy Mauriello." Schoolcraft then said "That's your buddy Mauriello, that fat miserable fuck. If I could get him.... If I could get him, I would fucking sell him out faster than anything, for free. I would give him away for free." (Pl.'s Consol. 56.1 Statement Mauriello Countercl. ¶ 3.)

63. During the course of the morning of October 31, 2009, Lieutenant Caughey took Schoolcraft's memo book to "scratch it," i.e., to make a copy of it. (Pl.'s Consol. 56.1 Statement, ¶ 51.)

64. Schoolcraft's recording of his entire day tour does not reveal anything said to Schoolcraft by Lieutenant Caughey other than a request to see his memo book so Caughey could "scratch" it. (Mauriello's Consol. 56.1 Statement, ¶ 62.)

65. While in his office, Lieutenant Caughey made two photocopies of the entire memo book because he saw "unusual" entries in it. Lieutenant Caughey kept one copy for himself and put the other copy in DI Mauriello's office desk. (Pl.'s Consol. 56.1 Statement, ¶ 52.)

66. Schoolcraft testified that, when Lieutenant Caughey returned the memo book to Schoolcraft later that day, Schoolcraft noticed, and became alarmed, that several pages of the memo book containing his entries about corruption or misconduct were earmarked or folded down. The City and DI Mauriello dispute that several pages of the memo book containing his entries about corruption or misconduct were earmarked or folded down, and DI Mauriello disputes characterization that pages reflected corruption or misconduct. (Pl.'s Consol. 56.1
482 Statement, ¶ 57.) Schoolcraft contends, and City Defendants and DI Mauriello dispute, that Lieutenant *482
Caughey later started behaving in an unusual manner towards Schoolcraft. (Pl.'s Consol. 56.1 Statement, ¶ ¶ 54–56.)

67. One of the civilian workers at the Precinct, Police Administrative Aide ("PAA") Curtis Boston ("PAA Boston") testified that she saw Lieutenant Caughey walk by Schoolcraft that day in an unusual manner, and that twice during the course of that morning, PAA Boston and Schoolcraft discussed Lieutenant Caughey's unusual behavior toward Schoolcraft. (Pl.'s Consol. 56.1 Statement, ¶ 55.)

68. PAA Boston testified that Schoolcraft told her that he felt uncomfortable about Lieutenant Caughey's behavior and that Schoolcraft asked her to document her reasons for why she believed Lieutenant Caughey was acting in a suspicious manner. (Pl.'s Consol. 56.1 Statement, ¶ 56.)

69. About one hour before the end of his scheduled day, Schoolcraft told his supervisor, Sergeant Rasheena Huffman ("Sergeant Huffman") that he was not feeling well and was going home.

70. Schoolcraft also submitted a sick report to Sergeant Huffman, which could have been a basis for Sergeant Huffman authorizing him to take "administrative sick" for the day. (Pl.'s Consol. 56.1 Statement, ¶ 58.)

71. As Schoolcraft was leaving the precinct, Sergeant Huffman told Schoolcraft that he had the option of taking "lost time," but did not give him written approval for either lost time or administrative sick time. (Pl.'s Consol. 56.1 Statement, ¶ 59.)

72. Sergeant Huffman called the NYPD centralized Sick Desk to inquire whether Schoolcraft had called for permission to leave work early, and was told he had not done so. (Mauriello's Consol. 56.1 Statement, ¶ 44.)

73. As Schoolcraft walked out of the precinct, DI Mauriello was walking in and said hello to Schoolcraft. (Mauriello's Consol. 56.1 Statement, ¶ 41.)

**G.** ***October 31, 2009—Events Subsequent to Schoolcraft's Departure***

74. Following Schoolcraft's departure, Captain Lauterborn contacted the NYPD sick desk supervisor. (City's Consol. 56.1 Statement, ¶ 26.)

75. After leaving work on October 31, 2009, at approximately 2:30 p.m., Schoolcraft recorded conversations and events in his apartment throughout the rest of that day until the first entry was made by NYPD into his apartment at approximately 9:40 p.m. (Mauriello's Consol. 56.1 Statement, ¶ 36.)

76. At about 3:30 p.m., Schoolcraft got home, which was located at 82–60 Eighty–Eighth Place, Queens, New York, and telephonically notified IAB of what Schoolcraft characterized as Lieutenant Caughey's menacing behavior. (Pl.'s Consol. 56.1 Statement, ¶ 60.)

77. Schoolcraft specifically informed IAB that he felt threatened, retaliated against, and in danger as a result of what Schoolcraft characterized as Lieutenant Caughey's menacing behavior. (Pl.'s Consol. 56.1 Statement, ¶ 61.)

78. Shortly after Schoolcraft left the precinct, the desk officer called Schoolcraft's cell phone, but the calls were not answered. (Mauriello's Consol. 56.1 Statement, ¶ 45.)

79. The 104th Precinct was notified about Schoolcraft's status, and was asked to send an officer to his home. (Mauriello's Consol. 56.1 Statement, ¶ 47.)

80. About one hour later, at about 4:20 p.m., a Sergeant Krohley, from the 104th Precinct, went to Schoolcraft's
483 home with his driver. Sergeant Krohley rang the bell *483 for Schoolcraft's apartment, which was on the second floor of a three-family house, and when there was no answer, he spoke to the landlady, Carol Stretmoyer ("Stretmoyer"), who told him that she believed that Schoolcraft had left about thirty minutes before. (Pl.'s Consol. 56.1 Statement, ¶ 62.)

81. Stretmoyer also informed Sergeant Krohley that Schoolcraft had a car, which was parked on the street. Sergeant Krohley determined that the car was registered in the name of Schoolcraft's father. (Pl.'s Consol. 56.1 Statement, ¶ 63.)

82. On October 31, 2009, Captain Lauterborn was the Executive Officer of the 81st Precinct, i.e., the position below Commanding Officer in the chain of authority. (Mauriello's Consol. 56.1 Statement, ¶ 50.)

83. On October 31, 2009, Captain Lauterborn was also assigned for the day to be the PBBN Duty Captain, for the entire Brooklyn North area. (Declaration of Walter A. Kretz, Jr. dated March 6, 2015, hereinafter "SM," Ex. AB, Brooklyn North Duty Sheet; Mauriello's Consol. 56.1 Statement, ¶ 51.)

84. At all relevant times, Deputy Chief Marino (now retired) was the PBBN Assistant Chief, or second in command, with supervisory authority over all of the precincts in PBBN, including the 81st Precinct. (Mauriello's Consol. 56.1 Statement, ¶ 53.)

85. Defendant Lieutenant Christopher Broschart from the 81st Precinct was instructed by Captain Lauterborn to go with his driver to Schoolcraft's apartment and check to see if Schoolcraft had returned home. (Mauriello's Consol. 56.1 Statement, ¶ 46.)

86. At about 5:00 p.m. Lieutenant Broschart arrived at the scene, and Sergeant Krohley briefed Lieutenant Broschart on the facts he had determined since arriving at the scene. (Pl.'s Consol. 56.1 Statement, ¶ 64.)

87. After Lieutenant Broschart and Captain Lauterborn arrived at Schoolcraft's home, they periodically knocked on the door from the early afternoon until it was dark out. (City's Consol. 56.1 Statement, ¶ 32.)

88. Schoolcraft did not answer the door. (City's Consol. 56.1 Statement, ¶ 33.)

89. Lieutenant Broschart updated Captain Lauterborn by telephone that Schoolcraft was not home and that Stretmoyer had told him that Schoolcraft might have left. (Pl.'s Consol. 56.1 Statement, ¶ 66.)

90. Captain Lauterborn told Lieutenant Broschart to stand by and wait to see if Schoolcraft returned. (Pl.'s Consol. 56.1 Statement, ¶ 67.)

91. Later that evening, Captain Lauterborn spoke with Dr. Lamstein. According to Dr. Lamstein's notes of the call, Captain Lauterborn told her that Schoolcraft left early that day and the "underlying issue" was that Schoolcraft "has made allegations against others" and the "dept's investigation of those allegations picked up this week & it snowballed from there." (Pl.'s Consol. 56.1 Statement, ¶ 68.)

92. Dr. Lamstein told Captain Lauterborn that she had seen Schoolcraft a few days ago and that she "had no reason to think [Schoolcraft] was a danger to himself or others." She also stated that her "assessment of his suicide risk is only as good as the last time [she] saw him. If something happened after that and led him to be so upset that he left work without permission an hour before the end of his tour, said to have stomach pains, etc., then [she is] unable to say with any reasonable amount of certainty that he is not at risk of S/I [suicidal
484 ideation] under present circumstances." While Dr. Lamstein further *484 testified that she thought the NYPD "absolutely needed" to find Plaintiff and "make sure that he was ok," Plaintiff contends that her testimony implies she did not so informed Captain Lauterborn, while City Defendants contend she explicitly communicated this impression to Captain Lauterborn. (Pl.'s Consol. 56.1 Statement, ¶ 69; City's Consol. 56.1 Statement, ¶ 30.)

93. Captain Lauterborn asked Dr. Lamstein to see if she could try to reach Schoolcraft over the telephone. (Mauriello's Consol. 56.1 Statement, ¶ 70.)

94. On October 31, 2009, Dr. Lamstein attempted to contact Schoolcraft by calling him on his cell phone. (City's Consol. 56.1 Statement, ¶ 34.)

95. At about 7:40 p.m., after speaking with Dr. Lamstein, Captain Lauterborn also called Schoolcraft's father and told him that Schoolcraft left without permission and had to return to the 81st Precinct that night. (Pl.'s Consol. 56.1 Statement, ¶ 70.)

96. Schoolcraft listened to Dr. Lamstein's message and recorded it. (Mauriello's Consol. 56.1 Statement, ¶ 74.)

97. Dr. Lamstein's message was as follows:

Hi Schoolcraft, Dr. Lamstein. I am the pager duty psychologist today and I got a call from Captain Lauterborn. I know I'm not the first call you're receiving so I'm sure you're aware that they're all looking for you and very concerned because you ran off without doing proper procedure and they're not sure if you're OK.

So right now they are trying to figure out if they supposed to do a whole city-wide high-level mobilization to find you or if you're OK and they're not sure if they are supposed to be doing that. So there are other people who left you a message asking you to return to the 8–1. I asked if it would also be OK if you just returned to your home and to send a Lt. there hoping to find you.

So I don't know what to tell them because as long as I've known you, I've had no concerns about you having thoughts about hurting yourself, I really really want to urge you to return to your home or call your Captain or you can call me. Whatever this is, if you just return to your home and just resolve whatever this is quickly and easily otherwise it's just going to blow up to a bigger mess than you would want and I would really really hate to see that happen. I would much rather this, whatever this is, get reconciled very quickly and easily without a whole big city wide mobilization and suspensions and whatever else is being considered because this is not necessary, it can be resolved in two minutes.

[Gives phone numbers]. You can also just return home and resolve it with you there instead of at the precinct because I suggested that might be embarrassing for you.

So hope everything is OK and please give me a call. (Mauriello's Consol. 56.1 Statement, ¶ 75.)

98. Schoolcraft did not answer Dr. Lamstein's phone call. (City's Consol. 56.1 Statement, ¶ 35.)

99. Captain Lauterborn also spoke with Schoolcraft's father over the telephone. Schoolcraft's father told him that he had spoken to Schoolcraft earlier that day, that his son told him he felt sick with a "tummy ache" and was going home and would call Schoolcraft's father when Schoolcraft woke up. (Pl.'s Consol. 56.1 Statement, ¶ 70.)

100. Lauterborn told Schoolcraft's father that he needed to "physically talk to" Schoolcraft and "resolve things" and the situation was not going to "wait until the *485 morning." Captain Lauterborn insisted that he had to talk to Schoolcraft "in person" and not "over the phone." He also stated that the "situation [is] going to escalate as the night goes on" and that "no one is going in or out of that house he lives in because there is police all over it." If Schoolcraft was there, Captain Lauterborn said that "we are eventually going to make our way in." (Pl.'s Consol. 56.1 Statement, ¶ 72.)

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101. Although Schoolcraft's father assured Captain Lauterborn that his son was fine and was probably sleeping, Captain Lauterborn insisted that it was not going to "end here" and that Schoolcraft should report to the Lieutenant on the scene outside his home. (Pl.'s Consol. 56.1 Statement, ¶ 73.)

102. While alone in his apartment with NYPD personnel gathered outside on the street, Schoolcraft spoke several times over the telephone with his father, who was in upstate New York. (Mauriello's Consol. 56.1 Statement, ¶ 68.)

103. Lieutenant Broschart remained outside of Schoolcraft's apartment for approximately four hours, and never saw or heard Schoolcraft. (City's Consol. 56.1 Statement, ¶ 37.) Deputy Chief Marino believed that Schoolcraft was still in his apartment. (City's Consol. 56.1 Statement, ¶ 38.)

104. Despite knowing that various persons were attempting to reach him during that seven-hour period, Schoolcraft did not respond to any of the telephone calls or to the numerous knocks on his apartment door. (Mauriello's Consol. 56.1 Statement, ¶ 71.)

105. The City Defendants and Plaintiff disagree as to the level of Assistant Chief Nelson's involvement during this time. Plaintiff contends that DI Mauriello kept Assistant Chief Nelson informed of the NYPD's activities throughout the evening, and understood the conduct to be in response to an "AWOL officer," i.e., and officer absent without leave. (*See* City's Consol. 56.1 Statement, ¶ 58.)

106. Lieutenant Broschart, Captain Lauterborn, and DI Mauriello were aware on October 31, 2009 that Schoolcraft's gun and shield had previously been removed from him. (City's Consol. 56.1 Statement, ¶ 39.)

107. Prior to arriving at Schoolcraft's apartment, Captain Lauterborn was informed by Lieutenant Broschart that Stretmoyer had heard creaking sounds from Schoolcraft's apartment, which was indication of activity in the apartment. (Mauriello's Consol. 56.1 Statement, ¶ 59.)

108. NYPD officers also noticed that Schoolcraft's television set was on. (Jamaica's Consol. 56.1 Statement, ¶ 23.)

109. At approximately 8:30 p.m., Captain Lauterborn and Lieutenant Gough, Sergeant Duncan, and Sergeant Hawkins, arrived at Schoolcraft's residence. (Mauriello's Consol. 56.1 Statement, ¶ 58.)

110. Deputy Chief Marino directed that the NYPD Operations division be notified and that arrangements be made to have an Emergency Services Unit ("ESU") also respond to Schoolcraft's residence. (Mauriello's Consol. 56.1 Statement, ¶ 55.)

111. The role of ESU is to provide specialized assistance to other units of the NYPD. (Mauriello's Consol. 56.1 Statement, ¶ 56.)

112. An NYPD ESU crew was requested at 9:09 p.m. (Mauriello's Consol. 56.1 Statement, ¶ 63.)

113. Deputy Chief Marino, driving his own car, and DI Mauriello, driven by Lieutenant Crawford, arrived at the scene at approximately 9:30 p.m. By the time Deputy Chief Marino arrived, ESU had already arrived at Schoolcraft's apartment. (Mauriello's Consol. 56.1 Statement, ¶ 64.)

486 *486 114. Deputy Chief Marino met with Captain Lauterborn and ESU officers, Lieutenant Gough and Sergeant Duncan, who had gathered at the 81st Precinct, in the precinct parking lot, as they prepared to go to Schoolcraft's apartment. (Mauriello's Consol. 56.1 Statement, ¶ 54.)

**H.** ***October 31, 2009—NYPD's First Entry into Schoolcraft's Apartment***

115. On October 31, 2009, Schoolcraft had a voice-activated recorder in his bedroom. (Mauriello's Consol. 56.1 Statement, ¶ 78.)

116. The hidden recorder recorded every sound heard in Schoolcraft's bedroom on the evening of October 31, 2009. (Mauriello's Consol. 56.1 Statement, ¶ 79.)

117. Captain Lauterborn obtained a key to Schoolcraft's apartment from Stretmoyer. (City's Consol. 56.1 Statement, ¶ 40; Mauriello's Consol. 56.1 Statement, ¶ 65.)

118. At 9:45 p.m. that night, after waiting approximately four or five hours outside Schoolcraft's home, the NYPD used Stretmoyer's key to enter the apartment. (Pl.'s Consol. 56.1 Statement, ¶ 74.)

119. Several supervisory NYPD officers, including Deputy Chief Marino, DI Mauriello, Captain Lauterborn, Lieutenant Broschart, and three members of the Brooklyn North Investigation Unit, Lieutenant William Gough, Sergeant Kurt Duncan, and Sergeant Raymond Hawkins, entered Schoolcraft's home without a warrant. (Pl.'s Consol. 56.1 Statement, ¶ 75.)

120. At the time of their entry, several other members of the NYPD, including DI Keith Green, the commanding officer of the 104th Precinct, Lieutenant Thomas Crawford (81st Precinct); Sergeant Kevin Scanlon (104th Precinct); and several Police Officers were waiting outside of Schoolcraft's apartment. (Pl.'s Consol. 56.1 Statement, ¶ 77.)

121. Also responding to the scene was FDNY Lieutenant Elise Hanlon and two Jamaica Hospital Emergency Medical Technicians ("EMTs"). (Pl.'s Consol. 56.1 Statement, ¶ 78.) Plaintiff contends that Lieutenant Hanlon testified that she reported in connection with a "barricaded EDP," while the 911 operator listed the purpose of the EMT dispatch as "unknown condition."

122. According to Deputy Chief Marino and DI Mauriello, the warrantless entry into Schoolcraft's home was justified by their concerns for his "well-being." (Pl.'s Consol. 56.1 Statement, ¶ 79.)

123. Deputy Chief Marino testified that he had no information that Schoolcraft had threatened to hurt himself or others, though Mauriello contends that he only lacked "specific" information and points to a portion of his testimony where he states that he had been briefed about the events of day and Schoolcraft's "psychological history." (Pl.'s Consol. 56.1 Statement, ¶ 80.)

124. Upon entry, the ESU officers moved into Schoolcraft's bedroom wearing bulletproof vests and helmets and carrying tactical shields. (Pl.'s Consol. 56.1 Statement, ¶ 82.)

125. On the recording, ESU is heard knocking on the apartment door and calling out "Adrian." As the door apparently opens, a comment is made by one of the officers in a low voice, saying "He's on the bed." In response, another officer asks "Is he alright?" (Mauriello's Consol. 56.1 Statement, ¶ 80.)

126. The Emergency Services Unit officers moved into Schoolcraft's bedroom with their guns drawn. DI Mauriello disputes this statement. (Pl.'s Consol. 56.1 Statement, ¶ 82.)

127. Schoolcraft was awake lying on his bed. (Pl.'s Consol. 56.1 Statement, ¶ 83.)

487 *487 128. The ESU officers then addressed Schoolcraft directly, asking him to show his hands and asking him to assure them he was OK. There is no indication of any aggressive conduct or the exertion of any physical force against Schoolcraft. (Mauriello's Consol. 56.1 Statement, ¶ 81.)

129. As reflected by the recording captured by Schoolcraft's voice-activated digital recorder, one of the ESU officers asked Schoolcraft, "You okay?" to which Schoolcraft replied, "Yeah, I think so." (Pl.'s Consol. 56.1 Statement, ¶ 84.)

130. Once entry was made into the apartment and Schoolcraft appeared to be in reasonably good condition, Deputy Chief Marino, then DI Mauriello, and then Captain Lauterborn explained to him that he was being directed to return to the precinct. (Mauriello's Consol. 56.1 Statement, ¶ 91.)

131. The exchange between Deputy Chief Marino and Schoolcraft was as follows:

Marino: Adrian, you didn't hear us knocking on this door for a couple hours?

Schoolcraft: I drank some Nyquil. Unidentified male voice: Adrian, sit up.

Marino: Adrian, you didn't hear us knocking on that door ... for the last couple hours?

Schoolcraft: No, why would I be expecting anyone knocking at my door Chief?

Marino: I don't know Adrian, but normally if you hear someone knocking you get up and answer it. They were kicking on that door loud and yelling.

Schoolcraft: I wasn't feeling well.

Marino: You got a million people downstairs worried about your welfare, spending hours out here, worried about you. We've talked to your father, we've called your phone.

Schoolcraft: What did my father say?

Marino: I don't know Adrian, I didn't talk to him personally. Alright, sit down.

(Mauriello's Consol. 56.1 Statement, ¶ 82.)

132. After speaking with Schoolcraft for less than a minute, Deputy Chief Marino said "Steve," indicating to DI Mauriello that Deputy Chief Marino wanted him to step into the bedroom and deal with the situation. (Mauriello's Consol. 56.1 Statement, ¶ 84.)

133. DI Mauriello ordered Schoolcraft to return to the 81st Precinct along with two officers—Sergeant Huffman and a "Rodriguez"—who had witnessed his early departure from work and were being detained at the precinct. (Mauriello's Consol. 56.1 Statement, ¶¶ 85, 92.)

134. The exchange between DI Mauriello and Schoolcraft, lasting approximately forty-five seconds, was as follows:

Mauriello: Adrian, what happened today?

Adrian: I wasn't feeling well, I left.

Mauriello: That's it? You weren't feeling well. Your sergeant told you to stay, right?

Schoolcraft: No, she didn't say anything. She was talking on her cell phone.

Mauriello: You got everybody worried, we are worried about your safety.

Schoolcraft: Worried about what?

Mauriello: What do you mean, worried about what? They tried calling you, everybody(s) been calling you. Captain Lauterborn's been calling, everyone has been calling you, your father has been calling you. You're not answering. We were worried about anything that happens. That's what we are worried about. God forbid. You
488 just walk out of the precinct. I say hello to you today that was the last I saw you. You know, *488 that's what we are worried about, your safety, your well-being.

Schoolcraft: Alright, I'm fine.

Mauriello: Well, you are going to come back to the precinct with us.

Schoolcraft: Well ... if I'm forced to. It's against my will.

Mauriello: Against your will? OK Teddy [referring to Captain Lauterborn], you handle this.

(Mauriello's Consol. 56.1 Statement, ¶ 85.)

135. DI Mauriello did not have any physical contact with Schoolcraft. (Mauriello's Consol. 56.1 Statement, ¶ 88.)

136. Captain Lauterborn then spoke with Schoolcraft over the course of the next several minutes. Their conversation included the following exchange:

Lauterborn: Get your stuff on, we are going back to the precinct.

Schoolcraft: I'm not going back to the precinct.

Lauterborn: Adrian, we are going to go back to the precinct.

Schoolcraft: For ... ?

Lauterborn: Because we are going to do it the right way. You can't just walk out of the command.

Schoolcraft: And do what?

Lauterborn: You can't just walk out of the command.

Schoolcraft: What's going to be done if I go back to the 8–1?

Lauterborn: What's gonna be done? We are going to investigate why you left.

Schoolcraft: I'm telling you why I left, I was feeling sick.

Lauterborn: Adrian, that's not the reason why you leave. Alright, you know that. You just don't put a thing on a desk, you ask for permission.

Schoolcraft: I did ask permission.

Lauterborn: No you didn't.

Schoolcraft: She denied it.

Lauterborn: Alright, so you can't leave. You weren't given permission.

Schoolcraft: Well ... I wasn't feeling well.

Lauterborn: She denied it, that's it. You have to sit there and wait until your permission is granted. Alright, if it's that bad then you're gonna go to the hospital from the precinct. You know better than to just slap a sick report on a desk and walk out.

Schoolcraft: I didn't do that. She embellished that I ... she was on the cell phone.

Lauterborn: Alright, so then what did you do? Set it down? She told you [that] you can't leave and you left anyway, right?

Schoolcraft: I was going sick.

Lauterborn: And you left anyway? She told you [that] you can't leave? Right. You can't leave. That's the way it rolls. You can't go. Alright? So we have to go back. So get your clothes on, whatever you have to do. People have been calling you all day, I talked to your father. Alright?

(Mauriello's Consol. 56.1 Statement, ¶ 89.)

137. As reflected by the recording, Schoolcraft refused to return to the Precinct. After the colloquy with Captain Lauterborn and Lieutenant Gough, Schoolcraft stated he would go under protest. (Pl.'s Consol. 56.1 Statement, ¶ 86.)

138. After agreeing to return the 81st Precinct, Schoolcraft spoke on the phone with his father, then indicated he did not feel well. (Mauriello's Consol. 56.1 Statement, ¶ 98.)

139. Schoolcraft stated that he had to sit down because he was not feeling well and agreed to receive medical attention. (Pl.'s Consol. 56.1 Statement, ¶ 87.)

489 140. Upon hearing that Schoolcraft was not feeling well, NYPD officers offered *489 Schoolcraft medical aid. (Mauriello's Consol. 56.1 Statement, ¶ 99.)

141. Jamaica Hospital EMT Salvatore Sangeniti has been a trained EMT since 1980. (City's Consol. 56.1 Statement, ¶ 46.)

142. While Schoolcraft was being examined by EMT Sangeniti, Deputy Chief Marino spoke with Schoolcraft about his leaving the precinct and stated that Schoolcraft disobeyed an order, and informed him that he was suspended. (Pl.'s Consol. 56.1 Statement, ¶ 88.)

143. Immediately following Deputy Chief Marino's statement that Schoolcraft would be suspended, EMT Sangeniti measured Schoolcraft's blood pressure. When informed that his pressure was high, Schoolcraft responded that he had been feeling sick all day. (Pl.'s Consol. 56.1 Statement, ¶ 89.)

144. Schoolcraft's pulse was 120 beats per minute. (City's Consol. 56.1 Statement, ¶ 47.)

145. Schoolcraft's blood pressure was 160 over 120. (City's Consol. 56.1 Statement, ¶ 48.)

146. EMT Sangeniti told Lieutenant Hanlon that Schoolcraft's medical condition required medical attention at a hospital. (City's Consol. 56.1 Statement, ¶ 37.)

147. Schoolcraft agreed to go to the hospital for an evaluation. Medical personnel were recorded discussing Jamaica Hospital and Forest Hills Hospital (also referred to as LaGuardia) as potential options. Schoolcraft stated that he wanted to go to Forest Hills and EMT Sangeniti explained that Jamaica Hospital would be better. Schoolcraft reiterated that he wanted to go to Forest Hills. (Pl.'s Consol. 56.1 Statement, ¶ 90.)

148. A total of sixteen minutes had elapsed from the time ESU first opened the door to the apartment until the remaining officers and EMTs left the apartment with the expectation the ambulance would take Schoolcraft to the hospital for a medical exam. (Mauriello's Consol. 56.1 Statement, ¶ 104.)

149. Schoolcraft walked out of the apartment and approached the ambulance. (Mauriello's Consol. 56.1 Statement, ¶ 103.)

150. From a distance out on the street, DI Mauriello saw Schoolcraft walk out of the house and toward the ambulance. (Mauriello's Consol. 56.1 Statement, ¶ 108.)

151. Schoolcraft eventually refused further medical attention and went back to his apartment. (Pl.'s Consol. 56.1 Statement, ¶ 91.)

152. Schoolcraft did not suffer any physical harm during the period DI Mauriello was in the apartment during the first entry, and DI Mauriello is unaware of any such harm being suffered by Schoolcraft any time during the remainder of the first entry. (Mauriello's Consol. 56.1 Statement, ¶ 106.)

153. Defendants did not use any force against Schoolcraft prior to the second entry. (Mauriello's Consol. 56.1 Statement, ¶ 110.)

154. The EMTs remained by the ambulance, and did not enter Schoolcraft's apartment again. (Jamaica's Consol. 56.1 Statement, ¶ 30.)

**I.** ***October 31, 2009—NYPD's Second Entry into Schoolcraft's Apartment***

155. As reflected in the second part of the recording of the events in Schoolcraft's home on October 31, 2009, Schoolcraft returned to his apartment, laid back down in his bed and refused further orders first by Captain Lauterborn and then by Deputy Chief Marino who returned to the apartment and again entered without permission. (Pl.'s Consol. 56.1 Statement, ¶ 92.)

490 *490 156. When Schoolcraft returned to his apartment, DI Mauriello saw Chief Marino, Captain Lauterborn and Sergeant Duncan, Sergeant Hawkins, and Lieutenant Gough, follow Schoolcraft back inside. (Mauriello's Consol. 56.1 Statement, ¶ 103.)

157. DI Mauriello did not re-enter the apartment. (Mauriello's Consol. 56.1 Statement, ¶ 115.)

158. Deputy Chief Marino declared Schoolcraft an "emotionally disturbed person" (also known as an "EDP") and Captain Lauterborn, Lieutenant Broschart, Lieutenant Gough and Sergeant Duncan handcuffed Schoolcraft with his hands behind his back. (Pl.'s Consol. 56.1 Statement, ¶ 93.)

159. After Schoolcraft was declared an EDP, Deputy Chief Marino was in charge at the scene as the highest ranking NYPD officer present. Prior to that declaration, Schoolcraft disputes that Deputy Chief Marino was in charge. (Mauriello's Consol. 56.1 Statement, ¶ 83.)

160. While Schoolcraft was prone on the floor, Lieutenant Broschart held down his shoulders and Captain Lauterborn held him down by his legs. All Defendants save the City also admit that Deputy Chief Marino put his boot on Schoolcraft's face as he tried to turn his neck around to see what was being done to his body. (Pl.'s Consol. 56.1 Statement, ¶ 94.)

161. DI Mauriello did not arrest Schoolcraft, did not direct anyone to arrest him, and was not present when, if ever, he was placed under arrest. However, Schoolcraft contends that DI Mauriello ordered his Executive Officer, Captain Lauterborn, to "take care of this" when Schoolcraft refused to voluntarily return to the 81st Precinct immediately, which was, Schoolcraft contends, an order to bring Schoolcraft back to the precinct involuntarily. (Mauriello's Consol. 56.1 Statement, ¶ 120.)

162. DI Mauriello was not present when Schoolcraft was handcuffed, and he had not directed anyone to apply handcuffs. (Mauriello's Consol. 56.1 Statement, ¶ 117.)

163. DI Mauriello waited outside of the house until he saw everyone exit the house with Schoolcraft being carried in a chair to the ambulance. (Mauriello's Consol. 56.1 Statement, ¶ 124.)

164. The entire time that elapsed from the time Schoolcraft went back into his apartment until everyone left the apartment was approximately fifteen minutes. (Mauriello's Consol. 56.1 Statement, ¶ 125.)

165. DI Mauriello was not present when Schoolcraft was suspended. (Mauriello's Consol. 56.1 Statement, ¶ 117.)

166. DI Mauriello was not present when Schoolcraft was declared an EDP. (Mauriello's Consol. 56.1 Statement, ¶ 119.)

167. DI Mauriello was not in Schoolcraft's apartment when all of the events allegedly occurred that form the basis for Schoolcraft's claims, whether for the remainder of the first entry or during the second entry. (Mauriello's Consol. 56.1 Statement, ¶ 96.)

168. DI Mauriello did not know what had happened in the apartment during the second entry, and he did not ever again speak to or interact with Schoolcraft. (Mauriello's Consol. 56.1 Statement, ¶ 126.)

169. Lieutenant Broschart rode in the back of the ambulance with Schoolcraft. (Pl.'s Consol. 56.1 Statement, ¶ 96.)

170. While the NYPD officers were in Schoolcraft's apartment, they searched his person and his apartment and found a voice-activated digital recorder belonging to Schoolcraft. (Pl.'s Consol. 56.1 Statement, ¶ 97.)

491 171. DI Mauriello was not present for the removal of any of Schoolcraft's personal *491 property, including any alleged removal of evidence Schoolcraft claims to have gathered of NYPD corruption. (Mauriello's Consol. 56.1 Statement, ¶ 122.)

172. DI Mauriello did not direct anyone to remove any property and did not direct or participate in the alleged forcible removal of Schoolcraft from his apartment during the second entry. (SM Ex. S, recording of first and second entries; SM Ex. C, Mauriello Dep. pp. 376–81; Mauriello Affidavit ¶ 123.)

173. There have been no substantiated incidents involving any allegation that any physical force whatsoever was used by Deputy Chief Marino in any incident. Schoolcraft contends that City Defendants successfully precluded inquiry on this subject in discovery and should not be permitted to assert this contention. (City's Consol. 56.1 Statement, ¶ 97.)

174. There are no substantiated allegations of unlawful search or seizure, conspiracy, or retaliation against Deputy Chief Marino, DI Mauriello, or Assistant Chief Nelson. Schoolcraft contends that City Defendants successfully precluded inquiry on this subject in discovery and should not be permitted to assert this contention. (City's Consol. 56.1 Statement, ¶ 98.)

**J.** ***Arrival at Jamaica Hospital***

175. Schoolcraft was taken to Jamaica Hospital's Emergency Room. (Pl.'s Consol. 56.1 Statement, ¶ 98.)

176. Jamaica Hospital is a not-for-profit hospital. (Jamaica's Consol. 56.1 Statement, ¶ 2.)

177. In 2009, Jamaica Hospital had a mental health clinic, a psychiatric emergency department, and two psychiatric inpatient units. (Jamaica's Consol. 56.1 Statement, ¶ 3.)

178. Schoolcraft was held at Jamaica Hospital, pretextually according to Schoolcraft, pursuant to New York State Mental Hygiene Law Section 9.39 until November 6, 2009. (City's Consol. 56.1 Statement, ¶ 51.)

179. Hospital medical records, or the “chart,” reflect that Schoolcraft was in custody of the NYPD at the time he was admitted. (Pl.'s Consol. 56.1 Statement, ¶ 99.)

180. Medical records state that "EMS said the patient was behaving irrationally." (Jamaica's Consol. 56.1 Statement, ¶ 37.)

181. Following Schoolcraft's arrival at the Jamaica Hospital Medical Emergency Department, he was triaged at approximately 11:03 p.m. (Jamaica's Consol. 56.1 Statement, ¶ 36.)

182. Schoolcraft was handcuffed by one hand to a gurney and under the custody of Lieutenant Broschart until the Lieutenant was relieved at about midnight by Defendant Sergeant Shantel James. Sergeant James remained there until the morning. (Pl.'s Consol. 56.1 Statement, ¶ 100.)

183. On November 1, 2009, Defendant Sergeant Frederick Sawyer ("Sergeant Sawyer"), another supervisor from the 81st Precinct, was sent to Jamaica Hospital to relieve Sergeant James. When Sergeant Sawyer got to the hospital, he saw Schoolcraft on the telephone and, according to Sergeant Sawyer, he ordered him to get off the telephone. (Pl.'s Consol. 56.1 Statement, ¶ 101.)

184. Subsequently, Sergeant Sawyer, Sergeant James, and two other officers forced Schoolcraft onto the gurney and handcuffed his other hand to the gurney, leaving him in a fully shackled position on the gurney. (Pl.'s Consol. 56.1 Statement, ¶ 102.) All parties save the City Defendants do not deny that when Sergeant Sawyer applied the cuffs to Schoolcraft, he used both hands to squeeze the cuffs tighter and said "this is what happens to rats." (Pl.'s Consol. 56.1 Statement, ¶ 103.)

492 *492 185. Schoolcraft was examined and laboratory tests were taken. In addition, a CT scan was ordered. (Jamaica's Consol. 56.1 Statement, ¶ 39.)

186. No physical problems were found, other than the impression of handcuffs on both wrists. (Jamaica's Consol. 56.1 Statement, ¶ 40.)

187. At 12:03 a.m. on November 1, Dr. Silas Nwaishieny examined Schoolcraft and requested a psychiatric consultation. (Jamaica's Consol. 56.1 Statement, ¶ 41.)

188. In October and November 2009, non-party Dr. Khin Mar Lwin ("Dr. Lwin") was a physician in the first year of her residency at Jamaica Hospital. (Jamaica's Consol. 56.1 Statement, ¶ 6.)

189. Dr. Lwin performed the psychiatric consultation, which had been requested because Schoolcraft had purportedly been acting "bizarre." (Jamaica's Consol. 56.1 Statement, ¶ 42.)

190. Schoolcraft, underwent the initial psychiatric examination/assessment at approximately 6:30 a.m. on November 1, 2009. (Bernier's Consol. 56.1 Statement, ¶ 23.)

191. According to Dr. Lwin's notes, Schoolcraft told Dr. Lwin that he was "worried about the situation." He told her that "this is happening" because he had been discussing the internal affairs of the police department with his superiors and the Police Commissioner, that his supervisors were hiding information about robbery and assault cases to improve their statistics for their own advancement, that he has "documentation" about "this crime," and that he has been reporting his supervisors' actions for the past year. (Jamaica's Consol. 56.1 Statement, ¶ 43.)

192. Dr. Lwin's note indicated that as per a Sergeant James of the 81st Precinct, Schoolcraft complained about not feeling well the prior afternoon and left work early after becoming agitated and cursing a supervisor. The police followed Schoolcraft to his home. Schoolcraft barricaded himself in his apartment and the door had to be broken down to get him. Schoolcraft initially agreed to go with them for evaluation, but once outside, he ran and had to be chased and brought to the medical emergency room. (Bernier's Consol. 56.1 Statement, ¶ 24.)

193. The NYPD officers who remained with Schoolcraft at that time informed Dr. Lwin of Schoolcraft's history and the events that occurred throughout October 31st, and said that that Schoolcraft had left work early "after getting agitated and cursing [his] supervisor." (Jamaica's Consol. 56.1 Statement, ¶ 44.)

194. Dr. Lwin was also told that Schoolcraft had "barricaded himself" in his apartment, which required the NYPD to break the door down, and that Schoolcraft had initially agreed to go to the Hospital for evaluation, but that once he was outside his house, he began to run, after which a chase ensued, and he was brought to the Emergency Department ("ED") in handcuffs. (Jamaica's Consol. 56.1 Statement, ¶ 45.)

195. Dr. Lwin was also advised that Schoolcraft had previously been evaluated by an NYPD psychologist and that as a result, Schoolcraft had not carried a gun or a badge for almost a year. (Jamaica's Consol. 56.1 Statement, ¶ 46; Bernier's Consol. 56.1 Statement, ¶ 25.)

196. Dr. Lwin noted that while Schoolcraft was in the ED before Dr. Lwin saw him, Schoolcraft had become agitated, uncooperative and verbally abusive due to a discussion about using the telephone, and that he had told his treating physician that "they are all against me." (Jamaica's Consol. 56.1 Statement, ¶ 47.)

493 197. Dr. Lwin performed a mental status examination and determined that *493 Schoolcraft was coherent and relevant, with goal-directed speech (Exhibit U, p. 5). He was irritable with appropriate affect. (Jamaica's Consol. 56.1 Statement, ¶ 48.)

198. Dr. Lwin noted that Schoolcraft denied suicidal and homicidal ideation, but that he was "paranoid about his supervisors." (Jamaica's Consol. 56.1 Statement, ¶ 49.)

199. Dr. Lwin noted that Schoolcraft's memory and concentration were intact, that he was alert and oriented, but that his insight and judgment were, in Dr. Lwin's estimation, impaired. (Jamaica's Consol. 56.1 Statement, ¶ 50.)

200. Dr. Lwin diagnosed Schoolcraft with a Psychotic Disorder, Not Otherwise Specified ("NOS"). (Jamaica's Consol. 56.1 Statement, ¶ 51.)

201. Dr. Lwin recommended continued one-to-one observation due to Schoolcraft's unpredictable behavior and escape risk. (Jamaica's Consol. 56.1 Statement, ¶ 52.)

202. Dr. Lwin also recommended that Schoolcraft be transferred to the Psychiatric Emergency Room for further observation after he was medically cleared. (Jamaica's Consol. 56.1 Statement, ¶ 53.)

203. Schoolcraft testified that he had no complaints with regard to the treatment rendered by Dr. Lwin. (Jamaica's Consol. 56.1 Statement, ¶ 55.)

204. Dr. Patel, a psychiatrist at Jamaica Hospital, subsequently reviewed Dr. Lwin's note and concurred with Dr. Lwin's findings. (Bernier's Consol. 56.1 Statement, ¶ 26.)

205. A Psychiatric Nursing Assessment Form was completed in the Psychiatric Emergency Department on November 1, 2009 at 9:00 a.m. (Jamaica's Consol. 56.1 Statement, ¶ 65.)

206. Dr. Khwaja Khusro Tariq ("Dr. Tariq"), a resident physician, performed a psychiatric evaluation in the Psychiatric Emergency Department at 12:00 p.m. (Jamaica's Consol. 56.1 Statement, ¶ 66.)

207. In the section marked chief complaints, Dr. Tariq wrote "they just came to my place and handcuffed me" and that according to the accompanying New York City Police Department Officer (Sergeant James as per the ER consult note), Schoolcraft had been acting bizarre. (Bernier's Consol. 56.1 Statement, ¶ 28.)

208. Hospital records state that Schoolcraft had been brought to the "ED" because he had been "deemed to be paranoid and a danger to himself by his police sergeant." (Exhibit U, pp. 74–79). Contusions were noted on Schoolcraft's arms, but he was cooperative, with clear, spontaneous, and relevant speech. (Jamaica's Consol. 56.1 Statement, ¶ 67.)

209. Dr. Tariq's notes indicate that Schoolcraft had been reporting irregularities at work to IAB for over a year, that his supervisors had been under-reporting crime statistics to advance their careers, that he had documentary proof thereof, and that, as a result, he was being "persecuted." (Jamaica's Consol. 56.1 Statement, ¶ 69.)

210. Dr. Tariq's notes indicated that Sergeant James stated that Schoolcraft had been acting bizarre, but Sergeant James denied making that statement. (Jamaica's Consol. 56.1 Statement, ¶ 70.)

211. Dr. Tariq stated that Schoolcraft was cooperative, but that he was angry, with constricted affect. (Jamaica's Consol. 56.1 Statement, ¶ 71.)

212. Dr. Tariq noted that Schoolcraft had paranoid and persecutory delusions because he believed that he was being persecuted for having reported his supervisors' irregularities and corruptive behavior. (Jamaica's Consol. 56.1 Statement, ¶ 72.)

494 *494 213. Dr. Tariq also determined that Schoolcraft had poor insight and judgment. (Jamaica's Consol. 56.1 Statement, ¶ 73.)

214. Dr. Tariq diagnosed Schoolcraft as suffering from Psychosis, NOS, Rule Out Schizophrenia, Paranoid Type. (Jamaica's Consol. 56.1 Statement, ¶ 74.)

215. At 1:40 p.m., Dr. Tariq wrote an Order for a head CT to be performed. (Jamaica's Consol. 56.1 Statement, ¶ 75.)

216. It was noted that Schoolcraft had spoken with his father on the telephone twice. (Jamaica's Consol. 56.1 Statement, ¶ 76.)

217. On November 2, 2009, non-party physician Dr. Heron noted that Schoolcraft had been taken to the Hospital because the NYPD thought he was paranoid and was a danger to himself. (Jamaica's Consol. 56.1 Statement, ¶ 77.)

218. Schoolcraft's head CT was read as normal, per the "11/2/0910:45 a.m." CT report. (Jamaica's Consol. 56.1 Statement, ¶ 78.)

219. Later that morning, the two sets of handcuffs were removed and Schoolcraft was wheeled into the Jamaica Hospital Psychiatric Emergency Room for further observation following a diagnosis of Psychotic Disorder, Not Otherwise Specified ("NOS"). (Pl.'s Consol. 56.1 Statement, ¶ 104.)

220. After the paperwork was filled out, Schoolcraft was taken from the Psychiatric Emergency Room to a psychiatric ward in the hospital. (Pl.'s Consol. 56.1 Statement, ¶ 107.)

221. A non-party physician, Dr. Slowik, examined Schoolcraft on November 2, 2009, at 2:15 p.m. (Bernier's Consol. 56.1 Statement, ¶ 29.)

222. Defendant Dr. Bernier is a physician duly licensed to practice medicine in the State of New York. (Bernier's Consol. 56.1 Statement, ¶ 20.)

223. Dr. Bernier was privately employed in October and November of 2009. (Bernier's Consol. 56.1 Statement, ¶ 22.)

224. In October and November of 2009, Dr. Bernier was also an attending physician at Jamaica Hospital. (Jamaica's Consol. 56.1 Statement, ¶ 4.)

225. In October and November of 2009, Dr. Bernier was director of JHMC's psychiatric emergency room. (Bernier's Consol. 56.1 Statement, ¶ 21.)

226. Dr. Bernier took over Schoolcraft's care as the attending psychiatrist while he was in the Psychiatric Emergency Department, prior to his admission to the psychiatric unit. (Jamaica's Consol. 56.1 Statement, ¶ 79.)

227. Prior to purportedly examining Schoolcraft, Dr. Bernier reviewed the notes created by prior treating physicians and nurses, including, but not limited to, Dr. Lwin, Dr. Patel, Dr. Tariq and Dr. Slowick. (Bernier's Consol. 56.1 Statement, ¶ 31.)

228. Dr. Bernier's notes suggest that she examined Schoolcraft at Jamaica Hospital on November 2, 2009, at approximately 3:10 pm, but Schoolcraft denies she actually examined him. (Bernier's Consol. 56.1 Statement, ¶ 30.)

229. Dr. Bernier sought a second opinion from Dr. Dhar concerning Schoolcraft. (Bernier's Consol. 56.1 Statement, ¶ 33.)

230. Dr. Bernier was not directly told by anyone from the NYPD, or anyone acting on their behalf, to keep Schoolcraft at Jamaica Hospital against his will. Schoolcraft contends that she reviewed Schoolcraft's hospital file which indicated the NYPD's wish to keep Schoolcraft in the hospital. (Bernier's Consol. 56.1 Statement, ¶ 34.)

495 231. Dr. Bernier never spoke with the Sergeant James, or any other officer, who *495 is identified in the notes of prior treating physicians. (Bernier's Consol. 56.1 Statement, ¶ 35.)

232. Dr. Bernier never spoke with any police officer concerning Schoolcraft. (Bernier's Consol. 56.1 Statement, ¶ 36.)

233. Dr. Bernier never spoke with Dr. Lamstein concerning Schoolcraft. (Bernier's Consol. 56.1 Statement, ¶ 37.)

234. Dr. Bernier never falsified any medical records concerning Schoolcraft. (Bernier's Consol. 56.1 Statement, ¶ 42.)

235. As Schoolcraft's attending, Dr. Bernier supervised the residents who evaluated Schoolcraft in the Psychiatric Emergency Room prior to admission, and she had the ultimate responsibility to care for Schoolcraft during her shift. (Jamaica's Consol. 56.1 Statement, ¶ 80.)

236. On November 3, 2009 at 8:54 a.m., Dr. Bernier ordered Schoolcraft's involuntary hospitalization. (Pl.'s Consol. 56.1 Statement, ¶ 105.)

237. Dr. Bernier determined that Schoolcraft was a danger to himself because he was psychotic and paranoid, and would benefit from in-patient stabilization. Schoolcraft contends that her determination was not *bona fide* as it was not based on her own examination. (Jamaica's Consol. 56.1 Statement, ¶ 81.)

238. Dr. Bernier indicated that she agreed with the previous evaluation by resident Dr. Tariq. (Jamaica's Consol. 56.1 Statement, ¶ 82.)

239. Dr. Bernier made the decision to admit the patient to the psychiatric unit of Jamaica Hospital. (Jamaica's Consol. 56.1 Statement, ¶ 84.)

240. On November 3, 2009 at 1:20 p.m., Dr. Bernier completed the Emergency Admission Form mandated by Mental Hygiene Law § 9.39. (Jamaica's Consol. 56.1 Statement, ¶ 83; Isakov's Consol. 56.1 Statement, ¶ 3.)

241. The Policies and Procedures regarding restraints are from the Policy and Procedure Manual from the Psychiatric Emergency Department of Jamaica Hospital. (Jamaica's Consol. 56.1 Statement, ¶ 109.)

242. The written policy regarding the criteria for involuntary hospitalization is identical to the language in the Mental Hygiene Law. (Jamaica's Consol. 56.1 Statement, ¶ 111.)

243. Dr. Bernier provided Schoolcraft with written notice of his status and rights as an admitted patient on November 3, 2009. (Jamaica's Consol. 56.1 Statement, ¶ 85.)

244. In October and November of 2009, Dr. Isakov was an attending physician at Jamaica Hospital. (Jamaica's Consol. 56.1 Statement, ¶ 5.)

245. On November 4, 2009, Dr. Isakov confirmed Dr. Bernier's decision to involuntarily hospitalize Schoolcraft. (Pl.'s Consol. 56.1 Statement, ¶ 108.)

246. On November 4, 2009, Dr. Isakov co-signed the Emergency Admission Form that was previously completed by Dr. Bernier. (Jamaica's Consol. 56.1 Statement, ¶ 86; Isakov's Consol. 56.1 Statement, ¶ 4.)

247. Dr. Isakov also wrote the psychiatric admission note on November 4, 2009. (Jamaica's Consol. 56.1 Statement, ¶ 87.)

248. IAB visited Schoolcraft twice while he was in Jamaica Hospital. (Mauriello's Consol. 56.1 Statement, ¶ 136.)

249. Dr. Isakov was at a family meeting with Schoolcraft and Schoolcraft's father ("Family Meeting"). Present at the Family Meeting was an officer from the IAB, who Schoolcraft had requested attend, and a licensed mental health social worker, Colleen McMahon. (Isakov's Consol. 56.1 Statement, ¶ 7; Jamaica's Consol. 56.1 Statement, ¶ 88.)

496 *496 250. The Family Meeting was tape recorded. (Isakov Aff. 11.) The IAB officer did not request, pressure or influence Dr. Isakov's independent medical judgment concerning Schoolcraft. (Isakov's Consol. 56.1 Statement, ¶ 8.)

251. Dr. Isakov requested permission from Schoolcraft to obtain a copy of his prior records from the police psychologist who had ordered taking his gun away. That request was denied by Schoolcraft. (Isakov's Consol. 56.1 Statement, ¶ 9.)

252. Dr. Isakov noted that Schoolcraft told him that he had not been happy with how the police department was being run since his career started, that he had made multiple complaints which had not been addressed, and that, instead, he was "declared" emotionally "unstable." (Jamaica's Consol. 56.1 Statement, ¶ 89.)

253. Dr. Isakov's notes indicate that Schoolcraft told Dr. Isakov that his gun had been taken away from him after a psychiatric evaluation was performed by an NYPD psychologist, and that, since then, he has started to collect the "evidence" to "prove his point," but then he became suspicious that "they are after him." (Jamaica's Consol. 56.1 Statement, ¶ 90.)

254. Dr. Isakov's notes indicate that Dr. Isakov found Schoolcraft to be suspicious, guarded, restless, and noted that Schoolcraft demanded to be discharged. Schoolcraft contends that this was not Dr. Isakov's genuine belief. (Jamaica's Consol. 56.1 Statement, ¶ 91.)

255. Dr. Isakov's notes indicate that Schoolcraft denied suicidal and homicidal ideation, but Dr. Isakov noted that Schoolcraft expressed questionably paranoid ideas about conspiracies and cover-ups in his precinct. Schoolcraft contends that this was not Dr. Isakov's genuine belief. (Jamaica's Consol. 56.1 Statement, ¶ 92.)

256. Dr. Isakov noted that Schoolcraft's cognition and memory were intact, but that his judgment and insight were limited. Schoolcraft contends that this was not Dr. Isakov's genuine belief. (Jamaica's Consol. 56.1 Statement, ¶ 93.)

257. Dr. Isakov's diagnosis was Psychosis NOS, Rule Out Adjustment Disorder with Anxiety. Schoolcraft contends that this was not Dr. Isakov's genuine belief. (Exhibit U, p. 95; Pl.'s R. 56.1 Responsive Statement p. 83, ¶ 94).

258. On November 5, 2009, Dr. Isakov performed an evaluation of Schoolcraft, which Schoolcraft contends was unnecessary and not properly performed. (Jamaica's Consol. 56.1 Statement, ¶ 95.)

259. Dr. Isakov noted that although Schoolcraft "reiterated his story" and still wanted "to take steps/action against his precinct," he did not express any physical threats to anyone. (Jamaica's Consol. 56.1 Statement, ¶ 96.)

260. Dr. Isakov's notes indicate that Schoolcraft refused to give permission for anyone at Jamaica Hospital to speak with the police psychiatrist who had previously evaluated him, but agreed to see a psychotherapist after he was discharged. (Jamaica's Consol. 56.1 Statement, ¶ 97.)

261. On November 6, 2009, Dr. Isakov performed an evaluation of Schoolcraft, which Schoolcraft contends was unnecessary and not properly performed. (Jamaica's Consol. 56.1 Statement, ¶ 98.)

262. Dr. Isakov noted that Schoolcraft was compliant, was not in emotional distress, and was not expressing any paranoid ideation or making any threats. (Jamaica's Consol. 56.1 Statement, ¶ 99.)

263. Dr. Isakov indicated that Schoolcraft would be discharged after an appointment was made with an outside psychiatrist. (Jamaica's Consol. 56.1 Statement, ¶ 100.)

497 *497 264. Dr. Isakov composed Schoolcraft's Discharge Summary. (Jamaica's Consol. 56.1 Statement, ¶ 101.)

265. Dr. Isakov's discharge diagnosis was Adjustment Disorder with Anxious Mood. (Jamaica's Consol. 56.1 Statement, ¶ 103.)

266. Dr. Isakov discharged Schoolcraft with a recommendation to follow up with a psychotherapist and, if he became symptomatic, to see a psychiatrist for medication. Schoolcraft contends that Dr. Isakov illegally conditioned release on Schoolcraft's agreeing to see a psychiatrist. (Jamaica's Consol. 56.1 Statement, ¶ 102.)

267. Dr. Isakov's notes indicate that Schoolcraft verbalized an understanding of the recommendation that Schoolcraft consult with a psychiatrist once discharged. (Jamaica's Consol. 56.1 Statement, ¶ 104.)

268. On November 6, 2009, Jamaica Hospital released Schoolcraft from its custody. (Pl.'s Consol. 56.1 Statement, ¶ 112.)

269. There is no direct evidence that Deputy Chief Michael Marino spoke to any personnel from Jamaica Hospital, beyond the EMTs that arrived at Schoolcraft's home on October 31st. (Jamaica's Consol. 56.1 Statement, ¶ 100.)

270. There is no direct evidence that Captain Lauterborn spoke to any personnel from Jamaica Hospital, beyond the EMTs that arrived at Schoolcraft's home on October 31st. (Jamaica's Consol. 56.1 Statement, ¶ 113.)

271. There is no direct evidence that Lieutenant Caughey spoke to any personnel from Jamaica Hospital. (Jamaica's Consol. 56.1 Statement, ¶ 114.)

272. There is no direct evidence that DI Mauriello spoke to any personnel from Jamaica Hospital, beyond the EMTs that arrived at Schoolcraft's home on October 31st. (Jamaica's Consol. 56.1 Statement, ¶ 115.)

273. There is no direct evidence that Sergeant Huffman spoke to anyone at Jamaica Hospital regarding Schoolcraft. (Jamaica's Consol. 56.1 Statement, ¶ 116.)

274. There is no direct evidence that Lieutenant Hanlon spoke to anyone at Jamaica Hospital regarding Schoolcraft. (Jamaica's Consol. 56.1 Statement, ¶ 117.)

275. There is no direct evidence that Captain Trainer spoke to anyone at Jamaica Hospital about Schoolcraft. (Jamaica's Consol. 56.1 Statement, ¶ 118.)

276. There is no direct evidence that Lieutenant Gough spoke with anyone at Jamaica Hospital regarding Schoolcraft, beyond the EMTs that arrived at Schoolcraft's home on October 31st. (Jamaica's Consol. 56.1 Statement, ¶ 119.)

277. Sergeant Weiss never went to Jamaica Hospital and never directed anyone to say anything to anyone at Jamaica Hospital. (Jamaica's Consol. 56.1 Statement, ¶ 120.)

278. There is no direct evidence that Sergeant Duncan had any contact with anyone at Jamaica Hospital, beyond the EMTs that arrived at Schoolcraft's home on October 31st. (Jamaica's Consol. 56.1 Statement, ¶ 121.)

279. Lieutenant Broschart testified that until a physician evaluated Schoolcraft, he was in police custody. (Jamaica's Consol. 56.1 Statement, ¶ 123.)

230. Sergeant James denied having any contact with anyone at Jamaica Hospital. (Jamaica's Consol. 56.1 Statement, ¶ 124.)

281. Dr. Roy Lubit ("Dr. Lubit") has been retained by Schoolcraft as a psychiatric expert. Pursuant to his retention, Dr. Lubit issued an expert report. (Bernier's Consol. 56.1 Statement, ¶ 43.)

498 282. In his report, Dr. Lubit claims Dr. Bernier committed malpractice, in part, *498 due to her failure to gather information about Mr. Schoolcraft, including speaking with IAB and other key collaterals such as the police. (Bernier's Consol. 56.1 Statement, ¶ 44.)

**K.** ***Events Subsequent to Release from Jamaica Hospital***

283. Schoolcraft was re-suspended for refusing to return to work after he was released from JHMC on November 6, 2009. (City's Consol. 56.1 Statement, ¶ 71.)

284. After his discharge, Schoolcraft consulted with Dr. Steven Luell ("Dr. Luell"), a private physician. (Jamaica's Consol. 56.1 Statement, ¶ 105.)

285. According to Dr. Luell's report, Schoolcraft complained of stomach distress, anxiety, difficulty relaxing and insomnia, and his mood was depressed. (Jamaica's Consol. 56.1 Statement, ¶ 106.)

286. Dr. Luell diagnosed Schoolcraft with Adjustment Disorder with Mixed Emotional Features, Rule Out Obsessive Compulsive Personality Disorder, and recommended that Schoolcraft undergo a comprehensive psychiatric evaluation and counseling. (Jamaica's Consol. 56.1 Statement, ¶ 107.)

287. Schoolcraft did not follow those recommendations. (Jamaica's Consol. 56.1 Statement, ¶ 108.)

288. Schoolcraft met with NYPD representatives from IAB in his Queens apartment on November 6, 2009. (Mauriello's Consol. 56.1 Statement, ¶ 137.)

289. At the meeting with IAB, Schoolcraft recounted the events of October 31, 2009. (Mauriello's Consol. 56.1 Statement, ¶ 138.)

290. Schoolcraft provided the IAB officers with the recordings he had made of the events in his apartment on October 31, 2009. (Mauriello's Consol. 56.1 Statement, ¶ 139.)

291. Following the IAB meeting in his Queens apartment, Schoolcraft was contacted by IAB and told IAB wanted to revisit his apartment. They met again on November 9, 2009, together with Schoolcraft's father. (Mauriello's Consol. 56.1 Statement, ¶ 140.)

292. The IAB officers discussed the existence of a weapon in the apartment. IAB had learned of the weapon from the recording of the two NYPD entries on October 31, 2009, in which Schoolcraft discusses the weapon with his father and they agree he should hide it under his mattress before the NYPD makes its first entry. After denying there were any weapons on the premises, Schoolcraft ultimately acknowledged he had a weapon. (Mauriello's Consol. 56.1 Statement, ¶ 141.)

293. Schoolcraft turned the shotgun over to IAB. (Mauriello's Consol. 56.1 Statement, ¶ 142.)

294. After Schoolcraft was released from Jamaica Hospital, he moved to Johnstown, New York. (Pl.'s Consol. 56.1 Statement, ¶ 113.)

295. In December 2009, the NYPD's Brooklyn North Investigations Unit ("BNIU") made its first attempt to contact Schoolcraft upstate (SAC ¶ 216), and continued to do so thereafter. (Mauriello's Consol. 56.1 Statement, ¶ 144.)

296. According to DI Mauriello, at no time did BNIU or IAB inform DI Mauriello of their actions or seek to consult with him in any way about their efforts to contact Schoolcraft. (Mauriello's Consol. 56.1 Statement, ¶ 147.)

297. Schoolcraft chose not to speak with the visiting NYPD personnel. It thus became clear he had no interest in communicating further with the NYPD. (Mauriello's Consol. 56.1 Statement, ¶ 146.)

499 298. Schoolcraft did not attend any disciplinary hearing for disclosing or attempting *499 to disclose NYPD corruption and police misconduct. (City's Consol. 56.1 Statement, ¶ 101.)

299. Schoolcraft decided after his October 31, 2009 involuntary commitment to go to the media. (City's Consol. 56.1 Statement, ¶ 72.)

300. Schoolcraft contends that Brooklyn North Investigations Unit officers were sent to Officer Schoolcraft's Johnstown residence on eight separate occasions, while the City Defendants contend that they visited six times. Schoolcraft further contends that Captain Timothy Trainer ("Captain Trainer") also arranged for the local police on four occasions to "visit" Schoolcraft's upstate home. The parties agree that Schoolcraft opened the door of his upstate home only once to accept an NYPD delivery. (City's Consol. 56.1 Statement, ¶¶ 63, 65.)

301. In January 2010 and in February 2010, Lieutenant Gough and Sergeant Duncan traveled with others north over 200 miles to his home to deliver papers to him. (Pl.'s Consol. 56.1 Statement, ¶ 114.)

302. According to Schoolcraft, the Defendants' purported visits to his upstate residence spurred him to speak to the media. (See citations in City's Consol. 56.1 Statement, ¶ 83.)

303. A Daily News reporter contacted Schoolcraft within a month after Schoolcraft's suspension. (City's Consol. 56.1 Statement, ¶ 76.)

304. Schoolcraft corresponded with reporters and attorneys via e-mail for "a couple years" beginning in 2010. (City's Consol. 56.1 Statement, ¶ 77.)

305. Schoolcraft spoke numerous times with The Daily News, This American Life, and The Village Voice in late 2009 and/or early 2010 through 2012. (City's Consol. 56.1 Statement, ¶ 78.)

306. Schoolcraft wrote a summary of his JHMC confinement and provided that summary to The Village Voice, The Daily News, and his various attorneys. (City's Consol. 56.1 Statement, ¶ 79.)

307. Schoolcraft began communicating with The Village Voice reporter Graham Rayman ("Rayman") in early 2010 and continued to communicate with him through the summer of 2012. (City's Consol. 56.1 Statement, ¶ 80.)

308. Schoolcraft gave copies of recordings of individuals within his command to Rayman and Schoolcraft's attorneys. (City's Consol. 56.1 Statement, ¶ 81.)

309. Schoolcraft spoke with Rayman "a couple dozen times" from early 2010 through 2012. (City's Consol. 56.1 Statement, ¶ 83.)

310. As of October 2012, Schoolcraft had given at least six or seven interviews to the media. (City's Consol. 56.1 Statement, ¶ 84.)

311. Schoolcraft contacted State Senator Hugh T. Farley in 2010. (City's Consol. 56.1 Statement, ¶ 85.)

312. Schoolcraft contacted New York City Councilman Albert Vann in 2010. (City's Consol. 56.1 Statement, ¶ 86.)

313. Schoolcraft contacted New York City Councilman Peter Vallone in 2010. (City's Consol. 56.1 Statement, ¶ 87.)

314. Schoolcraft contacted the Queens District Attorney in late 2009 or early 2010. (City's Consol. 56.1 Statement, ¶ 88.)

315. Schoolcraft contacted the United States Department of Justice. (City's Consol. 56.1 Statement, ¶ 89.).

316. Schoolcraft contacted plaintiff's counsel in a stop-and-frisk case recently tried before the Honorable Shira A. Scheindlin, *Floyd v. City of New York,* 08 CV 1034(SAS), and provided supporting affidavits. (City's Consol. 56.1 Statement, ¶ 90.)

500 *500 317. DI Mauriello was a witnesses in *Floyd.* During his testimony, DI Mauriello stated that after the quota allegations were made against him as the commanding officer of the 81st Precinct, he was transferred to become the Executive Officer of Transit Borough Brooklyn and Queens on July 3, 2010. According to DI Mauriello's testimony, at the time of the transfer, the Chief of Patrol for the entire NYPD told DI Mauriello that he was doing a "really good job at the 81st Precinct." However, Mauriello contends that the Chief of Patrol's comments constituted a conciliatory gesture given Mauriello's disappointment with the transfer, rather than a statement suggesting that the transfer was a reward. (Pl.'s Consol. 56.1 Statement, ¶ 115.)

318. DI Mauriello considered the transfer to Executive Officer in Transit to be a position as "second commander to more officers." (Pl.'s Consol. 56.1 Statement, ¶ 116.)

319. In his deposition in this case, DI Mauriello testified that soon after the news broke in a February 2010 Daily News article about the investigation into downgrading major crimes at the 81st Precinct, he attended a Patrol Borough Brooklyn North supervisors' meeting. At the meeting his direct supervisor, Deputy Chief Marino, told DI Mauriello not to worry about the negative press because he did not believe it. (Pl.'s Consol. 56.1 Statement, ¶ 119.)

320. In addition, according to DI Mauriello, Deputy Chief Marino and the thirty-five other supervisors in the room told DI Mauriello that they supported him. (Pl.'s Consol. 56.1 Statement, ¶ 120.)

321. DI Mauriello testified that he had discussions in the summer of 2011 with his now-retired supervisor, Transit Bureau Chief Diaz, and his successor, Joseph Fox, who told him that any transfers or promotions would likely have to wait until the case is over and that until then they could not "push for him." (Pl.'s Consol. 56.1 Statement, ¶ 122.)

322. All parties save DI Mauriello do not dispute that DI Mauriello has not suffered any damage to his status at the NYPD as a result of Schoolcraft's actions. (Pl.'s Consol. 56.1 Statement, ¶ 118.)

323. After October 31, 2009, IAB began an investigation into whether DI Mauriello knew about or suspected at the time of his entry into Schoolcraft's home that IAB or QAD was investigating the 81st Precinct. IAB also investigated whether DI Mauriello knew about the contents of Schoolcraft's memo book at the time he entered the apartment. (Pl.'s Consol. 56.1 Statement, ¶ 126.)

324. IAB has recommended that formal charges against DI Mauriello be filed, and those charges are still pending. (Pl.'s Consol. 56.1 Statement, ¶ 128.)

325. In 2010, QAD issued a report on its investigation, stating: "In summary, although some upgrades were made during the course of 2008 and 2009, the findings illustrate severe deficiencies in the overall crime reporting process as a whole beginning with the initial interaction of complainants attempting to file reports, the supervisor's review and finalization of the reports submitted and continuing with inordinate delay in changing, improper classifications. These conclusions, coupled with the significant amount of reports found not to have been entered into the Omni–System is disturbing." (Pl.'s Consol. 56.1 Statement, ¶ 129.)

**III. *APPLICABLE STANDARD***

Summary judgment is appropriate only where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A dispute is "genuine" if "the
501 evidence is such that a reasonable *501 jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The relevant inquiry on application for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52, 106 S.Ct. 2505. A court is not charged with weighing the evidence and determining its truth, but with determining whether there is a genuine issue for trial. *Westinghouse Elec. Corp. v. N.Y. City Transit Auth.,* 735 F.Supp. 1205, 1212 (S.D.N.Y.1990) (quoting *Anderson,* 477 U.S. at 249, 106 S.Ct. 2505).

## IV. *CONSTITUTIONAL LAW CLAIMS RELATING TO CITY DEFENDANTS AND DI MAURIELLO*

### A. *Fourth Amendment Claims Survive Summary Judgment*

Plaintiff and City Defendants[4] both seek judgment as a matter of law with respect to Schoolcraft's Fourth Amendment claims relating to the NYPD's October 31st warrantless entry into Schoolcraft's home, the subsequent search and seizure of his apartment, and forcible removal of Schoolcraft from his apartment after classifying him as an Emotionally Disturbed Person. *See generally* Pl.'s Mem. in Supp't 34–44; City Defs.' Mem. in Supp't 1–6.

4 Mauriello joins City Defendants on this point of law, and the determinations below therefore apply equally to him. *See* Mauriello Mem. in Opp'n 27–28.

#### i. NYPD's Initial Entry into Schoolcraft's Home

As the Supreme Court has repeatedly instructed, warrantless entry inside a home is permitted only under exigent circumstances. *See Georgia v. Randolph,* 547 U.S. 103, 109, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006) (warrantless entry per se unreasonable); *Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (same); *Coolidge v. New Hampshire,* 403 U.S. 443, 477–78, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (same); *see also Terry v. Ohio,* 392 U.S. 1, 39 n. 4, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (warrantless search *per se* unreasonable); *United States v. Martino,* 664 F.2d 860, 869 (2d Cir.1981). One category of exigent circumstances, at issue in this case, relates to instances where entry is reasonably believed necessary to "render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City, Utah v. Stuart,* 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006); *Minnesota v. Olson,* 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990); *Tierney v. Davidson,* 133 F.3d 189, 196 (2d Cir.1998). "[D]etermination of exigent circumstances is an objective one based on the totality of the circumstances confronting law enforcement agents." *United States v. MacDonald,* 916 F.2d 766, 772 (2d Cir.1990); *see also Tierney,* 133 F.3d at 196. Courts consider "the facts, as they appeared at the moment of entry, would lead a reasonable, experienced officer, to believe that there was an urgent need to render aid or take action." *United States v. Simmons,* 661 F.3d 151, 157 (2d Cir.2011) (internal quotations and citations omitted).

In this case, City Defendants contend Dr. Lamstein informed Captain Lauterborn that he " 'absolutely needed' to find Plaintiff and 'make sure that he was ok,' " thus satisfying the objective reasonableness of entry under the emergency aid doctrine as a matter of law. City Defs.' Mem. in Opp'n 7; City Defs.' Mem. in Supp't 3.
502 However, whether Dr. Lamstein actually made this statement to Captain *502 Lauterborn is plainly in dispute. *See* Section II of this Opinion (hereinafter "Facts") ¶ 92; *see also* Pl.'s Reply Mem. 24; Pl.'s Mem. in Opp'n 2–6. Contrary to the City Defendants' position, Dr. Lamstein's deposition transcript does not establish that she made those statements, and her affidavit offered as part of the City Defendants' reply to their summary

judgment motion does not render this issue indisputable. Dr. Lamstein's recollection and her earlier deposition testimony arguably conflict. Therefore, Dr. Lamstein's warning cannot serve as a basis for City Defendants' motion for summary judgment dismissing Schoolcraft's Fourth Amendment claim.

In support of his motion for summary judgment on the same issue, Schoolcraft contends that, even if the conversation between Dr. Lamstein and Captain Lauterborn took place as City Defendants contend, the record establishes that Deputy Chief Marino was not actually made aware of this conversation. Facts ¶ 123; Pl.'s Reply Mem. 25–26. The City Defendants counter that under the collective or imputed knowledge doctrine, which permits an officer to conduct a warrantless search or seizure based upon a colleague's objectively reasonable belief of exigent circumstances, Dr. Lamstein's warning to Captain Lauterborn is imputed to Deputy Chief Marino. City Defs.' Mem. in Opp'n 7–8 (citing *United States v. Colon,* 250 F.3d 130, 135 (2d Cir.2001)).

The collective knowledge doctrine is typically applied to warrantless searches and seizures, rather than warrantless entry, and the Second Circuit has not definitively ruled that the doctrine applies to exigent circumstances, such as under the emergency aid analysis at issue here. *See Anthony v. City of New York,* 339 F.3d 129, 136 n. 3 (2d Cir.2003) ("[b]ecause the record before us shows that [police officers] knew the substance of the 911 call when they [entered an apartment without a warrant], this case does not raise any issues regarding the scope of the "collective knowledge" doctrine, and we need not consider whether the warrantless entry would have been justified by exigent circumstances if the information provided to the 911 operator was never transmitted either to the police dispatcher or to the officers on the scene."). Nevertheless, other circuit and district courts have applied the doctrine under similar circumstances. *See, e.g., United States v. Russell,* 436 F.3d 1086, 1095 (9th Cir.2006) (applying the doctrine to the emergency aid situation); *James v. Chavez,* 830 F.Supp.2d 1208, 1261 (D.N.M.2011) *aff'd,* 511 Fed.Appx. 742 (10th Cir.2013) (collecting cases from the Ninth and Tenth Circuits, together with *Anthony* from the Second, and concluding: "Although the parties have not directed the Court's attention to, and the Court has not found, cases which discuss whether the collective-knowledge doctrine can be used to impute knowledge of exigent circumstances, the only authority which the Court has found has suggested that the collective-knowledge doctrine can be used."). While not settled law in this Circuit, it is concluded that the collective knowledge doctrine may be applied to exigent circumstance analysis, just as it applied to warrantless searches and seizures.

However, City Defendants are incorrect that "it is of no moment ... that Captain Lauterborn alone" knew of his conversation with Dr. Lamstein for the purpose of the collective knowledge doctrine. City Defs.' Mem. in Opp'n 7. The doctrine applies only where officers are in communication, sharing information relevant to the determination of exigent circumstances. *United States v. Cruz,* 834 F.2d 47, 51 (2d Cir.1987) ("The
503 determination of whether probable cause to arrest *503 exists can be based on the collective knowledge of all of the officers involved in the surveillance efforts because the various law enforcement officers in this investigation were in communication with each other."); *Toliver v. City of New York,* No. 10 CIV. 3165 PAC JCF, 2012 WL 7782720, at *6 (S.D.N.Y. Dec. 10, 2012) *report and recommendation adopted,* No. 10 CIV. 3165 PAC JCF, 2013 WL 1155293 (S.D.N.Y. Mar. 21, 2013) ("The [collective knowledge] doctrine applies if the officers involved are in communication with each other."); *Colon v. City of New York,* No. 11–CV–0173 MKB, 2014 WL 1338730, at *4 (E.D.N.Y. Apr. 2, 2014) (same). Here, the record does not establish whether other officers were aware of Dr. Lamstein's warning to Captain Lauterborn. *See* Facts ¶¶ 92, 123. Consequently, whether Dr. Lamstein made the statement to Captain Lauterborn, and whether Captain Lauterborn in turn communicated that information to his colleagues such that the collective knowledge doctrine may apply, present questions of fact barring summary judgment for the City Defendants.

Similarly, the question of whether the remaining basis for the initial entry constitute an objectively reasonable basis for warrantless entry cannot be resolved as a matter of law on this record. A jury could find that, "the facts, as they appeared at the moment of entry, would lead a reasonable, experienced officer, to believe that there was an urgent need to render aid or take action." *United States v. Simmons,* 661 F.3d 151, 157 (2d Cir.2011). A jury must determine whether the NYPD acted reasonably given that Schoolcraft, who had been placed on restricted leave without a gun or badge, had consulted a psychiatrist, left the 81st without formal approval and did not respond to telephone calls and numerous knocks on his door. *See* Facts ¶¶ 35, 39, 69–72, 104. Whether the officers' conduct was improperly motivated is a contended factual issue to be determined by a jury.

These issues of material fact apply equally to Defendants' qualified immunity defense. "Qualified immunity will attach to an officer's decision to enter a dwelling in response to perceived exigent circumstances so long as the conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kerman v. City of New York,* 261 F.3d 229, 236 (2d Cir.2001) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (internal quotations omitted)). City Defendants' qualified immunity defense is premised on a disputed fact: whether Dr. Lamstein instructed the NYPD to find Schoolcraft. *See* City Defs.' Mem. in Supp't 4 (citing *Anthony v. City of New York,* 339 F.3d 129 (2d Cir.2003)); City Defs.' Reply Mem. 5. As in *Kerman,* "objective reasonableness is a mixed question of law and fact when, as here, material historical facts are in dispute." *Kerman v. City of New York,* 374 F.3d 93, 111 (2d Cir.2004). The Plaintiffs' and Defendants' motions for summary judgment regarding Plaintiff's Fourth Amendment claim are consequently denied.

## ii. NYPD's Decision to Remain In Schoolcraft's Home

Similarly, judgment as a matter of law is inappropriate with respect to the NYPD's post-entry conduct. "The officer's post-entry conduct must be carefully limited to achieving the objective which justified the entry—the officer may do no more than is reasonably necessary to ascertain whether someone is in need of assistance and to provide that assistance." *Tierney v. Davidson,* 133 F.3d 189, 197–98 (2d Cir.1998); *accord United States v.*
504 *Andino,* 768 F.3d 94, 99 (2d Cir.2014). "For example, where officials enter private *504 property to fight a fire, the scope of the warrantless search is limited to that reasonably necessary to extinguish the blaze, determine the cause and origin of a fire, and ensure against rekindling." *Id.* (quoting *United States v. Klump,* 536 F.3d 113, 118 (2d Cir.2008) (internal quotations omitted)). As was the case with respect to the initial decision to enter without a warrant, the decision to remain is evaluated on a reasonableness standard.

Material issues of fact remain with respect to the reasonableness of the NYPD's continued presence in Schoolcraft's apartment. It is undisputed that when the NYPD asked Schoolcraft if he was all right within the first moments after warrantless entry, Schoolcraft responded "Yeah, I think so." Facts ¶ 129. When asked why he did not respond to the door and phone calls, Schoolcraft informed Deputy Chief Marino that he had taken some Nyquil and had not expected anyone to knock at his door. Facts ¶ 131. He then informed DI Mauriello that he was "fine." Facts ¶ 134. A factual issue remains as to whether continued presence by the NYPD was unreasonable.

The majority of justifications to which City Defendants point, i.e., Schoolcraft's refusal of medical treatment and his "rapid retreat" into his apartment after being escorted toward the waiting ambulance (City Defs.' Mem. in Opp'n 9) occurred after a trier of fact might conclude that the NYPD lacked a reasonably objective basis for remaining in Schoolcraft's home. At the time he refused to return to the 81st Precinct, Schoolcraft was indisputably alert and responsive, and he had not requested medical intervention beyond saying he had taken Nyquil and had left work because he was not feeling well. Facts ¶¶ 127–29, 131, 134. Following that exchange,

the officers present were not explicitly discussing Schoolcraft's 'wellbeing,' rather, they were reprimanding Schoolcraft for leaving without permission and ordering him back to the 81st Precinct in order to "investigate" why he had left. *See, e.g.,* Facts ¶ 136.

However, summary judgment is only appropriate where the party opposing summary judgment tells a story "which is blatantly contradicted by the record, so that no reasonable jury could believe it." *See Scott v. Harris,* 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). This is not the case here. Contrary to Schoolcraft's contention, his situation was not analogous to that of the plaintiff in *United States v. Sikut,* 488 F.Supp.2d 291, 312 (W.D.N.Y.2007). In *Sikut,* police officers unequivocally admitted that they remained in a residence following a warrantless entry after they stopped making an exigency determination. *Id.* It is under such circumstances that a court may, as a matter of law, hold that police officers' presence ceases being about the exigent circumstance. *See, e.g., id.* In Schoolcraft's case, City Defendants make no such admissions, and there is sufficient contradictory evidence in the record to require credibility determinations and weighing the evidence, precisely the type of analysis that cannot be undertaken on summary judgment. *Fischl v. Armitage,* 128 F.3d 50, 55–56 (2d Cir.1997). Consequently, the constitutionality of Defendants' decision to remain in Schoolcraft's apartment presents a triable issue.

## iii. Designation as an EDP

Finally, the validity of the NYPD's designation of Schoolcraft as an emotionally disturbed person ("EDP") also cannot be determined at the summary judgment stage.

Schoolcraft was declared an EDP pursuant to New York's Mental Hygiene Law. The statute permits an officer
505 to place a person who "appears to be mentally ill and *505 is conducting himself ... in a manner which is likely to result in a serious harm to the person or others" into custody. N.Y. Mental Hyg. Law § 9.41. The phrase "likely to result in serious harm" is defined as:

> (a) a substantial risk of physical harm to the person as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to himself or herself, or (b) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm.

*Id.* § 9.01.

A likelihood of serious harm determination is evaluated under "the same objective reasonableness standard that is imposed by the Fourth Amendment." *Kerman,* 374 F.3d at 100. Likelihood of serious harm can be evidenced by overt acts, attempts or threats of harm, or by "other conduct" such as neglect or refusal to care for oneself. *Boggs v. New York City Health & Hospitals Corp.,* 132 A.D.2d 340, 523 N.Y.S.2d 71, 89 (1987). However, refusal to accept medical treatment does not, by itself, establish that a person is dangerous to himself. *See Green v. City of New York,* 465 F.3d 65, 83 (2d Cir.2006). In *Green,* the Second Circuit considered a New York City Fire Department Lieutenant's decision to involuntarily transport a patient with amyotrophic lateral sclerosis and pneumonia that explicitly, and repeatedly, declined to go to the hospital after an episode of labored breathing. *See id.* at 69–73. Though not in the context of New York's Mental Hygiene Law, the Second Circuit noted that "dangerousness to oneself justifying [involuntary transport to a hospital] does not include a refusal to accept medical treatment." *Id.* at 83.

Here, material issues of fact, specifically whether Schoolcraft's behavior rose to the level of "other conduct demonstrating" that he was a danger to himself, remain. *See, Amato v. Hartnett,* 936 F.Supp.2d 416, 435 (S.D.N.Y.2013) (legality of civil confinement under Section 9.41 survives summary judgment where parties

dispute whether the patient refused medical care and whether he made a statement indicating intent to commit suicide); *Thomas v. City of New York,* No. 09 CIV 3162 CM HBP, 2010 WL 5490900, at *9 (S.D.N.Y. Dec. 22, 2010) (summary judgment inappropriate where parties dispute, *inter alia,* whether patient was yelling or cursing at officers).

The record is devoid of any homicidal or other violent behavior, or of suicidal or self-harming behavior on Schoolcraft's part. *See* N.Y. Mental Hyg. Law § 9.01. Therefore, as applied to Schoolcraft's case, the inquiry under the applicable sections of the law is whether the NYPD had probable cause to believe that: (1) Schoolcraft appeared to be mentally ill; and (2) manifested conduct demonstrating that he was dangerous to himself. *See id.* §§ 9.01, 9.41.

Triable issues of fact remain as to both prongs of this inquiry.[5] As noted above, the questions of whether Dr. Lamstein ever communicated her concerns to Captain Lauterborn, or whether he then disseminated that
506 information to colleagues at *506 the NYPD, are in dispute. *See* Section IV.B.i of this Opinion. Moreover, the recordings do not contain video so that evaluation of Schoolcraft's demeanor following the NYPD's warrantless entry is at issue. *See Cameron v. City of New York,* 598 F.3d 50, 60 (2d Cir.2010) (blurry and incomplete video footage evidence cannot be used to determine legality of arrest as a matter of law, since a possibility existed that the basis for arrest existed but was not visible in the footage).

> 5 City Defendants' brief appears to reproduce portions of *Bayne v. Provost* in support of the contention that these two inquiries "essentially become one" in Schoolcraft's situation. *Compare* Defs.' Mem. in Supp't 8 *with Bayne v. Provost,* No. 1:04 CV 44, 2005 WL 1871182, at *7 (N.D.N.Y. Aug. 4, 2005). In *Bayne,* the court held that the two prongs become one where a nurse practitioner confirmed her patient was suicidal. Here, by contrast, it is undisputed that Schoolcraft was never characterized as "suicidal" by a medical professional or any other person. The prongs in this case therefore remain distinct.

Summary judgment is also inappropriate where the evidence that is undisputed can reasonably be interpreted in opposing ways. For example, a jury may find that Schoolcraft's calm tone for the duration of the recordings conflicts with his arguably erratic conduct. Over the course of sixteen minutes, Schoolcraft stating he did not feel well, and then that he was fine, requesting medical care, walked to the ambulance following a diagnosis of elevated blood pressure, then turned around and reentered his home, again refusing medical care. Facts ¶¶ 134, 136, 138, 147, 149, 151. On the other hand, a jury may also find that such conduct was the result of having several officers in tactical gear enter his apartment and his suspension, so that Schoolcraft's conduct would not permit any reasonable officer to believe Schoolcraft satisfied either prongs of the substantial risk test. Facts ¶¶ 126, 142. Under such circumstances, a jury must determine whether the NYPD had probable cause to find Schoolcraft mentally ill and a danger to himself. *Cf. Higgins v. City of Oneonta,* 208 A.D.2d 1067, 617 N.Y.S.2d 566, 569 (1994) (Holding as a matter of law that confinement was justified "[g]iven [the police officers'] knowledge of plaintiff's longstanding hostility toward certain members of the Police Department and City officials, coupled with [his treating psychiatrist's] opinion that plaintiff was dangerous and the obvious threatening nature of plaintiff's phone calls"); *Bayne v. Provost,* No. 1:04 CV 44, 2005 WL 1871182, at *7 (N.D.N.Y. Aug. 4, 2005) (finding probable cause as a matter of law where a medical professional "persisted in her position that Plaintiff had made the threat of suicide").

City Defendants contend, in the alternative, that 'arguable probable cause' existed, rendering the NYPD's actions protected under qualified immunity. *See* City Defs.' Mem. in Supp't 9. "Arguable probable cause exists when a reasonable police officer in the same circumstances and possessing the same knowledge as the officer in question could have reasonably believed that probable cause existed in the light of well-established law." *Zellner v. Summerlin,* 494 F.3d 344, 369 (2d Cir.2007) (internal quotations and citations omitted). A judicial

finding of arguable probably cause can serve as the basis for granting summary judgment as to the affirmative defense of qualified immunity. *See generally id.* at 367–72. However, "a court may grant a motion for judgment as a matter of law only if it can conclude that, with credibility assessments made against the moving party and all inferences drawn against the moving party, a reasonable juror would have been compelled to accept the view of the moving party." *Id.* at 370–71 (internal citations and quotations omitted). Here, the record does not permit such a finding, and the issue must be submitted to a jury. The Plaintiffs' and Defendants' motions for summary judgment on Plaintiff's Fourth Amendment claim are denied.

**B. *First Amendment Claim Survives Summary Judgment***

City Defendants contend that Schoolcraft's First Amendment claim should be dismissed as a matter of law. City Defs.' Mem. in Supp't 10–15. Schoolcraft alleges that the City Defendants violated his First Amendment rights to report "corruption, misconduct and fraud" at the 81st Precinct by seizing his notes and other effects, having
507 *507 him involuntarily committed as an EDP, and harassing him at his upstate residence. *See* TAC ¶¶ 245–61. The Second Circuit has tailored the elements of a First Amendment claim to the factual context alleged. *Compare Curley v. Vill. of Suffern,* 268 F.3d 65, 73 (2d Cir.2001) *with Morrison v. Johnson,* 429 F.3d 48, 51 (2d Cir.2005). In either formulation, the first requirement is protected speech. *Williams v. Town of Greenburgh,* 535 F.3d 71, 76 (2d Cir.2008) ("Regardless of the factual context, we have required a plaintiff alleging retaliation to establish speech protected by the First Amendment.").

## i. Schoolcraft Engaged in Protected Speech

"[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos,* 547 U.S. 410, 417, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). A public employee, however, must "by necessity ... accept certain limitations on his or her freedom," because, his speech can "contravene governmental policies or impair the proper performance of governmental functions." *Id.* at 418–19, 126 S.Ct. 1951. The Second Circuit recently set out the applicable inquiry for determining whether a public employee's speech is protected under the First Amendment:

Initially, a court must determine "whether the employee spoke as a citizen on a matter of public concern. This step one inquiry in turn encompasses two separate subquestions: (1) whether the subject of the employee's speech was a matter of public concern and (2) whether the employee spoke 'as a citizen' rather than solely as an employee.

If the answer to either question is no, that is the end of the matter. If, however, both questions are answered in the affirmative, the court then proceeds to the second step of the inquiry, commonly referred to as the *Pickering* analysis: whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the public based on the government's needs as an employer."

*Matthews v. City of New York,* 779 F.3d 167, 172 (2d Cir.2015) (hereinafter "*Matthews IV* ") (citing *Garcetti,* 547 U.S. at 418, 126 S.Ct. 1951; *Jackler v. Byrne,* 658 F.3d 225, 235 (2d Cir.2011); *Lane v. Franks,* —— U.S. ——, 134 S.Ct. 2369, 2380, 189 L.Ed.2d 312 (2014); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (internal quotations and citations omitted)).

City Defendants first contend that Schoolcraft lacked a protected interest with respect to his post-suspension speech under the First Amendment because he was suspended rather than terminated on October 31, 2009. City Defs.' Mem. in Supp't 11., citing *Anemone v. Metro. Transp. Auth.,* No. 05 CIV. 3170(LAP), 2008 WL 1956284, at *16 (S.D.N.Y. May 2, 2008) *aff'd,* 629 F.3d 97 (2d Cir.2011). The facts in *Anemone* are

distinguishable from those in this case. Unlike Schoolcraft, the plaintiff in *Anemone* continued to describe himself as a "current" public employee even after his suspension. *Id.* Moreover, unlike Schoolcraft, the plaintiff in *Anemone* held the title of "Deputy Executive Director and Director of Security for the MTA," and the court found that he had engaged in speech pursuant to his official duties relating to security. *Id.* (internal quotations omitted). The City Defendants also do not attempt to square this Court's September 10, 2012 Opinion with their current argument. *See Schoolcraft v. City of New York,* No. 10 CIV. 6005 RWS, 2012 WL 3960118, at *8 (S.D.N.Y. Sept. 10, 2012) (hereinafter "*September 2012 Opinion* "). Indeed, the Court's September 2012 holding remains unaltered with respect to Schoolcraft's post-suspension speech:

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> Although the City Defendants contend that Plaintiff, notwithstanding his suspension was still a sworn law enforcement officer and employee of the NYPD, the fact that Plaintiff was suspended and, for the substantial majority of the time period relevant to the prior restraint claim, was hundreds of miles outside the NYPD's jurisdiction provides a sufficient factual basis for Plaintiff to allege that he sought to exercise his First Amendment rights "as a citizen," rather than "as a government employee."
>
> ...
>
> Plaintiff intended to speak, following his suspension from the NYPD, to the media and public at large about the NYPD's summons policy. This intended speech addressed a matter of public concern, and, because Plaintiff intended to speak to the media and public following his suspension, Plaintiff's speech was outside the scope of his official duties. Accordingly, the speech was protected by the First Amendment.

*Schoolcraft September 2012 Opinion,* 2012 WL 3960118, at *6, *8.

In opposition to the City Defendants' motion, Schoolcraft suggests that recent case law following the September 2012 Opinion favors extending his First Amendment claim to encompass "Schoolcraft's speech before his suspension." Pl.'s Mem. in Opp'n 20–22 (citing *Lane v. Franks,* —— U.S. ——, 134 S.Ct. 2369, 2380, 189 L.Ed.2d 312 (2014) (the *Garcetti* test is whether the speech falls within the scope of the employee's ordinary duties); *Hagan v. City of New York,* 39 F.Supp.3d 481 (S.D.N.Y.2014) (a public employee reporting improper conduct of supervisors and other official outside of the chain-of-command was not part of the employee's ordinary job responsibilities); and *Griffin v. City of New York,* 880 F.Supp.2d 384, 400 (E.D.N.Y.2012) (police officer's report of a colleague's misconduct to internal affairs not part of the chain of command and could qualify as protected speech)).

Though Schoolcraft does not detail the pre-suspension speech which he contends is now protected, he is presumably referring to Schoolcraft's pre-suspension internal reporting to his supervisors at the 81st Precinct and to his reports to IAB and QAD. *See* Pl.'s Ltr. dated March 17, 2015 requesting a pre-motion conference ("Schoolcraft's speech and conduct raising issues with IAB, QAD and his supervisors at the 81st Precinct, as well as his plans to report that misconduct to the Commissioner, are matters of public concern that are entitled to First Amendment protection before his October 31, 2009 suspension").[6]

> 6 To the extent that he is referring to Schoolcraft's refusal to adhere to arrest or summons quotas, this Court's September 2012 opinion made clear that such behavior does not constitute speech. *September 2012 Opinion,* 2012 WL 3960118, at *10.

In the September 2012 Opinion, this Court ruled that Schoolcraft could not base his First Amendment claims on his reporting up the chain of command or his reporting to internal affairs. *See September 2012 Opinion,* 2012 WL 3960118, at *6. The *September 2012 Opinion* relied upon the district court opinion in *Matthews v. City of New York,* No. 12 Civ. 1354(BSJ), 2012 WL 8084831, 2012 U.S. Dist. LEXIS 53213 (S.D.N.Y. Apr. 12,

2012) (hereinafter "*Matthews I* "), for the proposition that internal reporting of a quota policy is part of an officer's role and therefore not protected. When ultimately appealed, the Second Circuit recently vacated the District Court's ruling in *Matthews I*, holding that a patrolman's reporting on arrest and summons quota policy
509 is not "part-and- *509 parcel" of his role as a patrolman and therefore may constitute protected speech if the way in which the officer reported has a civilian analogue and if the speech relates to an issue of public concern. *See Matthews v. City of New York,* 779 F.3d 167, 171–76 (2d Cir.2015) (hereinafter "*Matthews IV* ").[7]

[7] The *Matthews IV* opinion was published after the parties' summary judgment briefs in support and opposition were due, but prior to the deadline for the parties' reply briefs. Procedurally, *Matthews IV* is an appeal of a second district court opinion, *Matthews v. City of New York,* 957 F.Supp.2d 442, 445 (S.D.N.Y.2013) (hereinafter "*Matthews III* "). *Matthews III* echoed the reasoning from *Matthews I* cited in this Court's *September 2012 Opinion,* that the Patrol Guide requirement made an officer's quota-related speech part of his duties as a public employee. *See Matthews III,* 957 F.Supp.2d at 459.

Considering Schoolcraft's situation in light of the Second Circuit's guidance in *Matthews IV,* the following conclusions are reached.[8] First, the record available here does not indicate that Schoolcraft played any role in setting policy, was expected to speak on policy, or had been consulted to formulate policy. Indeed, both plaintiffs had the same title of Patrolman and presumably substantially similar responsibilities which would not relate to this type of speech. *See* Facts ¶ 1; *Matthews IV,* 779 F.3d at 174. Second, the fact that an officer's allegations resulted in negative performance evaluations and other professional difficulties for the reporting officer "is not relevant to the narrow question of whether the officer was speaking as citizen or as a public employee." *Id.* at 170. Third, the NYPD Patrol Guide's duty to report misconduct does not support the conclusion that reporting corruption is part of Schoolcraft's role as a police officer, and is therefore unprotected. *Matthews IV,* 779 F.3d at 175. Fourth, whether Schoolcraft engaged in speech that had a "comparable civilian analogue" is relevant to establishing whether his speech was protected. *Id.*

[8] Unlike in *Matthews IV,* discovery in this case was not geared specifically toward establishing the elements of this inquiry and judgment as a matter of law cannot be rendered. *Cf. Matthews v. City of New York,* 488 Fed.Appx. 532, 533 (2d Cir.2012) (hereinafter "*Matthews II* ") (vacating and remanding *Matthews I* for discovery on whether the officer spoke pursuant to his official duties).

In light of *Matthews IV,* Schoolcraft's First Amendment claim extends to his pre-suspension speech. Like Officer Matthews, Schoolcraft's reports to QAD and Internal Affairs concerned precinct-wide summons and arrest quota policies. *Compare Matthews IV,* 779 F.3d at 174 *with* Facts ¶ ¶ 52–54. Also like Matthews, Schoolcraft raised issues of the quotas with his precinct's leadership. *Compare Matthews IV,* 779 F.3d at 169 (raising concerns about quotas twice with the precinct's commanding officer and once with another precinct executive) *with* Facts ¶¶ 13–17, 19–20 (raising the issue with 81st Precinct leadership at the February Appeal Meeting and with leadership in Brooklyn North command at the March Evaluation Meeting).

City Defendants' factual distinctions with respect the speech in which Matthews and Schoolcraft engaged do not alter the analysis above. *Cf.* City Defs.' Reply Mem. 13–19. On the issue of a civilian analog, it is admittedly difficult to imagine a civilian one for a patrolman's performance evaluation and appeal meetings. *See Weintraub v. Bd. of Educ. of City Sch. Distr. of City of N.Y.,* 593 F.3d 196, 203 (2d Cir.2010) (a teacher's choice to pursue his complaint by following the employee grievance procedure had no civilian analogue). However, Schoolcraft's speech is not limited to those channels. He also raised these issues with IAB on August
510 20th and with QAD on October 7th. Facts *510 ¶¶ 48, 52. At minimum, with respect to IAB, "any citizen may report wrongdoing to the IAB. Citizens are able and directed to file reports with the IAB in the exact same manner as NYPD officers." *Griffin v. City of New York,* 880 F.Supp.2d 384, 399 (E.D.N.Y.2012). Thus the IAB

reporting had a civilian analogue. Moreover, with respect to the QAD reporting, whether the public at large could have engaged in similar speech is not established on this record, and this will remain a question for trial. In sum, Schoolcraft's pre-suspension speech has civilian analogues.

The question of whether Schoolcraft's speech is part-and-parcel of his official duties is a more difficult one. The City Defendants contend that Schoolcraft's speech is distinguishable from Matthews's because Schoolcraft's pertained predominately to his own work, his own summons and arrest 'activity,' and to conduct at his own precinct. *See* City Defs.' Reply Mem. 16–17. They see Schoolcraft's speech as analogous to the teacher in *Weintraub,* whose "formal grievance regarding the administration's refusal to discipline a student was unprotected speech because a teacher's need to discipline his own students is essential to his ability to effectively run a classroom as part of his day-to-day responsibilities." *Weintraub v. Bd. of Educ. of City Sch. Dist. of City of New York,* 593 F.3d 196, 203 (2d Cir.2010) (cited in *Matthews IV,* 779 F.3d at 173). City Defendants also point to another pre-*Matthews* district court opinion, which held:

> [P]laintiffs' complaints to their superiors ... related to their concerns about their ability to properly execute their duties as police officers, as they expressed concern, *inter alia,* that the assignment of officers to chauffeur intoxicated officers left [their police department] short-handed, that the hiring of uncertified officers and the retention of unqualified and/or corrupt officers affected their ability to perform their job assignments safely and that they were told not to issue summonses to certain individuals and businesses. Plaintiffs' speech in challenging the ... defendants' alleged cover-ups of officer misconduct, including their complaints to the Suffolk County District Attorney's Office, was undertaken in the course of performing one of their core employment responsibilities of enforcing the law and, thus, was speech made pursuant to their official duties. Moreover, all of the relevant speech reflected plaintiffs' special knowledge about the [police] defendants which was gained as a result of plaintiffs' position as police officers for those defendants based upon what plaintiffs' observed or learned from their job.

*Carter v. Inc. Vill. of Ocean Beach,* 693 F.Supp.2d 203, 211 (E.D.N.Y.2010). The Second Circuit affirmed the lower court's ruling in *Carter* on the basis that "Plaintiffs' allegations establish no more than that they reported what they believed to be misconduct by a supervisor up the chain of command—misconduct they knew of only by virtue of their jobs as police officers and which they reported as "part-and-parcel of [their] concerns about [their] ability to properly execute [their] duties." " *Carter v. Inc. Vill. of Ocean Beach,* 415 Fed.Appx. 290, 293 (2d Cir.2011) (quoting *Weintraub,* 593 F.3d at 203). The Second Circuit cited *Weintraub* repeatedly in its *Carter* and *Matthews IV* opinions, and gave no indication of having invalidated or abrogated it. Consequently, the analysis here must apply both *Weintraub* and *Matthews IV* to Schoolcraft's facts.

A distinction between Matthews's and Schoolcraft's speech does exist. Matthews raised his concerns before he suffered professional backlash, while Schoolcraft reported the policies in the context of his professional evaluation, contending that he was being improperly faulted for failure to adhere to an invalid policy. *Compare*
511 **511 Matthews III,* 957 F.Supp.2d at 446 *with* Facts ¶¶ 14–15, 17, 19, 48–52. Matthews "chose a path that was available to ordinary citizens who are regularly provided the opportunity to raise issues with the Precinct commanders," while Schoolcraft initially spoke with commanders in relation to his performance evaluation. *Matthews IV,* 779 F.3d at 176; *cf.* Facts ¶¶ 14–15, 17, 19. In short, Schoolcraft's speech up the chain of command regarding his performance was closely related to his role as a public employee, focusing on the ramifications of the policy on his performance reviews. However, the same is not true with respect to Schoolcraft's reporting to QAD and IAB.

The QAD and IAB speech, in light of *Matthews,* is not part-and-parcel of Schoolcraft's role and is therefore protected. Schoolcraft complained of "corruption involving the integrity control program" in the 81st Precinct, mainly attributable to DI Mauriello, resulting "in violation of people's civil rights." Facts ¶¶ 48, 50. This is virtually identical to Matthews's speech about his own precinct, when Matthews stated that his own supervisors' policies were resulting in "unjustified stops, arrests, and summonses because police officers felt forced to abandon their discretion in order to meet their numbers and [were] having an adverse effect on the precinct's relationship with the community." *Matthews IV,* 779 F.3d at 174 (internal quotations omitted). Moreover, Schoolcraft reported this activity outside the chain of command, and separate from his appeal process. These circumstances distinguish Schoolcraft's speech from that in *Weintraub* and warrant the conclusion that his IAB and QAD reports constituted protectable speech outside of official duties under *Matthews IV.*

Having established that Schoolcraft's speech is protected, a *Pickering* analysis is required to determine "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the public based on the government's needs as an employer." *Matthews IV,* 779 F.3d at 172. Under the *Pickering* test, a government employer may take adverse employment action against its employee for speaking on a matter of public concern if: (1) the employer reasonably predicts the speech is disruptive; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech. *Locurto v. Safir,* 264 F.3d 154, 166 (2d Cir.2001).

It cannot be said that potential disruption stemming from reports of a quota policy outweigh the value of the speech. Imposition of quotas and manipulation of crime statistics, if true, are matters of general public concern that merit disclosure and discussion, whether through reports to internal affairs or larger dissemination to the media. Moreover, there is no indication on the record that the City Defendants took action due to the disruptive nature of Schoolcraft's speech. Indeed, the notion that such behavior would be disruptive to the NYPD is difficult to square with NYPD Patrol Guide § 207–21, which requires reporting of misconduct of this sort. *See September 2012 Opinion,* 2012 WL 3960118, at *6. At minimum, determining whether the City Defendants actions were "based on the potential for disruption rather than because of his speech" is a factual question unresolvable on summary judgment. *See Johnson v. Ganim,* 342 F.3d 105, 115 (2d Cir.2003)

Consequently, Schoolcraft's First Amendment claim now includes his pre-suspension speech to QAD and IAB, well as his post-suspension public statements to the press. A traditional First *512 Amendment free speech claim survives summary judgment where genuine issues of fact exist with respect to whether: (1) plaintiff has an interest protected by the First Amendment; (2) defendants' actions were motivated or substantially caused by his exercise of that right; and (3) defendants' actions effectively chilled the exercise of his First Amendment right. *Curley v. Vill. of Suffern,* 268 F.3d 65, 73 (2d Cir.2001). This standard applies to Schoolcraft's post-suspension speech, where he was acting as an ordinary citizen. *See September 2012 Opinion,* 2012 WL 3960118, at *6 ("the fact that Plaintiff was suspended and, for the substantial majority of the time period relevant to the prior restraint claim, was hundreds of miles outside the NYPD's jurisdiction provides a sufficient factual basis for Plaintiff to allege that he sought to exercise his First Amendment rights as a citizen, rather than as a government employee") (internal quotations omitted). However, where a public employee alleges an adverse employment action, the *Curley* formulation is disfavored. *Morrison v. Johnson,* 429 F.3d 48, 51 (2d Cir.2005) ("[w]here the plaintiff is a public employee alleging that he suffered an adverse employment action as retaliation for the exercise of his First Amendment rights, the standard is not the principle applied in *Curley.*" ). Rather, to survive summary judgment, a public employee alleging an adverse employment action must bring forth evidence showing that: (1) he has engaged in protected First Amendment activity; (2) he suffered an

adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action." *Id.; see also Anemone v. Metro. Transp. Auth.,* 629 F.3d 97, 114 (2d Cir.2011). This is the standard that applies to Schoolcraft's pre-suspension speech.

As noted above, the first prong for both types of speech has already been satisfied for the purpose of summary judgment. The analysis the follows addresses the remaining elements of the two tests.

## ii. Post–Suspension Free Speech Claim is Not Established

City Defendants contend that the record is devoid of proof of improper motivation, such that judgment as a matter of law in their favor is warranted. *See* City Defs.' Mem. in Supp't 11–13. "[P]articularized evidence of improper motive may include expressions by the officials involved regarding their state of mind, circumstances suggesting in a substantial fashion that the plaintiff has been singled out, or the highly unusual nature of the actions taken." *Blue v. Koren,* 72 F.3d 1075, 1084 (2d Cir.1995).

According to City Defendants, "is illogical to conclude that any defendant could have harbored an intent to prevent Plaintiff from going to the media with his allegations before his allegations became public in The Daily News on February 1, 2010." City Defs.' Mem. in Supp't 12. Whether a reasonable jury may conclude that the NYPD's numerous extra-jurisdictional trips to Schoolcraft's Johnstown residence following his release from Jamaica Hospital were unreasonable and "highly unusual," and constituted circumstantial proof of an improper motive, is a close question. *See Blue,* 72 F.3d at 1083–84, *see* Facts ¶ 300.

"[C]ourts are reluctant to decide issues of intent on a motion for summary judgment." *Vumbaca v. Terminal One Grp. Ass'n L.P.,* 859 F.Supp.2d 343, 380 (E.D.N.Y.2012) (citing *Johnson v. Ganim,* 342 F.3d 105, 117 (2d Cir.2003) (holding, in a case involving a constitutional tort, that "[w]here a factual issue exists on the issue of motive or intent, a defendant's motion for summary judgment on the basis of qualified immunity must fail")); *Nat'l Union* *513 *Fire Ins. Co. of Pittsburgh, Pa. v. Turtur,* 892 F.2d 199, 205 (2d Cir.1989) ("Questions of intent, we note, are usually inappropriate for disposition on summary judgment."); *Orange Lake Assocs., Inc. v. Kirkpatrick,* 825 F.Supp. 1169, 1177 (S.D.N.Y.1993) ("Cases in which the underlying issue is one of motivation, intent, or some other subjective fact are particularly inappropriate for summary judgment, as are those in which the issues turn on the credibility of the affiants."), *aff'd,* 21 F.3d 1214 (2d Cir.1994); *Sorensen v. City of New York,* No. 98 Civ. 3356, 2003 WL 169775, at *4 (S.D.N.Y. Jan. 23, 2003) ("It is well-settled that questions of intent in a variety of contexts cannot be resolved on a motion for summary judgment."). In this instance, the motive prong need not be resolved since a separate basis dismissal of the claim exists.

In the context of a private plaintiff, as Schoolcraft is post-suspension, a triable issue must exist with respect to an actual deprivation of the right of free speech in order for the post-suspension claim. In other words, to survive summary judgment, there must be evidence showing either that: (1) defendants silenced the plaintiff or (2) defendants' actions had some actual, non-speculative "chilling effect" on his speech. *Williams v. Town of Greenburgh,* 535 F.3d 71, 78 (2d Cir.2008). The record indicates that Schoolcraft spoke to several media outlets following the visits to his home. Indeed, he testified that the NYPD's conduct spurred him to action. His behavior, akin to the plaintiff in *Curley,* who exercised his First Amendment right notwithstanding what he alleged was unconstitutional government action coercion, justifies summary judgment in the City Defendants' favor. *See Curley,* 268 F.3d at 73. It is likewise similar to the plaintiff in *Williams v. Town of Greenburgh,* whose First Amendment claim dismissed on summary judgment where record showed that he spoke out against municipality after the municipality's allegedly unconstitutional coercive conduct. 535 F.3d 71, 78 (2d Cir.2008). Schoolcraft's First Amendment claim with respect to his post-suspension speech is consequently dismissed.

### iii. Pre–Suspension Speech Claim Survives Summary Judgment

Conversely, Schoolcraft's First Amendment claim with respect to his pre-suspension speech to IAB and QAD survives summary judgment. As found above, Schoolcraft's speech was protected. "Consequently, the two prongs that remain to be satisfied are whether he suffered an adverse employment action, and whether there was a causal connection between the protected activity and the adverse employment action." *See Anemone,* 629 F.3d at 114.

"[W]hether an undesirable employment action qualifies as being 'adverse' is a heavily fact-specific, contextual determination." *Zelnik v. Fashion Inst. of Tech.,* 464 F.3d 217, 226 (2d Cir.2006). Action adverse for the purposes of the First Amendment includes "discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand." *Id.* (internal quotations and citations omitted). On these facts, a reasonable jury may determine that Schoolcraft's suspension and the preceding conduct of the NYPD on October 31st would have dissuaded a reasonable officer from engaging in speech. *See, e.g., Kerman v. City of New York,* 261 F.3d 229, 242 (2d Cir.2001) ("an involuntary overnight trip to Bellevue has an obvious chilling effect").

A reasonable jury may likewise determine that there was a causal connection between Schoolcraft's reporting to IAB and QAD and his subsequent suspension. At the time of his suspension, Schoolcraft received a failing
514 evaluation *514 from his NYPD supervisors for his failing to adhere to arrest quotas. *See* Facts ¶ 6. When Schoolcraft challenged his evaluation, he alleges that he had been pretextually disciplined and placed on restricted duty. *See generally,* Facts ¶¶ 8, 27–47, 51. When Schoolcraft reported the existence of quotas and crime misclassifications to IAB, his supervisors were notified. Declaration of Nathaniel B. Smith dated February 11, 2015 Exhibit (hereinafter POX) 41 659:1–21. On October 31st, Schoolcraft's memo book containing entries which he believed reflected corruption was taken from him for several hours, and the officer that took the book began behaving strangely toward Schoolcraft. Facts ¶ 67. Later that day, the NYPD surrounded Schoolcraft's home, entered without a warrant, suspended him, and declared him an EDP. *See generally,* Facts ¶ ¶ 115–174.

In sum, Schoolcraft's First Amendment claim on the basis of his pre-suspension speech survives summary judgment.

### iv. Qualified Immunity Attaches to the First Amendment Claim

City Defendants contend that Schoolcraft's First Amendment retaliation claim is barred under the doctrine of qualified immunity. As the Second Circuit explained:

> Qualified immunity shields officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A right is "clearly established" when the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right. Though a mere mistake in the performance of an official duty may not deprive the officer of the defense, the qualified immunity doctrine does not shield performance that either was in violation of clearly established law or was plainly incompetent.

*Jackler v. Byrne,* 658 F.3d 225, 242–43 (2d Cir.2011). As discussed above, and particularly in light of this Court's contrary *September 2012 Opinion,* Schoolcraft's protected First Amendment right to report to IAB and QAD was not clearly established at the time it was made. Consequently, the First Amendment Claim cannot be pleaded against any officers in their individual capacities.

**C. *Monell Claims against City Defendants Survive Summary Judgment***

City Defendants contend that Plaintiff's municipal liability claims should be dismissed as a matter of law for failure to satisfy any of the bases of liability under *Monell v. Dep't of Soc. Servs. of City of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *See generally,* City Defs.' Mem. in Supp't 30–48; City Defs.' Reply Mem. 36–44. Plaintiff responds that the record supports two of *Monell's* grounds for municipal liability and that dismissal at this stage is therefore inappropriate. *See generally,* Pl.'s Mem. in Opp'n 72–83.

The parties agree that a valid claim for municipal liability under § 1983 exists under *Monell* if a plaintiff can show, *inter alia:* (1) "the existence of an unlawful practice by subordinate officials so permanent and well settled to constitute 'custom or usage,' with proof that this practice was so manifest as to imply the acquiescence of policy-making officials; or (2) a failure to train or supervise that amounts to 'deliberate indifference' to the rights of those with whom the municipality's employees interact. City Defs.' Mem. in Supp't 31 (citing *Monell,* 436 U.S. at 690, 98 S.Ct. 2018); Pl.'s Mem. in Opp'n 73 (citing *Patterson v. Cnty. of Oneida,*
515 *N.Y.,* 375 F.3d 206, 226 (2d Cir.2004); *Cash v. County of Erie,* 654 F.3d 324, 334 (2d Cir.2011); *515 *Okin v. Village of Cornwall–On–Hudson Police Dep't,* 577 F.3d 415, 439 (2d Cir.2009)). Additionally, a Plaintiff must demonstrate that the municipality's policy or custom caused the deprivation of the injured Plaintiff's federal or constitutional rights. *See, e.g., Monell,* 436 U.S. 658, 690–91, 98 S.Ct. 2018; *City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *Sarus v. Rotundo,* 831 F.2d 397, 400 (2d Cir.1987).

*Monell* claims can be brought against a municipality notwithstanding the fact that the same claims were barred by the doctrine of qualified immunity as asserted against individual officers. *See Askins v. Doe No. 1,* 727 F.3d 248, 254 (2d Cir.2013) ("[T]he entitlement of the individual municipal actors to qualified immunity because at the time of their actions there was no clear law or precedent warning them that their conduct would violate federal law is also irrelevant to the liability of the municipality.... Municipalities are held liable if they adopt customs or policies that violate federal law and result in tortious violation of a plaintiff's rights, regardless of whether it was clear at the time of the adoption of the policy or at the time of the tortious conduct that such conduct would violate the plaintiff's rights.") (internal citations and quotations omitted); *Amore v. Novarro,* 624 F.3d 522, 535–536 (2d Cir.2010) (same); *Vives v. City of New York,* 524 F.3d 346, 350 (2d Cir.2008) (same); *see also Owen v. City of Independence,* 445 U.S. 622, 650, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). Consequently, the analysis below applies to both the Fourth and First Amendment claims discussed in Sections IV.A and IV.B of this Opinion.

## i. Well–Settled Custom

*Monell* liability attaches where the existence of an unlawful practice by subordinate officials is so permanent and well settled that it constitutes a "custom or usage," with proof that this practice was so manifest as to imply the acquiescence of policy-making officials. *See City of St. Louis v. Praprotnik,* 485 U.S. 112, 127–30, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Sorlucco v. New York City Police Dep't,* 971 F.2d 864, 871 (2d Cir.1992). "A persistent practice may constitute municipal policy whether it is carried out by the policymakers themselves, by other high-ranking officials, or even by subordinate employees." *Id.* "However, before the actions of subordinate city employees can give rise to § 1983 liability, their discriminatory practice must be so manifest as to imply the constructive acquiescence of senior policy-making officials." *Id.*

Schoolcraft points to two categories of evidence that he contends demonstrates a policy or custom sufficient to survive summary judgment. The first relates to expert testimony and reports regarding the existence of what has been termed the "blue wall of silence" (or "Wall"). *See* POX 1. Plaintiff's experts, Drs. Eli B. Silverman and John A. Eterno described the Wall as "a police culture that prizes intense loyalty, unity and solidarity among police officers to the extent that any officer reporting the wrongdoing of another officer would be in violation of the code and subject to retaliation." *Id.* at 8. Officers that violate the code are labelled "rats." *Id.* at

9. The experts further testified that the Wall has been found to be an issue with the NYPD in the past, first in the 1970s by the Knapp Commission and then in the 1990s by the Mollen Commission. *Id.* Plaintiff's experts also described their own 2008 and 2012 surveys of NYPD officers, which found "widespread pressure on officers" to write summonses, make arrests, and conduct forcible stops. *Id.* at 14. The report concludes that Schoolcraft was a "victim" of the Wall and of the pressure put on the NYPD to generate favorable crime statistics. *Id.* at 25–26.

516 Schoolcraft also offered the Mollen Commission report, which found that officers *516 reporting corruption at the NYPD were labeled "rats," and the label resulted in professional and interpersonal harm coming to the officer, as well as the testimony of former Police Commissioner Raymond Kelly regarding the Wall. *See* POX 36 at 54–56 (providing examples of retaliatory conduct); POX 37 at 211 (Kelly testimony on Wall). Schoolcraft next pointed to an IAB report entitled "Police Corruption and Culture," published by IAB's Corruption and Analysis Unit. *See* POX 38. In its report, IAB noted that "[p]hysical fear surfaced several times during the discussion on reporting corruption" in the context of police officer focus groups run by IAB. *Id.* at 44. The report noted views diverged by rank on the issue of whether officers were reluctant to report misconduct. *Id.* at 9. This fear of retaliation related to both serious and less serious officer misconduct. *Id.* at 8–9.

The second category of evidence offered by Schoolcraft to prove a custom or policy involves officer testimony and accounts of the Wall. This category includes recent incidents of purported retaliatory conduct involving other NYPD officers who revealed crime statistics manipulation. *See generally,* Pl.'s Mem. in Opp'n 77–80. Schoolcraft points to the testimony of two officers from *Floyd v. City of New York,* 08 Civ. 1034. *See generally* POX 40, POX 41. Officer Adhyl Polanco testified in *Floyd* that he was declared an EDP, had his gun and shield taken away and was suspended after he reported on the quota system in September of 2011. POX 40 540:1–22. Officer Pedro Serrano testified that he was retaliated against and labeled a rat after he spoke out against quotas at his precinct, starting with internal discussions with precinct supervisors in 2007. POX 41 659:1–21. Schoolcraft further contends that Officer Craig Matthews, plaintiff in a separate case, was also retaliated against after voicing his concerns about quotas. *Id.* at 79–80. Finally, this category includes Lieutenant Joseph Ferrara's testimony relating to Schoolcraft's reporting to IAB and the NYPD's response. *See generally* POX 39. Ferrara testified that Mauriello characterized Schoolcraft as a "rat" at supervisory meetings of the 81st Precinct. *Id.* at 56:15–17, 58:10–17, 192:8–25. Ferrara also testified about his reluctance to report officer misconduct, which was motivated by a concern that he would be retaliated against by the NYPD. *Id.* at 79:1–10. Finally, Ferrara testified that he overheard that the precinct telephone switchboard operator left a message for Schoolcraft improperly revealing that IAB had called him. *Id.* at 193:12–18.

City Defendants contend that the reports on retaliation for reporting of police misconduct are too old to be relevant as a matter of law, and they also raise several admissibility objections to the reports. *See* City Defs.' Reply Mem. 37–38. City Defendants also contend that the anecdotal evidence of other police officers that were the subject of retaliation is also inadequate as a basis for concluding a custom existed, and inadmissible. *Id.* at 39–43. City Defendants expounded the admissibility arguments in their reply memorandum, leaving Plaintiff without an opportunity to respond. They explicitly reserve the right to raise objections under Rules 402, 403, 702 and, presumably the hearsay rules, of the Federal Rules of Evidence in subsequent motions. *See* City Defs.'
517 Reply Mem. 37 n. 14, 39 nn. 16–17. Consequently, admissibility issues, to the extent they persist,[9] *517 will be addressed in later proceedings and will not bar consideration in connection with the instant motions.

[9] City Defendants' dubious support for the contention that this District's "judicial decisions are hearsay" is a ruling that Ecuadorian court decisions are hearsay in *Chevron Corp. v. Donziger,* 974 F.Supp.2d 362, 605 (S.D.N.Y.2014). City Defendants also object to the admissibility of the Mollen Commission Report on hearsay grounds but do not explain

why the public record exception in Fed.R.Evid. 803(8)(A)(iii) does not render the report admissible.

The various reports, expert testimony and the testimony of other officers that were the purported victims or witnesses to this type of retaliation are sufficient to give rise to a question of fact as to whether a custom or policy of retaliation against "rats" existed and, if so, whether it was the direct cause of Schoolcraft's injuries brought pursuant to Section 1983. While City Defendants are correct that "contemporaneous or subsequent conduct cannot establish a pattern of violations that would provide notice to the city and the opportunity to conform to constitutional dictates," the subsequent conduct testimony does not stand alone. *See* City Defs.' Mem. in Supp't 37 (quoting *Connick v. Thompson,* 563 U.S. 51, 131 S.Ct. 1350, 1364, 179 L.Ed.2d 417 (2011)). Similarly, a triable issue exists with respect to causation. It is for a jury to decide whether DI Mauriello labelled Schoolcraft a "rat," and whether that designation resulted in the alleged retaliatory conduct discussed above.

Several courts have found an issue of triable fact where, as here, "plaintiff produced records of the testimony of experts, fellow officers, and [a] former Police Commissioner ... before the Mollen Commission to the code of silence that existed among police officers to prevent officers from breaking ranks"). *Ariza v. City of New York,* No. CV–93–5287, 1996 WL 118535, at *5 (E.D.N.Y. Mar. 7, 1996) (denying summary judgment on *Monell* claim because "plaintiff produced records of the testimony of experts, fellow officers, and [a] former Police Commissioner ... before the Mollen Commission to the code of silence that existed among police officers to prevent officers from breaking ranks"); *see also Barry v. New York City Police Dep't,* No. 01 CIV. 10627 CBM, 2004 WL 758299, at **11–14 (S.D.N.Y. Apr. 7, 2004); *White–Ruiz v. City of New York,* No. 93CIV.7233 (DLC) (MHD), 1996 WL 603983, at *10 (S.D.N.Y. Oct. 22, 1996); *cf. Domenech v. City of New York,* 919 F.Supp. 702, 711 (S.D.N.Y.1996) (where this Court held that the Mollen Commission report was not probative since an officer was alleging retaliation after reporting sexual harassment, i.e., conduct unrelated to corruption).

If this evidence is admissible, the arguments propounded by the City Defendants in opposition to it can be presented to the jury. It is for a jury to decide whether the commission and IAB reports, drafted several decades ago, are persuasive indications of today's NYPD culture or whether Schoolcraft's harm was the direct result of the NYPD's custom of retaliation against "rats." It remains a triable issue whether the other officers' accounts of retaliation, viewed in light of the Wall, are adequate indications of a larger trend. Such questions are not, however, resolvable as a matter of law.

## ii. Failure to Train

A municipality may also be liable under *Monell* where the Plaintiff demonstrates a failure to train or supervise that amounts to "deliberate indifference" to the rights of those with whom the municipality's employees interact. *City of Canton,* 489 U.S. at 388, 109 S.Ct. 1197. "[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown,* 520 U.S. 397, 410, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) (internal quotations and citations omitted). Plaintiff must show: (1) that the policymaker knows to a "moral certainty"
518 that the employees will confront a given situation, *518 (2) that the situation presents the employees with a difficult choice of the sort that training will make less difficult or that there is a history of mishandling the situation, and (3) that the wrong choice by a city employee will frequently cause the deprivation of a citizen's constitutional rights. *Walker v. City of New York,* 974 F.2d 293, 297–98 (2d Cir.1992) (internal quotations and citations omitted). However, as the Second Circuit explained:

*City of Canton* requires that plaintiffs establish not only that the officials' purported failure to train occurred under circumstances that could constitute deliberate indifference, but also that plaintiffs identify a specific deficiency in the city's training program and establish that that deficiency is "closely related to the ultimate injury," such that it "actually caused" the constitutional deprivation.

*Amnesty Am. v. Town of W. Hartford,* 361 F.3d 113, 129 (2d Cir.2004).

Schoolcraft has not pointed to a "specific deficiencies in the city's training program." *Id.* Indeed, Schoolcraft does not mention the NYPD's training program at all in his opposition papers. Consequently, the training prong is unsubstantiated.

**D. *Section 1983 Conspiracy Claim is Dismissed***

City Defendants contend that the intra-corporate conspiracy doctrine bars Schoolcraft's § 1983 conspiracy claim with respect to the NYPD and FDNY defendants, and that the conspiracy claims as between the City Defendants and Jamaica Hospital fail for lack of evidence indicating a conspiracy. *See* City Defs.' Mem. in Supp't 18–19; City Defs.' Reply Mem. 26–30.

## i. Intra–Corporate Conspiracy Doctrine

Under the doctrine, "there is no conspiracy if the conspiratorial conduct challenged is essentially a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment." *Herrmann v. Moore,* 576 F.2d 453, 459 (2d Cir.1978). City Defendants accurately note that all the NYPD and FDNY defendants are alleged to have engaged in illegal conduct "within the scope of their employment by the City of New York" and "in furtherance of their employment by the City of New York" and "under the supervision of the said department and according to their official duties." TAC ¶¶ 9, 11–12. City Defendants contend that the doctrine invalidates the conspiracy claim a matter of law as a result of Schoolcraft's pleadings.

In opposition, Plaintiff raises two arguments. *See generally* Pl.'s Mem. in Opp'n 38–42. The first relates to the principle that the doctrine does not apply to actions taken by several policy-making bodies operating ostensibly within the same organization. *Girard v. 94th St. & Fifth Ave. Corp.,* 530 F.2d 66, 71 (2d Cir.1976) (distinguishing between "one single business entity with a managerial policy implemented by the one governing board," which is covered by the doctrine, and one where "each department had its own disparate responsibilities and functions so that the actions complained of by the plaintiff were clearly not actions of only one policymaking body but of several bodies," which is not covered by the doctrine). In *Girard,* "each department had its own disparate responsibilities and functions." *Id.* Here, conversely, Plaintiff's TAC states that all the NYPD defendants were "acting in furtherance of their employment" by the City of New York and under the "supervision of *one* department," the NYPD. *See* TAC ¶¶ 9, 11 (emphasis added). The same result applies to an FDNY–NYPD conspiracy. The TAC alleges that the FDNY defendant acted in furtherance and
519 within the scope of her employment by the City *519 of New York. TAC ¶¶ 15–16. While Schoolcraft admittedly does not categorize the FDNY and NYPD as the same department, the record does not support a finding of divergent responsibilities and functions that would constitute an exception under this doctrine. Indeed, a factual condition-precedent to Plaintiff's municipal liability theory is that all of the purported NYPD and FDNY conspirators were acting in furtherance of the goals of one policy-making body, the City of New York. Plaintiff's first argument therefore fails.

Plaintiff also argues that the personal-interest exception renders the doctrine inapplicable here. That exception applies where a plaintiff adequately alleges that each defendant possessed an independent, personal conspiratorial purpose. *Everson v. New York City Transit Auth.,* 216 F.Supp.2d 71, 76 (E.D.N.Y.2002). Here, Schoolcraft pleads the opposite as to both the NYPD and the FDNY defendants; namely, that they acted "in furtherance of their employment by the City of New York." TAC ¶¶ 12, 15–16; *see also McEvoy v. Spencer,* 49 F.Supp.2d 224, 226 (S.D.N.Y.1999) ( "The individual defendants here are employees of the defendant [municipality]. True, they work for different departments of the City, but that is of no more moment in the municipal context than it would be if the individual defendants worked for the Mainframe and Personnel Divisions of IBM and were accused of conspiring with their employer corporation to discriminate against another employee. Such a claim cannot, as a matter of law, be sustained."). Though in his opposition papers, Plaintiff contends that this purported conspiracy is "far more complex and far reaching than" those contemplated by the intra-conspiracy doctrine, his claim in the TAC is limited to the events of October 31, 2009. *Compare* Pl.'s Mem. in Opp'n 39 *with* TAC ¶¶ 291–95. Therefore, this exception is also inapplicable.

The NYPD and FDNY defendants cannot be co-conspirators under the facts presented. If any conspiracy claim exists, it is between the City of New York and Jamaica Hospital.

## ii. Conspiracy Claims as Between the City Defendants and Jamaica Hospital are Dismissed

City Defendants contend that the conspiracy claim as between the City Defendants and Jamaica Hospital should be dismissed as a matter of law. "To prove a § 1983 conspiracy, a plaintiff must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Pangburn v. Culbertson,* 200 F.3d 65, 72 (2d Cir.1999) (internal quotations omitted). "While conclusory allegations of a § 1983 conspiracy are insufficient, [...] such conspiracies are by their very nature secretive operations, and may have to be proven by circumstantial, rather than direct, evidence." *Id.* (internal quotations and citations omitted).

The fundamental point of contention on this claim is whether evidence supporting an agreement exists. *Compare* City Defs.' Mem. in Supp't 19–21 *and* City Defs.' Reply Mem. 30–31 *with* Pl.'s Mem. in Opp'n 43–60. Plaintiff provides an extensive recitation of the context of the events of October 31, 2009 in his opposition papers. *See generally,* Pl.'s Mem. in Opp'n 43–60 (citing mainly to deposition testimony and documentary evidence reflecting the City's and Jamaica Hospital's actions taken on October 31, 2009 and following Schoolcraft's arrival at Jamaica Hospital).

Viewed in the light most favorable to Schoolcraft as the non-movant, the circumstantial evidence of an
520 agreement, besides that which was discussed in the *520 Fourth Amendment Claims Section above pertaining predominately to the NYPD defendants, is that: (1) there existed a disparity between the 911 dispatcher's description of Schoolcraft as in "unknown condition" versus Lieutenant Hanlon's testimony that she was responding to a "barricaded EDP"; (2) EMT Sangeniti measured Schoolcraft's blood pressure while Schoolcraft was being disciplined by Chief Marino; (3) EMT Sangeniti urged Schoolcraft to go to the hospital on the basis of the blood pressure reading; (4) EMT Sangeniti and Lieutenant Hanlon insisted that Schoolcraft be taken to Jamaica Hospital, which had a psychiatric ward, rather than Forest Hills which did not; (5) Jamaica Hospital was not closer than Forest Hills Hospital; (6) Lieutenant Hanlon testified that one of the considerations making Jamaica Hospital a better choice was existence of the psychiatric ward; (7) the two EMTs offered conflicting testimony as to whether two or only one blood pressure test was performed, and when the second reading was

taken; and (8) a second blood pressure reading was not taken, contrary to standard medical practice, and JHMC physicians conducted a psychological evaluation of Schoolcraft based upon the NYPD's representations and notwithstanding the fact that Schoolcraft was brought in due to high blood pressure. *Id.*

The above-summarized conduct may be interpreted as reasonable under the circumstances, or perhaps as indicating incompetence on the part of the first responders or JHMC's physicians. However, this record cannot be reasonably construed as circumstantial proof of an agreement. *See Cine SK8, Inc. v. Town of Henrietta,* 507 F.3d 778 (2d Cir.2007) (while there was evidence to suggest that each individual acted with racial animus, there was no evidence to suggest that there was an understanding among the defendants to do so); *Scotto v. Almenas,* 143 F.3d 105 (2d Cir.1998); *Manbeck v. Micka,* 640 F.Supp.2d 351, 379 (S.D.N.Y.2009) (dismissing conspiracy claim where there was no evidence that the state and private defendants had a "meeting of the minds" with the goal of depriving plaintiff of her constitutional rights). In the absence of "supporting operative facts" to show an agreement or concerted action to deprive the plaintiff of his civil rights, a conspiracy claim is properly dismissed. *Johnson ex rel. Johnson v. Columbia Univ.,* No. 99 CIV. 3415(GBD), 2003 WL 22743675, at *15 (S.D.N.Y. Nov. 19, 2003). Allegations of "joint conduct" are not sufficient. *Id.* Moreover, "private corporations can act only through natural persons, and their § 1983 liability arises through the conduct of their employees." *Schoolcraft,* 2011 WL 1758635, at *3 (internal quotations and citations omitted). Consequently, the agreement would have had to be between the City Defendants and Dr. Bernier, who committed Schoolcraft. *See* Facts ¶ 237. No evidence of an actual conversation between Dr. Bernier and the NYPD exists. *See generally* Facts ¶¶ 230–33. Even if her review of other physicians' notes reflecting NYPD's statements to JHMC's staff regarding Schoolcraft could be construed as circumstantial proof of an agreement, Schoolcraft's § 1983 claims against JHMC fail since JHMC is not a state actor, as discussed below. Consequently, the conspiracy claim that derives from those § 1983 claims must also fail. *See* Section VI.A of this Opinion.

## V. *REMAINING CLAIMS RELATING TO CITY DEFENDANTS AND DI MAURIELLO*

### A. *False Arrest and Imprisonment Claims Survive Summary Judgment*

521 Under New York law, the tort of false arrest is synonymous with that of *521 false imprisonment. *Kraft v. City of New York,* 696 F.Supp.2d 403, 421, n. 8 (S.D.N.Y.2010) (citing *Posr v. Doherty,* 944 F.2d 91 (2d Cir.1991)). To establish a cause of action for false imprisonment, a plaintiff must establish that: (1) the defendant intended to confine him; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged. *Smith v. County of Nassau,* 34 N.Y.2d 18, 22, 355 N.Y.S.2d 349, 311 N.E.2d 489 (1974); *Hernandez v. City of New York,* 100 A.D.3d 433, 953 N.Y.S.2d 199 (2012).

The NYPD's decision to involuntarily hospitalize a plaintiff are privileged if taken in conformity with the New York's Mental Hygiene Law. *Kerman v. City of New York,* 261 F.3d 229, 240 n. 8 (2d Cir.2001). As discussed in detail in Section IV.A of this Opinion, questions of material fact remain as to whether the City Defendants declared Schoolcraft an EDP consistent with the Mental Hygiene Law. Consequently, summary judgment on this issue is inappropriate.

### B. *Intentional Infliction of Emotional Distress Claim against City Defendants Survives Summary Judgment*

City Defendants contend that Plaintiff's Intentional Infliction of Emotional Distress ("IIED") claim is duplicative of his search and seizure and excessive force claims, and should therefore be dismissed. *See* City Defs.' Mem. in Supp't 21. Courts do not dismiss IIED claims whose substantiating conduct differs from those of other causes of action. *See, e.g., Sylvester v. City of New York,* 385 F.Supp.2d 431, 443 (S.D.N.Y.2005);

*Levine v. Gurney,* 149 A.D.2d 473, 539 N.Y.S.2d 967, 968 (1989); *Murphy v. Murphy,* 109 A.D.2d 965, 486 N.Y.S.2d 457, 459 (1985); *cf. Bender v. City of New York,* 78 F.3d 787, 792 (2d Cir.1996) (noting that New York courts dismiss IIED claims whose conduct falls under the ambit of other torts but affirming lower court's decision to allow IIED claim where the IIED claim "could be found to involve additional elements not necessarily comprehended by the torts" alleged.).

Schoolcraft's IIED claim alleges, *inter alia,* that he was "publicly embarrassed and humiliated," "was caused to suffer severe emotional distress," and "was forced to incur substantial expenses and had his professional reputation destroyed." Contrary to City Defendants' contention, these allegations do not overlap with Schoolcraft's Fourth Amendment and excessive force claims. The IIED claim extends beyond those claims and is not therefore dismissed on summary judgment. *Compare* TAC ¶¶ 340–48 *with* TAC ¶¶ 272–74, 280–84.

**C. *Common Law Negligent Hiring, Training, Supervision and Retention Claim against City Defendants is Dismissed***

City Defendants correctly note that New York law does not permit a claim for negligent hiring, training, retention or supervision where the defendants act in the scope of their employment. City Defs.' Mem. in Supp't 22–23 (citing *Newton v. City of New York,* 681 F.Supp.2d 473, 488 (S.D.N.Y.2010); *Stokes v. City of New York,* 05–CV–0007 (JFB)(MDG), 2007 WL 1300983, *14, 2007 U.S. Dist. LEXIS 32787, *53–54 (E.D.N.Y. May 3, 2007); *Colodney v. Continuum Health Partners, Inc.,* 03–CV–7276 (DLC), 2004 WL 829158, *8–9, 2004 U.S. Dist. LEXIS 6606, *27–28 (S.D.N.Y. Apr. 15, 2004); *Sun Min Lee v. J.B. Hunt Transp., Inc.,* 308 F.Supp.2d 310, 312 (S.D.N.Y.2004); *Karoon v. New York City Transit Authority,* 241 A.D.2d 323, 324, 659 N.Y.S.2d 27
522 (N.Y.App.Div. 1st Dept.1997); *522 *Eifert v. Bush,* 27 A.D.2d 950, 279 N.Y.S.2d 368 (N.Y.App.Div. 2d Dept.1967), *aff'd* 22 N.Y.2d 681, 291 N.Y.S.2d 372, 238 N.E.2d 759 (1968)).

Plaintiff responds that parties are permitted to plead inconsistent legal claims. Pl.'s Mem. in Opp'n 66. While Plaintiff is correct, this is not an inconsistent claim. The TAC alleges, and City Defendants have admitted, that the individual defendants acted within the scope of their employment. *See* TAC ¶¶ 11, 15; City Defs.' Mem. in Supp't 23. "[W]here a defendant employer admits its employees were acting within the scope of their employment, an employer may not be held liable for negligent hiring, training, and retention as a matter of law." *Rowley v. City of New York,* No. 00 CIV. 1793(DAB), 2005 WL 2429514, at *13 (S.D.N.Y. Sept. 30, 2005) (collecting cases). Consequently, no issues of material fact exists for a jury to resolve, and this claim is dismissed.

**D. *Negligent Disclosure of IAB Complaint Claim is Dismissed***

Under New York law, a negligence claim requires: "(1) the existence of a duty on Defendant's part as to Plaintiff; (2) a breach of this duty; and (3) injury to the Plaintiff as a result thereof." *Alfaro v. Wal–Mart Stores, Inc.,* 210 F.3d 111, 114 (2d Cir.2000). The City Defendants contend that the claim is barred by New York's public policy, and, in the alternative, that each of its elements cannot be satisfied under this record. *See generally* City Defs.' Mem. in Supp't 23–29.

## i. Public Policy Does Not Bar Claim

City Defendants contend that Schoolcraft's claim for negligent disclosure of the IAB reports against Mauriello and Caughey are barred by public policy, but they have not cited to cases holding that public policy disfavors claims for negligent disclosure of IAB reports. City Defendants instead rely on New York's public policy rule disfavoring claims for negligent investigation or negligent prosecution. *See, e.g., Russ v. State Employees Fed. Credit Union (SEFCU),* 298 A.D.2d 791, 793, 750 N.Y.S.2d 658 (2002); *Jenkins v. City of New York,* No. 91

CIV. 3539(RLC), 1992 WL 147647, at *8 (S.D.N.Y. June 15, 1992). However, aside from conclusory statements that the negligent disclosure claim is "little more than an attempt to evade the bar on claims for negligent investigation," the City Defendants do not provide support for their position that Schoolcraft's claim is akin to a negligent investigation or prosecution claim. That category of claims faults defendants for inadequately investigating a matter before bringing charges or causing them to be brought. Schoolcraft's claim faults the City Defendants for negligently informing NYPD officers of Schoolcraft's allegations against them. The two types of claims are distinct.

Similarly, the City Defendants' contention that this claim is a 'transmogrified' version of Schoolcraft's intentional tort claim barred by New York law is unpersuasive. The cases to which City Defendants cite held that facts substantiating an intentional assault or false arrest claims cannot be used to plead a negligence claim. *See, e.g., Jenkins,* 1992 WL 147647, at *8 (plaintiff cannot rely on same set of facts substantiating false arrest claim to plead negligence); *Schmidt v. Bishop,* 779 F.Supp. 321, 325 (S.D.N.Y.1991) (allegations of assault cannot be recast as negligence claim); *Mitchell v. Cnty. of Nassau,* No. CV05–4957(SJF)(WDW), 2007 WL 1580068, at *13 (E.D.N.Y. May 24, 2007) (same); *Naccarato v. Scarselli,* 124 F.Supp.2d 36, 45 (N.D.N.Y.2000) (same); *see also Marcano v. City of Schenectady,* 38 F.Supp.3d 238, 265 n. 23 (N.D.N.Y.2014) (dismissing negligence claim where the complaint "contains no allegations of negligent conduct, but merely
523 reasserts *523 the intentional tort claims of assault and battery and intentional infliction of emotional distress under a negligence heading."). Schoolcraft's is not an assault or wrongful arrest claim, and he pleads that the City Defendants negligently leaked his IAB report. His claim is therefore not barred on this basis.

## ii. Schoolcraft's Claim is Dismissed

The existence of a "special relationship" between a municipality and a plaintiff establishes a duty for the purposes of a negligence claim. *Pelaez v. Seide,* 2 N.Y.3d 186, 199, 778 N.Y.S.2d 111, 810 N.E.2d 393 (N.Y.2004). A municipality creates a special relationship, *inter alia,* if it "voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty." *Id.* at 200, 778 N.Y.S.2d 111, 810 N.E.2d 393. That is, if there is: "(1) an assumption by a municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party; (2) knowledge on the part of a municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking." *Id.* at 202, 778 N.Y.S.2d 111, 810 N.E.2d 393 citing *Cuffy v. City of New York,* 69 N.Y.2d 255, 260, 513 N.Y.S.2d 372, 505 N.E.2d 937 (N.Y.1987).

The first three elements are met. In the tape-recorded conversation between Schoolcraft and Lieutenant Brill of the QAD, Brill makes clear that his team handles complaints confidentially and take precautions when contacting complainants. Exhibit PP to the December 22, 2014 Declaration of Suzanna P. Mettham (hereinafter "Mettham Decl. Ex. PP") 2:4–10; 3:15–18. Such precautions included not speaking to complainants at work and avoiding official meetings so as not to reveal the complainant's identity. *Id.* at 2:1–3:2.

However, the undisputed facts establish that Schoolcraft did not rely upon confidentiality in conjunction with his reporting to IAB. *See* Facts ¶ 54. When Brill expressed hesitation in having Schoolcraft appear before QAD would "breach confidentiality, Schoolcraft responded that that was not a problem, that "there's no confidentiality," "I'm not being anonymous at all," and that Schoolcraft "already notified the command officer," i.e., DI Mauriello. Mettham Decl. Ex. PP at 3:3–5, 15–22. In opposition to this point, Schoolcraft contends that "he was merely stating that he was willing to provide his name to QAD, not that he was agreeing with the notion that QAD could inform his supervisors that he was reporting their misconduct." Pl.'s Mem. in Opp'n 70. However, Schoolcraft's contention is plainly contradicted by his own recording. Indeed, Schoolcraft had

already provided his name and contact information, which is how Brill managed to reach Schoolcraft. *See* Mettham Decl. Ex. PP at 1:1–15. Since Schoolcraft did not rely upon the City's undertaking of confidentiality, his negligent disclosure claim fails as a matter of law.

**E.** ***Malicious Abuse of Process Claim is Dismissed***

The elements of a claim under § 1983 for malicious abuse of process are derived from state law. *Cook v. Sheldon,* 41 F.3d 73, 80 (2d Cir.1994). Under New York law, an abuse of process claim has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective. *Curiano v. Suozzi,* 63 N.Y.2d 113, 116, 480 N.Y.S.2d 466, 469 N.E.2d 1324 (N.Y.1984).

524 *524 Warrantless arrest cannot form the basis for this claim. *Sforza v. City of New York,* No. 07CIV6122DLC, 2009 WL 857496, at *17 (S.D.N.Y. Mar. 31, 2009) (dismissing malicious abuse of process claim because Plaintiff's warrantless arrest "did not involve legal process."); *Shmueli v. City of New York,* 03–CV–1195 (PAC), 2007 WL 1659210, at *10, 2007 U.S. Dist. LEXIS 42012, at *10 (S.D.N.Y. June 7, 2007) ("Without a warrant, a malicious prosecution claim against the ADAs for pre-arraignment conduct does not lie because any deprivation of [the plaintiff's] liberty was not effected "pursuant to a legal process." "). Moreover, § 1983 liability is triggered by criminal, not civil, process. *See Alroy v. City of New York Law Dep't,* 69 F.Supp.3d 393, 401–02, No. 13–CV–6740 VEC, 2014 WL 6632982, at *6 (S.D.N.Y. Nov. 24, 2014).

As Schoolcraft's claim is based upon his civil commitment without a warrant, it fails as a matter of law.

**F.** ***DI Mauriello's Counterclaims are Dismissed***

Plaintiff seeks dismissal of Mauriello's state law claims for tortious interference with an employment relationship and prima facie tort. *See generally* Pl.'s Mem. in Supp't 25–34. Mauriello alleges that Schoolcraft falsely reported that Mauriello misclassified crimes and imposed arrest and summons quotas at the 81st Precinct. *See* Mauriello's Answer to SAC, Amended with Counterclaims, filed March 18, 2014 ("Mauriello Answer and Counterclaims"), 11–17. Mauriello further alleges that Schoolcraft's animus towards Mauriello was the sole motivation for these reports. *Id.*

New York courts apply the elements of tortious interference with prospective economic advantage when evaluating a claim of tortious interference relating to a prospective employment opportunity. *See, e.g., Moynihan v. New York City Health & Hospitals Corp.,* 120 A.D.3d 1029, 993 N.Y.S.2d 260, 265 (2014); *Purgess v. Sharrock,* 33 F.3d 134, 141 (2d Cir.1994) (applying New York state law). Under New York law, the elements of a claim for tortious interference with prospective business relations are: (1) business relations with a third party; (2) the defendant's interference with those business relations; (3) that the defendant acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means; and (4) injury to the business relationship. *Nadel v. Play–By–Play Toys & Novelties, Inc.,* 208 F.3d 368, 382 (2d Cir.2000) (cited in *Thompson v. Bosswick,* 855 F.Supp.2d 67, 81–82 (S.D.N.Y.2012)). To survive summary judgment, DI Mauriello must have pled, and there must exist genuine questions of fact regarding: the existence of a prospective employment opportunity for DI Mauriello at the NYPD;[10] Schoolcraft's direct interference with that opportunity; and that Schoolcraft either acted for the sole purpose of inflicting intentional harm upon DI Mauriello or employed "wrongful means."

10 DI Mauriello adopts Schoolcraft's recitation of the elements of the tortious interference claim and associated case law, but then recasts the first element as "existence of an employment relationship." *See* Mauriello's Mem. in Opp'n 12. That characterization does not match Schoolcraft's version, nor is it substantiated by the cases Mauriello cites. *See Posner v.*

*Lewis,* 18 N.Y.3d 566, 579 n. 2, 942 N.Y.S.2d 447, 965 N.E.2d 949 (N.Y.2012) and *Carvel Corp. v. Noonan,* 3 N.Y.3d 182, 190, 785 N.Y.S.2d 359, 818 N.E.2d 1100 (N.Y.2004). Indeed, the cause of action turns on the "prospective" nature of the employment opportunity. Consequently, Schoolcraft's version is applied.

Genuine issues of fact exist as to several elements of the tortious interference claim. DI Mauriello points to
525 testimony that he was not considered for promotion as a *525 result of Schoolcraft's allegations against him, while Schoolcraft contends that Mauriello had the support of NYPD leadership. *Compare* Facts ¶ 321 *with* ¶¶ 320, 322. There is also a factual dispute as to whether Schoolcraft's claims against him, or other factors, resulted in DI Mauriello being passed over for promotion. *Id.*

As to the purpose element, however, Mauriello's contention that Schoolcraft reported him solely in order to harm him is contradicted by DI Mauriello's pleadings. In his Counterclaims, DI Mauriello inconsistently alleges both that Schoolcraft falsely complained to QAD "purely for the sake of getting revenge against Mauriello," and that Schoolcraft hoped to influence QAD in order to "create support for the claims plaintiff was planning to assert in a lawsuit he intended to bring against the NYPD." *Compare* Mauriello Answer and Counterclaims, 11–12, ¶ 3(i) *with* ¶ 3(ii); *see also* Mauriello Answer and Counterclaims, 13, ¶ 7 (alleging that Schoolcraft acted "for the purpose of getting revenge against Steven Mauriello—interfering in his employment relationship with the NYPD, and otherwise trying to destroy his career and reputation—*while also creating false support for plaintiff's lawsuit* against the NYPD.") (emphasis added). "Although Rule 8(d)(3) [of the Federal Rules of Civil Procedure] allows parties to plead alternative legal theories, it does not permit inconsistent assertions of facts within the allegations." *XL Specialty Ins. Co. v. Otto Naumann, Ltd.,* No. 12–CV–8224 DAB, 2015 WL 1499208, at *2 (S.D.N.Y. Mar. 31, 2015) (internal quotations omitted and citations omitted); *In re Livent, Inc. Noteholders Sec. Litig.,* 151 F.Supp.2d 371, 407 (S.D.N.Y.2001) (Rule 8 does not "grant[ ] plaintiffs license to plead inconsistent assertions of facts within the allegations that serve as the factual predicates for an independent, unitary claim"). Here, the Mauriello's inconsistent statements are used to support the same counterclaim. *See* Mauriello Answer and Counterclaims, 11–16 (where the contradictory allegations are tied to both the tortious interference and prima facie claims).

Similarly, Mauriello's tortious claim fails as a matter of law on the issue of whether Schoolcraft's reports to QAD constitute "wrongful means" under New York law. " 'Wrongful means' include physical violence, fraud or mis-representation, civil suits and criminal prosecutions." *Friedman v. Coldwater Creek, Inc.,* 321 Fed.Appx. 58, 60 (2d Cir.2009) (citing *Guard–Life Corp. v. S. Parker Hardware Mfg. Corp.,* 50 N.Y.2d 183, 191, 428 N.Y.S.2d 628, 406 N.E.2d 445 (N.Y.1980)). Not all misrepresentations rise to the level of "more culpable" conduct constituting "wrongful means." *Friedman,* 321 Fed.Appx. at 60. Rather, "as a general rule, the defendant's conduct must amount to a crime or an independent tort" to constitute wrongful means, such as breach of fiduciary duty or defamation. *See Carvel Corp. v. Noonan,* 3 N.Y.3d 182, 190, 785 N.Y.S.2d 359, 818 N.E.2d 1100 (N.Y.2004); *see also EBC I, Inc. v. Goldman Sachs & Co.,* 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26 (N.Y.2005) (discussing breach of fiduciary as constituting wrongful means); *Phillips v. Carter,* 58 A.D.3d 528, 872 N.Y.S.2d 22, 23 (2009) (noting that defamation would constitute wrongful means). Here, Schoolcraft's allegations resulted in formal investigations into DI Mauriello's conduct and crime reporting at the 81st Precinct, and subsequent charges against DI Mauriello stemming from those investigations are currently pending. Facts ¶¶ 324–25. A report stemming from the investigations found "severe deficiencies in the overall crime reporting process as a whole beginning with the initial interaction of complainants attempting
526 to file reports, the supervisor's review and finalization of the reports submitted and continuing with *526 inordinate delay in changing, improper classifications." Facts ¶ 325.

The New York Court of Appeals has extended immunity from civil suit under such circumstances. In *Brandt v. Winchell,* it ruled that "[i]f the one who sets the agencies in motion is actuated by an evil motive[,] he may perhaps be subject to judgment in the forum of morals but he is free from liability in a court of law." 3 N.Y.2d 628, 635, 170 N.Y.S.2d 828, 148 N.E.2d 160 (1958). The court explained that "[t]he best interests of the public are advanced by the exposure of those guilty of offenses against the public and by the unfettered dissemination of the truth about such wrongdoers." *Id. Brandt* immunity remains good law today. *See Posner v. Lewis,* 18 N.Y.3d 566, 570, 942 N.Y.S.2d 447, 965 N.E.2d 949 (N.Y.2012) (adhering to the doctrine but declining to extend it to an individual that extorted and blackmailed an official prior to reporting him); *Posner v. Lewis,* 80 A.D.3d 308, 321, 912 N.Y.S.2d 53, 62 (N.Y.App.Div.2010) (quoting *ATI, Inc. v. Ruder & Finn, Inc.,* 42 N.Y.2d 454, 460, 398 N.Y.S.2d 864, 368 N.E.2d 1230 (N.Y.1977) and noting that the privilege continues to be extended to "circumstances where allegations of possible wrongdoing are acted upon by government agencies."); *see also Van Buskirk v. Bleiler,* 46 A.D.2d 707, 360 N.Y.S.2d 88, 90 (1974).

Perhaps anticipating this impediment to his counterclaim, DI Mauriello includes a series of novel allegations in his papers in opposition to Schoolcraft's motion for summary judgment, including contentions that Schoolcraft personally downgraded complaint reports, orchestrated the October 31 incident, misrepresented the status of the appeal of his 2008 Performance Evaluation, falsely denied being aware of the reason he was placed on restricted leave, accused Mauriello of placing him on restricted leave, contacted the media, falsely claimed he cared about the community served by the 81st Precinct, and falsely claimed he cared for his fellow officers, all in furtherance of his scheme to tortiously infer with Mauriello's career opportunities. *See generally,* Mauriello's Mem. in Opp'n 24–25. None of these assertions were included in Mauriello's Answer and Counterclaims. While they substantiate the same umbrella claim for tortious interference, the novel allegations fundamentally alter its scope, from one based on instigating the October 7, 2009 investigation to one involving a slew of actions that purportedly constitute wrongful means or were taken for the sole purpose of harming DI Mauriello. *See* Mauriello's Mem. in Opp'n 24–25. "A complaint cannot be amended merely by raising new facts and theories in [briefing], and hence such new allegations and claims should not be considered in resolving the [summary judgment] motion." *Southwick Clothing LLC v. GFT (USA) Corp.,* No. 99 CV 10452(GBD), 2004 WL 2914093, at *6 (S.D.N.Y. Dec. 15, 2004) (holding that a party could not introduce a different contract or series of contracts as a different basis for its breach of contract claim for the first time in its memorandum of law in opposition to a summary judgment motion); *see also Rojo v. Deutsche Bank,* 487 Fed.Appx. 586, 588 (2d Cir.2012) (A court is "justified" in brush aside further argument not alleged in complaint but raised for first time in opposition to summary judgment); *Tomlins v. Vill. of Wappinger Falls Zoning Bd. of Appeals,* 812 F.Supp.2d 357, 363 n. 9 (S.D.N.Y.2011) (declining to consider facts raised for first time in opposition to motion for summary judgment); *Scott v. City of New York Dep't of Correction,* 641 F.Supp.2d 211, 229 (S.D.N.Y.2009), *aff'd,* 445 Fed.Appx. 389 (2d Cir.2011) (same); *Jackson v. Onondaga Cnty.,* 549 F.Supp.2d 204, 219 (N.D.N.Y.2008) (same).

527 *527 As mentioned in the Prior Proceedings section above, Mauriello's motion to interpose counterclaims was initially denied as it "would cause undue delay and prejudice to Plaintiff." *Schoolcraft v. City of New York,* 296 F.R.D. 231, 238 (S.D.N.Y.2013). DI Mauriello was granted leave to interpose his counterclaim following his motion for reconsideration, in which he pointed to previously undisclosed recordings now in evidence of the October 7, 2009 conversation between Schoolcraft and his father, and contended that the recording demonstrates Schoolcraft's animus towards him. *Schoolcraft v. City of New York,* 298 F.R.D. 134, 137 (S.D.N.Y.2014). By including different allegations in his opposition to summary judgment, DI Mauriello is effectively seeking to craft a new claim based on a series of facts known to him before March 2014, and this time without filing a motion to replead as required under the Federal Rules of Civil Procedure. *See*

Fed.R.Civ.Pro. 15(a). This interjection is impermissible, and Mauriello's counterclaim remains related to the October 7, 2009 investigation, as pled over a year ago. Consequently, given DI Mauriello's admission that Schoolcraft did not act solely out of animus towards him, and in light of *Brandt* immunity, Mauriello's tortious interference claim fails as a matter of law, and is therefore dismissed.

For similar reasons, DI Mauriello's prima facie tort claim also fails. Under New York law, the elements of prima facie tort are: (1) an intentional infliction of harm; (2) without excuse or justification and motivated solely by malice; (3) resulting in special damages; (4) by an act that would otherwise be lawful. *McKenzie v. Dow Jones & Co.,* 355 Fed.Appx. 533, 536 (2d Cir.2009) (internal quotations omitted); *Evergreen Pipeline Constr. Co. v. Merritt Meridian Const. Corp.,* 95 F.3d 153, 161 (2d Cir.1996); *Belsky v. Lowenthal,* 62 A.D.2d 319, 405 N.Y.S.2d 62, 64 (1978) aff'd, 47 N.Y.2d 820, 418 N.Y.S.2d 573, 392 N.E.2d 560 (1979).

As discussed above, Mauriello's pleadings allege that Schoolcraft reported Mauriello in part to "create support for the claims plaintiff was planning to assert in a lawsuit he intended to bring against the NYPD." *See* Mauriello Answer and Counterclaims, 12, ¶ 3(ii); 13, ¶ 7. The second element is therefore not met. As with the tortious interference claim, *Brandt* immunity applies to this cause of action equally, and protects Schoolcraft from suit. *Brandt,* 3 N.Y.2d at 635, 170 N.Y.S.2d 828, 148 N.E.2d 160. Mauriello's prima facie tort claim is therefore also denied as a matter of law.

**G. *DI Mauriello Remains a Defendant***

DI Mauriello contends that he is not liable for several of Plaintiff's claims, because he did not personally engage in, or instruct subordinates to engage in, the conduct which allegedly giving rise to Plaintiff's § 1983 claims. *See generally* Mauriello's Mem. in Supp't 17–30.

"[I]t is well settled in this Circuit that personal involvement of defendant in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994); *see also Farid v. Ellen,* 593 F.3d 233, 249 (2d Cir.2010). Consequently, summary judgment in DI Mauriello's favor is warranted where the factual record indisputably establishes his lack of involvement.

## i. False Arrest and Use of Force Claims, and their State Law Analogues against DI Mauriello are Dismissed

The record establishes that DI Mauriello was not present when Schoolcraft was arrested, since he remained
528 outside of Schoolcraft's apartment after Schoolcraft left his apartment and began *528 walking towards the ambulance. Facts ¶¶ 149–50. He was indisputably not present for the second entry when Schoolcraft was declared an EDP and handcuffed. Facts ¶ 157.

Schoolcraft nevertheless contends that DI Mauriello remains liable because he "set in motion the series of events at the 81st Precinct designed to prevent Schoolcraft" from reporting on corruption. Pl.'s Mem. in Opp'n 89. Plaintiff relies on one case, *Gonzalez v. Bratton,* in which a senior officer order his subordinate to perform an unconstitutional search. 147 F.Supp.2d 180, 202 (S.D.N.Y.2001) *aff'd,* 48 Fed.Appx. 363 (2d Cir.2002).

Plaintiff does not address the factual distinctions between *McDermott* and this case. In *McDermott,* whether the defendant ordered his subordinate to conduct the search was in dispute and the subordinate officer testified that the defendant had ordered him. *Id.* Here, by contrast, there was no testimony that Mauriello ordered Schoolcraft's arrest. Schoolcraft contends that Mauriello ordered Captain Lauterborn to "take care of this"

when the officers first spoke to Schoolcraft during the First Entry and ordered Captain Lauterborn to stop Schoolcraft when he turned back from the ambulance and reentered his apartment. *See* Pl.'s Mem. in Opp'n 89; Facts ¶ 161.

The record does not support the conclusion that the subsequent arrest was at Mauriello's behest notwithstanding the statements Plaintiff quotes. Rather, as Plaintiff's recording demonstrates, Deputy Chief Marino and Captain Lauterborn reentered Schoolcraft's home, and Deputy Chief Marino declared Schoolcraft an EDP. Facts ¶¶ 158–59. It was only after the EDP designation that Schoolcraft was arrested, assaulted, and imprisoned. Facts ¶ 160. This intervening event is a significant distinction as to *McDermott* that is fatal to Plaintiff's argument. Consequently, Mauriello is not liable for the false arrest claim as a matter of law, and he is also not liable for the use of force claim.

### ii. Unlawful Search Claim Against DI Mauriello is Dismissed

Similarly, the record establishes that DI Mauriello was not present when Schoolcraft's apartment was searched. Facts ¶ 171. This claim therefore also fails as a matter of law.

### iii. Failure to Intercede Claim Against DI Mauriello Survives Summary Judgment

Referencing the same facts, DI Mauriello further contends that he cannot be liable to Schoolcraft as a matter of law on the failure to intercede claim. The TAC contains the following allegation:

> Defendants further violated plaintiff's constitutional rights when they failed to intercede and prevent the violation or further violation of plaintiff's constitutional rights and the injuries or further injuries caused as a result of said failure.

TAC ¶ 277.

The failure to intercede claim is not limited to events occurring during the Second Entry, to which DI Mauriello was not a party. The allegation can also fairly extend to the Fourth Amendment claims discussed above, which survive summary judgment. *See* Section IV.A of this Opinion. Therefore, DI Mauriello remains a defendant with respect to this claim.

### iv. Warrantless Entry Claim against DI Mauriello Survives Summary Judgment

Finally, the claim arising out of the First Entry, namely the warrantless entry claim, survives against DI
529 Mauriello. DI Mauriello was indisputably present during that interaction, and an issue of fact remains *529 as to whether DI Mauriello or Deputy Chief Marino were in charge prior to Schoolcraft's EDP designation. *See* Facts ¶ 159. DI Mauriello also remains a defendant with respect to this claim.

**H. *Claims with Respect to Other NYPD Officer Defendants***

City Defendants contend that Plaintiff's claims against several individual defendants should be dismissed because Plaintiff does not establish their personal involvement with respect to certain claims. *See generally,* City Defs.' Mem. in Supp't 15–18; City Defs.' Reply Mem. 24–26.

### i. Captain Trainor is Dismissed as a Defendant

City Defendants contend that Plaintiff has not properly alleged excessive force and assault and battery claims against Captain Trainor. City Defs.' Mem. in Supp't 15. Plaintiff is not alleging these claims against Captain Trainor. Rather, his claim against Captain Trainor centers on his involvement in the NYPD visits to

Schoolcraft's Johnstown residence, not the events in Schoolcraft's apartment on October 31, 2009. *See* TAC ¶ 216; *see also* Pl.'s Mem. in Opp'n 31. Since Schoolcraft's First Amendment claim with respect to his post-suspension speech is dismissed, *see* Section IV.B.ii of this Opinion, his claim against Trainor also fails.

## ii. Captain Lauterborn Remains a Defendant

City Defendants contend that Plaintiff's excessive force and assault and battery claims against Captain Lauterborn should be dismissed for lack of a "specific allegation that Lauterborn used force against him." City Defs.' Reply Mem. 24–25. The TAC alleges, in relevant part, that:

*[S]everal defendant police officers,* including defendants LT. WILLIAM GOUGH, SGT. KURT DUNCAN, and LT. CHRISTOPHER BROSCHART, pulled plaintiff out of his bed, physically assaulted him, tore his clothes as they threw him to the floor, illegally strip-searched him and violently handcuffed him with his arms behind his back, causing excruciating pain to his wrists, shoulders, arms, neck and back.

TAC ¶ 167 (emphasis added). Captain Lauterborn falls under the category of "defendant police officers" and the facts support the allegation that that Captain Lauterborn was indeed one of those officers engaging in the behavior alleged above. *See, e.g.,* Facts ¶ 160. Therefore, the claims against Captain Lauterborn survive summary judgment.

## iii. Assistant Chief Nelson Remains a Defendant

City Defendants next contend that Assistant Chief Nelson should be dismissed as a defendant because "no evidence has been discovered that Gerard Nelson in fact was aware of, or authorized, Chief Marino's actions on October 31, 2009 beyond Plaintiff's suppositions." City Defs.' Mem. in Supp't 15–16. In the alternative, City Defendants contend that qualified immunity shields Chief Nelson, since he reasonably relied upon his officers' statements with respect to the October 31 events. *Id.*

As the Second Circuit noted in *Wright v. Smith:*

[A] defendant who occupies a supervisory position may be found personally involved in the deprivation of a plaintiff's constitutionally protected liberty interests in several ways:

The defendant may have directly participated in the infraction. A supervisory official, after learning of the violation through a report or appeal, may have failed to remedy the wrong. A supervisory official may be liable
530 because he or she created a policy or custom under which unconstitutional practices occurred, *530 or allowed such a policy or custom to continue. Lastly, a supervisory official may be personally liable if he or she was grossly negligent in managing subordinates who caused the unlawful condition or event.

[...]

[However a supervisor cannot] be held personally responsible simply because he was in a high position of authority ...

21 F.3d 496, 501 (2d Cir.1994) (internal quotations and ellipses omitted).

Plaintiff contends that Assistant Chief Nelson was "kept informed" of the October 31 events by DI Mauriello, was the commanding officer under whose authority the NYPD planned to suspended Schoolcraft, and signed off on the disciplinary Charges and Specifications outlining Schoolcraft's purported misconduct. Pl.'s Mem. in Opp'n 11–12. The parties dispute Assistant Chief Nelson's level of involvement with respect to the NYPD's conduct on the 31st of October and as to the NYPD's subsequent interactions with Schoolcraft. Facts ¶ 105.

Contrary to the City Defendants' contentions, Schoolcraft has adduced evidence that may lead a reasonable jury to conclude that that Assistant Chief Nelson was aware of his subordinates' allegedly illegal conduct against Schoolcraft and failed to correct that conduct. *See* Facts ¶ 105.

The remaining basis for summary judgment dismissing Assistant Chief Nelson, which Plaintiff does not address, is qualified immunity. As discussed above, qualified immunity attaches to "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kerman,* 261 F.3d at 236. Assistant Chief Nelson is immune as a matter of law if "a reasonable juror would have been compelled to accept the view" that either the NYPD's conduct was constitutional or that Assistant Chief Nelson lacked the information necessary to conclude that the NYPD's conduct was unconstitutional. *See generally* the Fourth Amendment Claim discussion in Section IV.A of this Opinion; *see also Zellner,* 494 F.3d at 370; *Golphin v. City of New York,* No. 09 CIV. 1015 BSJ, 2011 WL 4375679, at *3 (S.D.N.Y. Sept. 19, 2011). This determination presents a factual dispute. Consequently, Assistant Chief Nelson is not dismissed as a defendant.

### iv. Lieutenant Caughey Remains a Defendant

City Defendants contend that Lieutenant Caughey should be dismissed as a defendant because "it is clear that Caughey had no personal involvement in any of the claimed misconduct." City Defs.' Mem. in Supp't 16. Plaintiff disagrees, contending that Caughey issued retaliatory command disciplines against him, referred him to the Early Intervention Unit, confiscated and kept Schoolcraft's memo book for several hours, menaced Schoolcraft with his gun during his October 31, 2009 shift, and conspired with Mauriello to retaliate against Schoolcraft. *See generally* Pl.'s Mem. in Opp'n 32–38.

As discussed above, Schoolcraft's First Amendment claim extends to his pre-suspension speech, and therefore so too do his allegations with respect to Caughey's alleged 'retaliatory' conduct. Therefore, Caughey remains a defendant.

## VI. *CLAIMS RELATING TO JAMAICA HOSPITAL MEDICAL CENTER*

### A. *Section 1983 Claims against JHMC are Dismissed*

Plaintiff brought involuntary confinement, due process violation and "municipal liability" claims pursuant to 42
531 U.S.C. § 1983 against Jamaica Hospital. *See* *531 TAC ¶¶ 285–290, 296–303. The statute provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

42 U.S.C. § 1983.

Section 1983 allows a plaintiff to bring claims for constitutional law violations against a "person." *Id.* Jamaica Hospital correctly notes that a hospital is generally not a "person" for the purposes of § 1983. *Kearse v. Lincoln Hosp.,* No. 07 CIV. 4730 (PAC JCF), 2009 WL 1706554, at *2 (S.D.N.Y. June 17, 2009); *Williams v. City of New York,* No. 03 CIV. 5342 RWS, 2005 WL 901405, at *1 (S.D.N.Y. Apr. 19, 2005); *Melani v. Bd. of Higher Educ. of City of New York,* No. 73 CIV. 5434, 1976 WL 589, at *2 (S.D.N.Y. June 23, 1976). Consequently, direct claims against JHMC under § 1983 fail as a matter of law.

Section 1983 liability is premised on state action. *See* 42 U.S.C. § 1983 (requiring that the "person" act "under color" of state law). Though private conduct falls outside the purview of the statute, private entities can be can still be held liable as "state actors" where the conduct leading to the constitutional violation is "fairly attributable" to a municipality. *See Sybalski v. Indep. Grp. Home Living Program, Inc.,* 546 F.3d 255, 257 (2d Cir.2008). Such conduct includes when the: (1) the private entity acts pursuant to the "coercive power" of the state or is "controlled" by the state ("the compulsion test"); (2) when the state provides "significant encouragement" to the private entity, the entity is a "willful participant in joint activity with the [s]tate," or the entity's functions are "entwined" with state policies ("the joint action test" or "close nexus test"); or (3) when the entity "has been delegated a public function by the [s]tate," ("the public function test"). *Id.* (internal citations and quotations omitted).

Plaintiff contends material questions of fact warrant denial of JHMC's summary judgment motion on the issue of state action. Specifically, Schoolcraft contends that JHMC's EMTs jointly decided along with City Defendants to declare Schoolcraft an EDP and forcibly transport him to Jamaica Hospital, and JHMC's decision to involuntarily commit Schoolcraft was significantly encouraged by City Defendants. Pl.'s Mem. in Opp'n 101. He also contends that JHMC satisfies the public function test because Schoolcraft was admitted in order to protect the public. Pl.'s Mem. in Opp'n 107. In support of his position, Plaintiff quotes a footnote in this Court's 2011 opinion on JHMC's motion to dismiss, noting that:

> [I]t does appear that JHMC is a state actor based on Plaintiff's allegations that the hospital's employees acted under the compulsion of, and in concert with, the NYPD. Furthermore, because Plaintiff contends that JHMC was used as a detention facility, JHMC can be seen as a state actor through its assumption of a traditional government function."

*Schoolcraft,* 2011 WL 1758635, at *2 n. 2 (internal citations and quotations omitted). While perhaps sufficient to withstand a motion to dismiss, Plaintiff's state actor argument fails in light of the record.

There were two purportedly unconstitutional actions taken against Schoolcraft: his designation as an EDP, and his involuntary hospitalization following arrival at JHMC. *See* Pl.'s Mem. in Opp'n 104–105 (contending that
532 Jamaica Hospital and its *532 employees "are state actors because of the joint action taken in Officer Schoolcraft's apartment and because of the significant encouragement by the NYPD and the EMTs to Jamaica Hospital's other staff to involuntarily commit him."). Neither of those can fairly construed as taken under color of state law.

Plaintiff's own recording unambiguously reflect that Deputy Chief Marino, not JHMC's EMTs, declared Schoolcraft an EDP. Facts ¶ 158. The EMTs were not present when the designation was made. Facts ¶ 154. Plaintiff's quotes from Captain Lauterborn's and Lieutenant Broschart's depositions do not contradict the fact that Marino classified Schoolcraft an EDP, because none of the deponents testified that the EMTs made the EDP designation. Indeed, EMTs cannot make EDP determinations, and to do so would constitute an *ultra vires* act that would not trigger JHMC's liability. *See* Declaration of Gregory J. Radomisli dated January 30, 2015 (hereinafter "Radomisli Decl.") Ex. K 156 ("NYPD is the only agency [the EMTs] work with that can declare someone an EDP."); *Chonich v. Wayne Cnty. Cmty. Coll.,* 973 F.2d 1271, 1280 (6th Cir.1992) (Community college was not liable, under § 1983, for alleged violations of college administrators' civil rights where *ultra vires* actions of an employee caused the constitutional harm); *see also Doe v. Guthrie Clinic, Ltd.,* 710 F.3d 492, 494 (2d Cir.) (noting that "direct corporate liability generally ... is not implicated by the *ultra vires* acts of employees"); *cf. Florida Dep't of State v. Treasure Salvors, Inc.,* 458 U.S. 670, 697, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982) (holding that sovereign immunity is not implicated since "action of an officer of the sovereign ...

beyond the officer's statutory authority is not action of the sovereign") (internal quotations and citations omitted). Finally, Schoolcraft's responses to Mauriello's 56.1 statement includes the admission that "Marino declared him an EDP." Mauriello's Consolidated 56.1 Statement, ¶ 119. In sum, there is no genuine issue of fact as to whether JHMC EMTs declared Schoolcraft an EDP. They did not.

Similarly, no issue of material fact exists with respect to whether JHMC's decision to hospitalize Schoolcraft constituted state action. Schoolcraft was taken to JHMC's emergency room following Marino's EDP designation. *See* Facts ¶ 175. His hospital chart reflected the JHMC's EMT's statement that he was "behaving irrationally." Facts ¶ 186. He was triaged and a psychiatric evaluation was performed at the request of an emergency room physician at JHMC. *See generally* Facts ¶¶ 175, 183, 187. The record does not indicate that the emergency room doctor spoke to the NYPD prior to requesting the psychiatric consult. *See* Facts ¶ 187. The record does, however, indicate that the psychiatric resident that conducted an initial interview with Schoolcraft was informed, or perhaps misinformed, by the NYPD that Schoolcraft had behaved in a bizarre manner, had cursed at his supervisor, was receiving psychiatric treatment and had his gun taken away, and had barricaded himself in his home on October 31st. *See* Facts ¶¶ 192–93. She documented these NYPD statements in Schoolcraft's file. *Id.* He was subsequently transferred to JHMC's psychiatric emergency department and Dr. Bernier took over his care. *See generally,* Facts ¶¶ 201–26. While in the psychiatric emergency department, Schoolcraft was examined by Dr. Tariq, whose also purportedly spoke with NYPD Sergeant James regarding Schoolcraft's behavior. Facts ¶ 207. It was Dr. Bernier, however, who made the decision to admit him pursuant to New York's Mental Hygiene Law. Facts ¶ 237, 241, 244. She indisputably did not speak to City Defendants,
533 but reviewed Schoolcraft's *533 file memorializing other JHMC's staff conversations with the NYPD.

Contrary to Schoolcraft's position, a state actor indirectly misinforming a private physician as to a patient's behavior is not conduct that rises to the level of "significant encouragement." *See Blum v. Yaretsky,* 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (describing "significant encouragement" standard). Providing factual background to a physician is not tantamount to encouraging that physician to undertake a certain action. *See McGugan v. Aldana–Bernier,* 752 F.3d 224, 230 (2d Cir.2014) *cert. denied,* —— U.S. ——, 135 S.Ct. 1703, 191 L.Ed.2d 680 (2015) (observing that state actors "did not request, much less compel" involuntary hospitalization). The link between the City Defs.' statement and the involuntary hospitalization decision is all the more attenuated because that decision was taken by Dr. Bernier without any direct conversation with a state actor, several days after the state actor statements were documented. *See* Facts ¶¶ 230–32. "It is not enough, however, for a plaintiff to plead state involvement in some activity of the institution alleged to have inflicted injury upon a plaintiff; rather, the plaintiff must allege that the state was involved with the activity that caused the injury giving rise to the action." *Sybalski,* 546 F.3d at 257–58 (internal quotations and citations omitted). To adopt Plaintiff's position would be to convert any independent medical decision into state action, so long as it was partly based upon the representations, or in this case misrepresentations, of a state actor.

In support of his "significant encouragement" argument, Plaintiff cites two cases. In *Tewksbury v. Dowling,* a private physician failed to conduct an independent examination, relying instead solely upon a state physician's determinations. 169 F.Supp.2d 103, 109 (E.D.N.Y.2001). Here, Dr. Bernier and her non-state-actor colleagues, Drs. Lwin, Patel, Tariq, and Heron, indisputably examined Schoolcraft throughout his hospital stay. *See generally* Facts ¶ 227. Plaintiff's contention that the level of care and attention paid him by these private physicians fell short of appropriate standards cannot alter the fact that he was examined by a non-state physician who made the decision to commit him. In *Ruhlmann v. Ulster Cnty. Dep't of Soc. Servs.,* a private hospital had initially cleared a patient that had been hospitalized as an EDP, but reversed its clearance following

pressured by state actors. 234 F.Supp.2d 140, 163 (N.D.N.Y.2002). Here, Dr. Bernier's opinion was not changed by direct conversations with state actors. Moreover, the extraordinary interventions of state actors who had a close working relationship with the private physicians in *Ruhlmann* are not found in this record, where state involvement in the commitment decision is limited to two written statements by police officers in the patient's chart regarding Schoolcraft's mental state and behavior. *See id.* at 161–63. Relatedly, Dr. Bernier held a position of authority relative to her colleagues who had spoken to the NYPD. She was not compelled to adopt her residents' impressions and notations, indeed she was not even obligated to credit them. Facts ¶¶ 235, 239. Conversely, the involuntary confinement decision in *Ruhlmann* was made by a relatively junior member of the private hospital's staff, following pressure from state actors and non-state-actor colleagues in positions of relative seniority. *See generally Ruhlmann,* 234 F.Supp.2d at 147–57, 161–64.

To find "significant encouragement" on basis of the NYPD officer statements would do violence to the underlying purpose of the test, which is to ascribe state actor status only where the private conduct is "fairly
534 attributable" to the state. *534 *McGugan,* 752 F.3d at 229. Dr. Bernier's decision to admit Schoolcraft is not fairly attributable to the state by virtue of Schoolcraft's chart that contained two statements by state actors.

Plaintiff also contends that JHMC is a state actor under the public functions test, since JHMC functioned as a detention facility with respect to Schoolcraft and since Dr. Bernier testified that she considered public safety when admitted Schoolcraft. Pl.'s Mem. in Opp'n 107–09. "The fact that [plaintiff] was brought to the hospital [in] police custody and was released from the hospital into police custody is insufficient to transform this private hospital and its staff into state actors for section 1983 purposes." *Morse v. City of New York,* No. 00 CIV. 2528(TPG), 2001 WL 968996, at *8 (S.D.N.Y. Aug. 24, 2001). Similarly, considering harm to others when admitting a patient is consistent with the Mental Hygiene Law, and consequently, no state action attaches on that basis. *Antwi v. Montefiore Med. Ctr.,* No. 14 CIV. 840 ER, 2014 WL 6481996, at *5 (S.D.N.Y. Nov. 18, 2014) ("[I]t is well-settled in the Second Circuit that a private hospital confining a patient under the New York MHL is not acting under color of state law.") (citing *McGugan v. Aldana–Bernier,* 752 F.3d 224, 229 (2d Cir.2014) (reaffirming the principle that "forcible medication and hospitalization ... by private health care providers" cannot be attributed to the state); *Hogan,* 346 Fed.Appx. at 629 (affirming district court's grant of summary judgment to private hospital and physician that involuntarily committed patient, finding that conduct could not be attributed to the state); *see generally Doe v. Rosenberg,* 166 F.3d 507 (2d Cir.1999) (holding that private health care professionals and a private hospital had not functioned as state actors when they involuntarily committed a patient to their psychiatric ward)).

Since JHMC was not a state actor, and also does not qualify as a "person" for the purposes of § 1983, Schoolcraft's claims for involuntary confinement, due process violations, and municipal liability against JHMC fail as a matter of law. TAC ¶¶ 285–90, 296–315.

**B. *State Law Medical Malpractice Claims against JMHC Survive Summary Judgment***

The TAC contains two state law negligence claims against JHMC: a medical malpractice claim and a negligence hiring, supervision, training and retention claim. TAC ¶¶ 365–68 (malpractice claim), 369–372 (negligent supervision claim). JHMC makes several arguments in favor of summary dismissal of Plaintiff's negligence claims against the hospital.

## i. Expert Testimony Raises Triable Issues

JHMC argues Plaintiff's expert reports are inadequate as a matter of law, and warrant dismissal of the medical malpractice claim. Under New York law, a medical malpractice claim requires a showing of: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage. *Stukas v. Streiter,* 83 A.D.3d 18, 918 N.Y.S.2d 176, 184 (2011) (internal quotations and citations omitted). Expert medical opinions are typically required to substantiate or defeat such claims. *See Fiore v. Galang,* 64 N.Y.2d 999, 1001, 489 N.Y.S.2d 47, 478 N.E.2d 188, 189 (1985); *Stukas,* 918 N.Y.S.2d at 184; *see also Sitts v. United States,* 811 F.2d 736, 739 (2d Cir.1987) ("It is well established in New York law that unless the alleged act of malpractice falls within the competence of a lay jury to evaluate, it is incumbent upon the
535 plaintiff to present expert testimony in support of the allegations to establish a prima facie case of *535 malpractice.") (internal quotations and citations omitted); *Bender v. Lowe,* No. 08 CV. 0334 BSJ, 2011 WL 4001147, at *8 (S.D.N.Y. Aug. 31, 2011) *aff'd,* 531 Fed.Appx. 142 (2d Cir.2013) ("In determining whether a physician's decision to commit someone involuntarily comports with due process, the plaintiff bears the burden of producing evidence, generally in the form of expert testimony, regarding the applicable medical standards and the defendant's alleged failure to meet those standards.") (internal quotations and citations omitted).

JHMC contends that Plaintiff's expert reports improperly omit the standard of care which Plaintiff alleges was violated and failed to establish a substantial departure from accepted standards of care. *See generally,* JHMC's Mem. in Supp't 24–29. In response to JHMC's contention, Plaintiff does not deny the necessity of expert testimony on this issue. *Compare* Pl.'s Mem. in Opp'n 119 *with Sitts* (noting possible exception to expert testimony requirement where "act of malpractice falls within the competence of a lay jury to evaluate"). Rather, Plaintiff contends that the report authored by Dr. Lubit, one of two experts for Plaintiff, "sets forth the governing standards, sets forth the established procedures for examining patients, and explains in detail the reason why the examinations of Officer Schoolcraft grossly departed from the standard of care." Pl.'s Mem. in Opp'n 119 (citing PMX 30 (hereinafter "Lubit Rpt.") 10–21).

Courts dismissed malpractice claims on summary judgment where the plaintiff's expert fails to identify the standard of care which was allegedly violated. *See Bender v. Lowe,* No. 08 CV. 0334 BSJ, 2011 WL 4001147, at *9 (S.D.N.Y. Aug. 31, 2011) *aff'd,* 531 Fed.Appx. 142 (2d Cir.2013) (granting summary judgment where the plaintiff's expert "only states that defendants' decisions departed from accepted standards of medical/psychiatric care; he does not conclude that the treatment decisions constituted a substantial departure from such standards, as required by case law.") (internal citation and quotations omitted); *Algarin v. New York City Dep't of Correction,* 460 F.Supp.2d 469, 477 (S.D.N.Y.2006) *aff'd,* 267 Fed.Appx. 24 (2d Cir.2008) ("An anecdotal account of one expert's experience, however extensive or impressive the numbers it encompasses, does not by itself equate to a methodology, let alone one generally accepted by the scientific community.") (internal quotations and citations omitted); *Zeak v. United States,* No. 11 CIV. 4253 KPF, 2014 WL 5324319, at *9 (S.D.N.Y. Oct. 20, 2014) (granting summary judgment where plaintiff's expert "repeatedly disclaimed the ability to define the standard of care").

In his report for Plaintiff, Dr. Lubit wrote: "[a]ccepted clinical practice entails gathering all available relevant, significant information; applying current scientific knowledge; and analyzing the situation via structured professional judgment, as taught in residency programs." *Id.* at 10. Dr. Lubit describes these as "three bases for accepted clinical decision making." *Id.* When asked whether he described the applicable standard of care in his report, Dr. Lubit responded:

> It would be almost impossible to, because then you'd have to lay out what one would have to do exactly in every contingency. It's–I mean I do to some extent describe the standard of care and what doctors are supposed to do and how they don't do it. But I didn't write, a-I didn't write a book chapter on what the standard of care is. I put down key aspects of the standard of care and then explained why I did not think the doctors met that standard of care.

Radomisli Decl. Ex. AA, pp. 49–51. The balance of Dr. Lubit's report details how JHMC's physicians: (1) failed to gather *536 adequate information; (2) failed to reasonably interpret the information they had; (3) failed to independently establish the truth of Schoolcraft's statements; (4) failed to establish whether Schoolcraft's beliefs raised a risk of dangerous behavior; (5) evidenced a lack of familiarity with appropriate commitment policy; and (6) evidenced a lack of knowledge as to the proper methodology for assessing dangerousness. Lubit Rpt. 10–11. According to Dr. Lubit, "[t]he failure of any of these six means that the work was below accepted professional standards." *Id.* at 11.

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Unlike the reports in *Bender* and *Algarin,* Dr. Lubit's report adequately sets out the standard of care and his opinion that JHMC's doctors substantially departed from that standard. *Compare Bender,* 2011 WL 4001147, at *9 *and Algarin,* 460 F.Supp.2d at 477 *with* Lubit Rpt. 10–21 (which can be fairly read as stating that an appropriate standard of care required the opposite of what JHMC had done, i.e.: (1) gathering adequate information about what Mr. Schoolcraft had done and believed concerning his allegation of corruption by superiors; (2) reasonably interpreting the information gathered; (3) calling and speaking with people in the Police Department's Internal Affairs Bureau in order to see if Schoolcraft's statements of corruption were paranoid, or a misperception, or were justified; (4) determining whether his beliefs were likely to lead him to engage in dangerous behavior; (5) being familiar with state law and JHMC's written policies regarding involuntary confinement; (6) being familiar with and applying proper methodology for assessing dangerousness).

Contrary to JHMC's contention, the court in *Bender* did not dismiss a malpractice claim because the Plaintiff's expert failed to cite authority for the contention that a physician must corroborate police reports or third party accounts. Rather, the *Bender* court dismissed the claim because the plaintiff "produced no expert report establishing that this [failure to verify] constituted a substantial departure from generally accepted medical standards." *Bender,* 2011 WL 4001147, at *10. In contrast to *Bender,* Dr. Lubit here stated that "[f]ailing to call key collaterals (in this case, IAB) is outside standard practice," as were the other criticisms he identified. Lubit Rpt. 10–21. Unlike the expert in *Zeak,* Dr. Lubit did not disclaim his ability to define the standard of care. Rather, he testified that his report described where the standard of care was violated and that he did not provide a lengthy description of the standard of care under myriad set of facts. *See* Radomisli Decl. Ex. AA, pp. 49–51. This is not, as JHMC would have it, a mere disagreement over a diagnosis or a course of treatment. Dr. Lubit's report states that Schoolcraft's treatment fell below the required standard of care. That Dr. Lubit's report does not have a section titled "standard of care" is no more fatal to his report than it is to the report of Dr. Levy, JHMC's expert. *Compare* Lubit Rpt. *with* Radomisli Decl. Ex. JJ (hereinafter "Levy Rpt."). Dr. Levy states that "I opine, with a reasonable degree of medical certainty that Jamaica Hospital did not deviate from acceptable community standards of care and did not violate the plaintiff's rights." Levy Rpt. 6. He then sets out JHMC's acts and his evaluation of their appropriateness. *See generally,* Levy Rpt. 6–7. He does not, however, proffer a discrete standard to which JHMC physicians adhered.

JHMC also notes that Dr. Lubit never claims the course of treatment fell *"substantially* below medical standards." *See, e.g.,* JHMC's Mem. in Supp't 26 (emphasis added). Previous cases, in granting summary judgment in the physician-defendant's favor, have noted that the departure was not "substantial" among the

537 reasons for granting summary judgment. *See, e.g.,* *537 *Kulak v. City of New York,* 88 F.3d 63, 75 (2d Cir.1996); *Kraft v. City of New York,* 696 F.Supp.2d 403, 414 (S.D.N.Y.2010) *aff'd,* 441 Fed.Appx. 24 (2d Cir.2011); *Bender,* 2011 WL 4001147, at *10. Rather than interpreting the above-cited opinions as turning on the existence of the word "substantial" in a plaintiff's expert report, the better reading is that they require *evidence* of a substantial departure, which creates a question of fact for a jury to decide. *See, e.g., Altamuro v. Cnty. of Nassau,* 33 Fed.Appx. 556, 561 (2d Cir.2002) (Plaintiff *"presented no evidence* that the defendants' conduct fell substantially below generally accepted standards in the medical community.") (emphasis added); *Kraft,* 696 F.Supp.2d at 415 ("Because *plaintiff fails to offer any evidence* that the doctor defendants' diagnoses, actions, and subsequent determinations ... fell substantially below accepted medical standards, no reasonable jury could conclude that they violated plaintiff's substantive due process rights under the Fourteenth Amendment.") (emphasis added); *Hogan v. A.O. Fox Mem'l Hosp.,* 346 Fed.Appx. 627, 630 (2d Cir.2009) (allowing summary judgment where the plaintiff *"offers no evidence* as to the generally accepted medical practices applicable to a physician's recommendation of involuntary commitment") (emphasis added); *Bender,* 2011 WL 4001147, at *9 ("Plaintiff's expert report does not describe any professional standards governing the involuntary admission of a patient for psychiatric care.").

"A court's duty ... is not to reject opinion evidence because non-lawyer witnesses answer questions that are not hypothetical or fail to use the words and phrases preferred by lawyers and judges, but rather to determine whether the whole record exhibits substantial evidence that there was a departure from the requisite standard of care." *Knutson v. Sand,* 282 A.D.2d 42, 725 N.Y.S.2d 350, 354–55 (2001). *Kulak* is consistent with this principle. In *Kulak,* the Second Circuit noted an earlier opinion, where it had "decided that an expert affidavit asserting that the treating physicians made incorrect and objectively unreasonable decisions created an issue of fact for trial regarding whether the doctors acted within the realm of professional competence in treating the plaintiff." 88 F.3d 63, 76 (citing *Rodriguez v. City of New York,* 72 F.3d 1051 (2d Cir.1995)). The plaintiff's expert in *Kulak* failed to base his opinion on the conditions of the plaintiff at the time of the alleged malpractice: in other words, the report did not raise an issue of material fact regarding the decision to commit the plaintiff at the time of his commitment. Tellingly, the plaintiff's expert report in *Kulak* did, in fact, contain the phrase "substantially departed," yet the Second Circuit nevertheless affirmed summary judgment for lack of evidence of the substantial departure. *Id.* at 75; *cf. Zeak v. United States,* No. 11 CIV. 4253 KPF, 2014 WL 5324319, at *9 (S.D.N.Y. Oct. 20, 2014) (noting that what matters is whether, "taken as a whole, the record contains evidence that there was a departure from the relevant standard of care ... Plaintiff's expert was not required to use specific terms of art in his expert report or deposition testimony.").

By contrast, Plaintiff's second expert report, authored by Dr. Halpren–Ruder ("Dr. Ruder"), is inadmissible. Dr. Ruder's report is divided into two parts. *See* PMX 36. Part One relates to the care rendered by JHMC's EMTs prior to Schoolcraft's arrival at JHMC. *Id.* at 2. Section 9.59 of the New York Mental Hygiene Law extends immunity to EMTs from suits for damages that did not result from the EMTs' gross negligence. A municipal employee's immunity extends to the municipality. *Shinn v. City of New York,* 65 A.D.3d 621, 884 N.Y.S.2d 466,
538 467 (2009) (citing Mental Hygiene Law § 9.59); *538 *cf. Woody v. Astoria Gen. Hosp., Inc.,* 264 A.D.2d 318, 319, 694 N.Y.S.2d 41, 42 (N.Y.1999) (holding that the EMT's employer cannot invoke Section 9.59 with respect to a negligent hiring claim as opposed to a claim premised on vicarious liability). As the EMTs are immune from the malpractice claim, JHMC too cannot be held vicarious liable since that liability is derivative of its agent. Consequently, Part One of Dr. Ruder's report is irrelevant to a triable issue.

Part Two of Dr. Ruder's report relates to "services provided in the Emergency Department (ED)" of JHMC. PMX 36 at 3. The basis for his criticisms of JHMC's standard of care is the Consensus Statement on Medical Clearance Protocols for Acute Psychiatric Patients Referred for Inpatient Admissions. *See* Radomisli Decl. Ex. CC, p. 2; Ex. EE; Ex. DD, p. 49. At his deposition, however, Dr. Ruder acknowledged that the guidelines he cited in support of his opinion only came into effect after Plaintiff was hospitalized, and that he was not familiar with the standard of care in New York as of 2009. Radomisli Decl. Ex. DD, p. 72. Indeed, he testified that the only guidelines or literature he reviewed regarding the standard of care for the running of emergency departments were the post–2009 guidelines he cited in his report (Radomisli Decl. Ex. DD, pp. 131–132), and that he did not review anything that was in effect in 2009 (Radomisli Decl. Ex. DD, pp. 132–133). Accordingly, Dr. Ruder's opinion lacks the appropriate foundation and is inadmissible.

## ii. JHMC Liable for Physicians' Alleged Malpractice

The parties apparently dispute the nature of Plaintiff's malpractice claim against JHMC. JHMC contends that Schoolcraft failed to plead a "vicarious liability" malpractice claim against JHMC for the Attending Physicians' actions. *See, e.g.,* JHMC's Reply Mem. 31. JHMC notes that Plaintiff has been permitted to amend his complaint three times, and has never asserted a vicarious liability claim. The TAC alleges, in relevant part:

> *JHMC,* its agents, officials, doctors, nurses, physician's assistants, servants, employees, *and/or independent contractors, including, but not limited to, DR. ISAK ISAKOV, and DR. LILIAN ALDANA–BERNIER, jointly and severally,* and individually, departed from good and accepted standards of medical care, and were negligent and careless in the service rendered for and on behalf of plaintiff ADRIAN SCHOOLCRAFT

TAC ¶ 336 (emphasis added). JHMC has not cited, and this court has not independently found, case law requiring that the term "vicarious" be used in order to put forward a medical malpractice claim under New York law. The background principle of notice pleading, which requires a short and plain statement showing the pleader is entitled to relief, also militates against JHMC's contention. Vicarious liability is not a type of claim, it is a theory of liability associated with state law claims, including medical malpractice claims. While not using the term "vicariously liable," the formulation employed by Plaintiff is sufficient to put JHMC on notice that it is being held liable, "jointly and severally," for the alleged malpractice of Drs. Bernier and Isakov. And in any event, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded the opportunity to test his claim on the merits." *Schoolcraft v. City of New York,* 81 F.Supp.3d 295, 298–99, No. 10 CIV. 6005 RWS, 2015 WL 252413, at *1 (S.D.N.Y. Jan. 16, 2015). Consequently, this holding obviates the need for another amendment of the complaint.

539 JHMC further contends that Schoolcraft "cannot sustain an independent *539 cause of action for medical malpractice against a defendant hospital" if he "fails to state how specific members of the hospital staff committed an act of malpractice independent from the patient's attending physicians." JHMC's Mem. in Supp't 21 (citing *Suits v. Wyckoff Heights Med. Ctr.,* 84 A.D.3d 487, 488, 922 N.Y.S.2d 388 (N.Y.App.Div.2011)). *Suits* is inapposite under these facts.[11] The court in *Suits* held that a "hospital may not be held concurrently liable for injuries suffered by a patient who is under the care of a private attending physician *chosen by the patient.*" *Id.* (emphasis added). Though it is true that hospitals are not normally liable for the alleged malpractice of their attending physicians, an exception exists where "a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing." *Muslim v. Horizon Med. Grp., P.C.,* 118 A.D.3d 681, 988 N.Y.S.2d 628, 630 (2014); *Orgovan v. Bloom,* 7 A.D.3d 770, 771, 776 N.Y.S.2d 879 (N.Y.App.Div.2004) (collecting cases). Schoolcraft was involuntarily admitted JHMC's emergency room, involuntarily transferred to JHMC's psychiatric emergency department, and involuntarily

committed by Dr. Bernier. *See generally* Facts ¶¶ 175–85, 237. There can be no question, under these facts, that Schoolcraft did not choose his physicians. *See, e.g.,* Facts ¶ 147 (Schoolcraft specifically requested to be taken Forest Hills Hospital, not JHMC). Consequently, the exception described in *Muslim* applies and questions of fact, as found above, warrant denial of the summary judgment sought by JHMC.

[11] Likewise, the two other trial court slip opinions JHMC cites in its reply memorandum of law did not involve involuntary admissions. *See Mercedes v. Farrelly,* 2012 WL 1576437, 2012 N.Y. Misc. LEXIS 2032 (N.Y.Sup.Ct. Apr. 27, 2012) (plaintiff selected her allegedly negligent surgeon); *Dendariarena v. Mount Sinai Hospital,* 2012 WL 1834253, 2012 N.Y. Misc. LEXIS 2319 (N.Y.Sup.Ct. May 9, 2012) (same) (cited in JHMC Reply Mem. 32).

**C. *Negligent Hiring, Retention, Training and Supervision Claim against JHMC is Dismissed***

To state a cause of action for negligent hiring, training or supervision (hereinafter "negligent hiring") under New York law, "in addition to the standard elements of negligence, a plaintiff must show 1) that the tortfeasor and the defendant were in an employee-employer relationship; 2) that the employer knew or should have known of the employee's propensity for the conduct which caused the injury prior to the injury's occurrence; and 3) that the tort was committed on the employer's premises." *Ehrens v. Lutheran Church,* 385 F.3d 232, 235 (2d Cir.2004) (citations and quotations omitted); *Kenneth R. v. Roman Catholic Diocese,* 229 A.D.2d 159, 654 N.Y.S.2d 791 (N.Y.App.Div.1997). "A negligent hiring claim, however, may be possible under an exception to the principle barring liability with respect to independent contractors where the defendant party itself was negligent in selecting, instructing, or supervising the contractor." *Corazzini v. Litton Loan Servicing LLP,* No. 1:09–CV–0199 (LEK RFT), 2010 WL 1132683, at *9 (N.D.N.Y. Mar. 23, 2010) (internal quotations and citations omitted).

In his opposition to JHMC's summary motion on this point, Plaintiff points the Court to the *negligence per se* argument from his moving papers. *See* Pl.'s Mem. in Opp'n 122–123 (referencing Pl.'s Mem. in Supp't 48–49). The gist of Plaintiff's argument there is that JHMC and the Attending Physicians involuntarily committed
540 patients on the basis of any *540 risk, as opposed to the statutorily-compliant level of "substantial risk." *See* Pl.'s Mem. in Supp't 48. This is insufficient to allege a negligent hiring claim. Plaintiff does not allege that JHMC "failed to investigate a prospective employee, notwithstanding knowledge of facts that would lead a reasonably prudent person to investigate that prospective employee." *Bouchard v. N.Y. Archdiocese,* 719 F.Supp.2d 255, 261 (S.D.N.Y.2010) (citations and quotations omitted). Plaintiff also does not allege that JHMC negligently instructed, supervised, or trained the Attending Physicians regarding involuntary commitment decisions. *See Corazzini,* 2010 WL 1132683, at *9. The fact that both JHMC and the Attending Physicians purportedly applied an incorrect commitment standard does not constitute evidence that JHMC knew or should have known that its independent contractors were applying the wrong standard.

**D. *Negligence Per Se Claim against JHMC is Dismissed***

As suggested above, Plaintiff's negligence *per se* claim cannot survive summary judgment. His contention is that JHMC and the Attending Physicians violated the Mental Hygiene law, by committing Schoolcraft in the absence of a substantial risk. *See* Pl.'s Mem. in Supp't 48. Schoolcraft was admitted by the Attending Physicians, not JHMC. Consequently, his claim against JHMC fails, since JHMC's purported breach of the law is not the proximate cause of Schoolcraft's injury. *See Anchundia v. Ne. Utilities Serv. Co.,* No. CV 07–4446(AKT), 2010 WL 2400154, at *5 (E.D.N.Y. June 11, 2010) ("[T]he plaintiff must prove that the violation of the statute, that is, the breach of duty imposed by the statute, was a proximate cause of the injury.") (internal quotations and citations omitted).

**E. *Intentional Infliction of Emotional Distress Claim against JHMC is Dismissed***

As discussed in Section V.B of this Opinion, IIED claims may be dismissed where they "fall within the ambit of traditional tort liability" and are in fact duplicates of other claims put forward. *See Fischer v. Maloney,* 43 N.Y.2d 553, 402 N.Y.S.2d 991, 373 N.E.2d 1215, 1217 (1978); *Druschke v. Banana Republic,* 359 F.Supp.2d 308, 315–16 (S.D.N.Y.2005); *Herlihy v. Metro. Museum of Art,* 214 A.D.2d 250, 633 N.Y.S.2d 106, 114 (1995); *see also McGrath v. Nassau Health Care Corp.,* 217 F.Supp.2d 319, 335 (E.D.N.Y.2002) ( "New York courts do not allow IIED claims where 'the conduct complained of falls well within the ambit of other traditional tort liability.' ") (internal citations omitted); *Crews v. Cnty. of Nassau,* 996 F.Supp.2d 186, 214 (E.D.N.Y.2014) (same); *Franco v. Diaz,* 51 F.Supp.3d 235, 243–44 (E.D.N.Y.2014) ("Because precisely the same conduct and the same injury fall within the ambit of defendants' proposed defamation counterclaim, their IIED counterclaim in the Amended Answer must be dismissed as duplicative."); *Druschke v. Banana Republic, Inc.,* 359 F.Supp.2d 308, 316 (S.D.N.Y.2005) (dismissing IIED claim where "there are no allegations of injuries that may not be redressed through [plaintiff's] other causes of action.").

Unlike Plaintiff's IIED claim against the City Defendants, which involved injuries distinct from his other claims, his IIED claim against JHMC is premised on the same conduct and injuries giving rise to Schoolcraft's malpractice claim. Consequently, the IIED claim is dismissed.

**VII. *CLAIMS RELATING TO THE ATTENDING PHYSICIANS***

541 Dr. Bernier and Dr. Isakov filed separate summary judgment motions and oppositions *541 to Schoolcraft's summary judgment motion. Where their arguments substantially overlap, they are treated jointly below.

**A. *Section 1983 Claims against the Attending Physicians are Dismissed***

As discussed above, neither JHMC nor the Attending Physicians treating Schoolcraft were state actors. Consequently, these claims are dismissed. *See generally* Section VI.A of this Opinion.

**B. *Intentional Infliction of Emotional Distress Claims against the Attending Physicians are Dismissed***

The IIED claim against the Attending Physicians is premised on the same conduct giving rise to Schoolcraft's malpractice claim against them. *See generally* Section VI.E of this Opinion. Consequently, the IIED claims are dismissed.

**C. *Declaratory Relief Claims Survive Summary Judgment***

The Attending Physicians contend that Plaintiff did not receive permission to add declaratory judgement claims against them in the TAC. *See* Bernier's Reply Mem. 10; Isakov's Mem. in Supp't 20. In making his motion to amend, Plaintiff included an exhibit reflecting the proposed changes to the operative complaint. *See* Exhibit 3 to Pl.'s Mem. of Law in Supp't of Motion to Amend, filed December 4, 2014. Neither of the Attending Physicians objected to the proposed changes. Though the Court's opinion on the motion to amend focused on the dispute as to the proposed declaratory and injunctive relief claim as brief by the City Defendants and Schoolcraft, that description should not be read as an implicit limitation of the proposed amendment. *Schoolcraft v. City of New York,* 81 F.Supp.3d 295, 302–03, No. 10 CIV. 6005 RWS, 2015 WL 252413, at *5 (S.D.N.Y. Jan. 16, 2015). The then-proposed, now operative, TAC contains a request for "[d]eclaratory judgment in favor of plaintiff and against *each of the defendants,"* which extends to the Attending Physicians. *See* TAC ¶ 373(c).

**D. *State Law Claims Survive Summary Judgment***

The Attending Physicians contend that the state law claims against them should be dismissed since the federal claims fail. Bernier's Mem. in Supp't 22; Isakov's Mem. in Supp't 18. The Court rejected a substantially similar request by JHMC in connection with its 2011 motion to dismiss. *See generally Schoolcraft v. City of New York,* No. 10 CIV. 6005 RWS, 2011 WL 1758635, at **4–5 (S.D.N.Y. May 6, 2011) (electing to exercise supplemental jurisdiction because there exists a common nucleus of overlapping facts). The same reasoning applies with equal force here, and the state claims are not dismissed.

**E. *False Arrest and Imprisonment Claims Survive Summary Judgment***

As noted in Section V.A of this Opinion, to establish a cause of action for false imprisonment or false arrest under New York law, a plaintiff must establish that: (1) the defendant intended to confine him; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged. *Smith v. County of Nassau,* 34 N.Y.2d 18, 22, 355 N.Y.S.2d 349, 311 N.E.2d 489 (N.Y.1974); *Hernandez v. City of New York,* 100 A.D.3d 433, 953 N.Y.S.2d 199 (2012).

A physician's decision to involuntary commit a patient pursuant under the Mental Hygiene Law is privileged in the absence of medical malpractice. *Anthony v. City of New York,* No. 00 CIV. 4688(DLC), 2001 WL 741743, at *14 (S.D.N.Y. July 2, 2001) *aff'd,* 339 F.3d 129 (2d Cir.2003); *542 *Ferretti v. Town of Greenburgh,* 191 A.D.2d 608, 610, 595 N.Y.S.2d 494 (2d Dept.1993). As discussed above in detail in Section VI.B.ii of this Opinion, questions of material fact remain as to whether JHMC's physicians engaged in malpractice by committing Schoolcraft. Consequently, summary judgment on this issue is inappropriate as to the Attending Physicians, as well as to JHMC, derivatively.

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**VIII. *CONCLUSION***

Based upon the facts and conclusions of law set forth above, Plaintiff's, City Defendants', Mauriello's, JHMC's, Dr. Bernier's, and Dr. Isakov's motions are all granted in part and denied in part.

A pretrial conference to schedule further proceedings will be held at two o'clock in the afternoon on May 12, 2015 in Courtroom 18C.

It is so ordered.

No. 14-1045-cv
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# Kregler v. City of N.Y.

604 F. App'x 44
Decided Mar 27, 2015

No. 14-1045-cv

03-27-2015

WILLIAM KREGLER, Plaintiff-Appellant, v. CITY OF NEW YORK, LOUIS GARCIA, BRIAN GROGAN, ROSE GILL HEARN, KEITH SCHWAM, DARREN KEENAGHAN, Sued Individually and in their official capacities, JAYME NABEREZNY, Defendants-Appellees.

For Plaintiff-Appellant: NATHANIEL B. SMITH, Esq., New York, NY. For Defendants-Appellees: DRAKE A. COLLEY, Assistant Corporation Counsel, for Zachary W. Carter, Corporation Counsel of the City of New York, New York, NY.

FOR THE COURT: Catherine O'Hagan Wolfe, Clerk

## SUMMARY ORDER

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of March, two thousand fifteen. PRESENT: RALPH K. WINTER, DEBRA ANN LIVINGSTON, DENNY CHIN, *Circuit Judges*. For Plaintiff-Appellant: NATHANIEL B. SMITH, Esq., New York, NY. For Defendants-Appellees: DRAKE A. COLLEY, Assistant Corporation Counsel, for Zachary W. Carter, Corporation Counsel of the City of New York, New York, NY.

**UPON DUE CONSIDERATION**, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the judgment
2 of the district court is **AFFIRMED**. *2

From 1984 to 2004, Plaintiff-Appellant William Kregler worked for the New York City Fire Department ("FDNY"), first as a firefighter and then as a Fire Marshal. Following his retirement, Kregler applied to become a New York City Marshal on April 22, 2004. Appointment as a City Marshal required approval of the Mayor's Committee on City Marshals, as well as approval by the New York City Department of Investigation ("DOI"). In March 2006, Kregler was notified by Defendant-Appellee Keith Schwam, Director of the Bureau of City

Marshals within DOI, that he would not be appointed as a City Marshal. In this action pursuant to 42 U.S.C. § 1983, Kregler, who was the President of the Fire Marshal's Benevolent Association at the time, argues that his application was terminated in retaliation for his Association's endorsement of Robert Morgenthau, who was running for re-election as Manhattan District Attorney against Leslie Crocker Snyder during the time that Kregler's application was being reviewed. Kregler appeals, *inter alia*, from the judgment of the district court (Marrero, J.) dismissing his amended complaint after a jury returned a verdict in favor of Defendant-Appellee Louis Garcia, from the district court's decisions and orders granting summary judgment in favor of Defendant-Appellees City of New York, Brian Grogan, Rose Gill Hearn, Keith Schwam, Darren Keenaghan, and Jayme Naberezny, and from decisions regarding discovery in the case. We assume the parties' familiarity with the underlying facts and procedural history of the case, and with the issues on appeal.

Kregler first argues that the district court's judgment following the jury verdict must be reversed because the district court improperly instructed the jury. He contends (i) that the jury instructions erroneously implied that the jury was required to find that Hearn, the Commissioner of DOI, acted to terminate his application with retaliatory animus, when his theory of the case was that *Garcia* harbored retaliatory animus and that Garcia's animus ultimately caused Kregler's application to be terminated, and (ii) that the jury instructions merged the
3 adverse *3 action and causation elements of his § 1983 First Amendment retaliation claim, when in fact the two elements were logically distinct and the adverse action element was not contested. Regardless of whether the district court's jury instructions were erroneous, a new trial is not required in this case because Kregler cannot show that "considering the instruction[s] as a whole, the cited errors were not harmless, but in fact prejudiced" him. *Crigger v. Fahnestock & Co.*, 443 F.3d 230, 235 (2d Cir. 2006). The jury instructions and verdict sheet correctly made clear that in order for Garcia to be liable, the jury was first required to find that Kregler had proven by a preponderance of the evidence that Garcia harbored retaliatory animus toward Kregler on account of Kregler having engaged in protected speech. Because the jury found that Kregler had not proven that Garcia harbored such animus, he cannot show that the alleged errors in the instructions actually prejudiced him.

Kregler also contends that the district court erroneously excluded important evidence during the trial and improperly limited and sustained objections to fair arguments by his counsel during summation. "We review [the] district court's evidentiary rulings for abuse of discretion, and will reverse only for manifest error." *Cameron v. City of New York*, 598 F.3d 50, 61 (2010) (internal quotation marks omitted). "[A]n evidentiary error in a civil case is harmless unless the appellant demonstrates that it is likely that in some material respect the factfinder's judgment was swayed by the error." *Tesser v. Bd. of Educ. of City Sch. Dist. of City of New York*, 370 F.3d 314, 319 (2d Cir. 2004) (internal quotation marks and alterations omitted). "[T]he propriety of comment by counsel in closing argument is best evaluated, in most instances, by the trial judge. Exclusion, even of permissible comment, will generally not warrant granting a new trial unless actual prejudice results." *Enercomp, Inc. v. McCorhill Pub., Inc.*, 873 F.2d 536, 542 (2d Cir. 1989). Kregler's challenges to the district court's evidentiary rulings and to its sustainment of opposing counsel's objections to his counsel's arguments
4 during summation fail because *4 regardless of whether the district court erred, Kregler has failed to demonstrate that any of the alleged errors affected the jury's judgment in any material respect.

Kregler also argues that the district court erred in granting summary judgment to Defendant-Appellees Grogan, Hearn, Schwam, Keenaghan, Naberezny, and the City of New York. This Court reviews the district court's grant of summary judgment *de novo*, construing the evidence in the light most favorable to the non-moving party. *Gayle v. Gonyea*, 313 F.3d 677, 682 (2d Cir. 2002). A motion for summary judgment is appropriately granted when the movant shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is 'material' when it might affect the

outcome of the suit under governing law," and "[a]n issue of fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 202 (2d Cir. 2007) (internal quotation marks omitted). After reviewing *de novo* the district court's decisions and orders granting summary judgment to each of the Defendant-Appellees listed above, we conclude that the district court correctly granted summary judgment to each of these Defendant-Appellees because they demonstrated that Kregler failed to raise a genuine issue of material fact in his claims against any of them.

We have reviewed Kregler's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

10 Civ. 6005 (RWS)
United States District Court, S.D. New York.

# Schoolcraft v. City of N.Y.

81 F. Supp. 3d 295 (S.D.N.Y. 2015)
Decided Jan 16, 2015

No. 10 Civ. 6005RWS.

01-16-2015

Adrian SCHOOLCRAFT, Plaintiff, v. CITY OF NEW YORK, et al., Defendants.

Law Office of Nathaniel B. Smith, by: Nathaniel B. Smith, Esq., New York, NY, for the Plaintiff. Zachary W. Carter, Corporation Counsel of the City of New York, by: Suzanna P. Mettham, Esq., New York, NY, for the City Defendants. Martin Clearwater & Bell, LLP., by: Gregory J. Radomisli, Esq., New York, NY, for Defendant Jamaica Hospital Medical Center.

SWEET, District Judge.

298 *298

Law Office of Nathaniel B. Smith, by: Nathaniel B. Smith, Esq., New York, NY, for the Plaintiff.

Zachary W. Carter, Corporation Counsel of the City of New York, by: Suzanna P. Mettham, Esq., New York, NY, for the City Defendants.

Martin Clearwater & Bell, LLP., by: Gregory J. Radomisli, Esq., New York, NY, for Defendant Jamaica Hospital Medical Center.

## OPINION

SWEET, District Judge.

Plaintiff Adrian Schoolcraft ("Schoolcraft" or "Plaintiff") moves for an order allowing him to amend the operative Second Amended Complaint ("SAC") pursuant to Rule 15 of the Federal Rules of Civil Procedure.

For the reasons set out below, Plaintiff's motion is granted in part and denied in part, and Plaintiff may file a Third Amended Complaint ("TAC") in keeping with this Opinion.

## Prior Proceedings

A detailed recitation of the facts of the underlying case is provided in this Court's opinion dated May 6, 2011, which granted in part and denied in part Defendant Jamaica Hospital Medical Center's motion to dismiss. *See Schoolcraft v. City of New York,* 10 Civ. 6005, 2011 WL 1758635, at *1 (S.D.N.Y. May 6, 2011). Familiarity with those facts is assumed. The action involves claims brought by Schoolcraft in the SAC against the City, several members of the New York City Police Department ("NYPD"), collectively the ("City Defendants"), and Jamaica Hospital Medical Center ("JHMC"), two doctors employed by JHMC, and others, (collectively with the City Defendants, the "Defendants").

Through the instant motion, Plaintiff seeks to:

1. Remove four of the named Defendants: Police Officers Sondra Wilson ("Wilson"); Richard Wall ("Wall"); Robert O'Hare ("O'Hare"); and Thomas Hanley ("Hanley");

2. Remove a redundant claim for relief brought under 42 U.S.C. § 1983 ;

3. Add Officers Steven Weiss ("Weiss") and Rafel A. Mascol ("Mascol") as named Defendants and amend the case caption accordingly;

4. Reassert claims brought under 42 U.S.C. § 1983 against JHMC;

299 5. Add a claim for injunction and declaratory relief, seeking an order: (a) finding *299 that all of the Defendants' conduct with respect to their treatment of Schoolcraft was unlawful; (b) and directing the expungement of Schoolcraft's medical and personnel records to the extent that those records suggest that Schoolcraft was properly admitted to a psychiatric ward, that he suffers from a mental illness, that his condition required his commitment to a psychiatric hospital, and that he is dangerous to himself or others; and

6. Modifying the phrasing of numerous factual allegations in the SAC.

The instant motion was marked fully submitted on December 31, 2014.

## Applicable Standard

Rule 15 of the Federal Rules of Civil Procedure directs that leave to amend a pleading be given freely when justice requires. *Schoolcraft v. City of New York,* 10–cv–6005, 2012 WL 2161596, at *1 (S.D.N.Y. June 14, 2012). "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded the opportunity to test his claim on the merits." *Id.* (quoting *Williams v. Citigroup, Inc.,* 659 F.3d 208, 213 (2d Cir.2011) ). "However, [a] district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *Id.* (quoting *McCarthy v. Dun & Bradstreet Corp.,* 482 F.3d 184, 200 (2d Cir.2007) ); *see also Zahra v. Town of Southold,* 48 F.3d 674, 686 (2d Cir.1995) (upholding the denial of a motion to amend the complaint that was filed 2 1/2 years after commencement of the action, and three months prior to trial); *Ansam Assocs., Inc. v. Cola Petroleum Ltd.,* 760 F.2d 442, 446 (2d Cir.1985) (upholding denial of a motion to amend a complaint when discovery had been completed and motions for summary judgment had been filed).

With respect to futility, a proposed amendment is evaluated on a motion to dismiss standard. *See Anderson News, L.L.C. v. Am. Media, Inc.,* 680 F.3d 162, 185 (2d Cir.2012) ; *Mina Inv. Holdings, Ltd. v. Lefkowitz,* 184 F.R.D. 245, 258 (S.D.N.Y.1999). To determine whether there would be undue prejudice from a proposed amendment, a court must consider whether the new aspects of the proposed pleading would "(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction." *Monahan v. New York City Dep't of Corrs.,* 214 F.3d 275, 284 (2d Cir.2000) (internal quotations and citations omitted). Delay alone, in the absence of a showing of undue prejudice or bad faith, typically provides an insufficient basis for denying a motion to amend. *See Rachman Bag Co. v. Liberty Mut. Ins. Co.,* 46 F.3d 230, 234–35 (2d Cir.1995) (citing *State Teachers Ret. Bd. v. Fluor Corp.,* 654 F.2d 843, 856 (2d Cir.1981) ); *cf. Parker v. Columbia Pictures Indus.,* 204 F.3d 326, 339 (2d Cir.2000) ( "despite the lenient standard of Rule 15(a), a district court does not abuse its discretion in denying leave to amend the pleadings after the deadline set in the scheduling order where the moving party has failed to establish good cause."). Furthermore, "the adverse party's burden of undertaking discovery, standing alone, does not suffice to warrant denial of a

motion to amend a pleading." *United States v. Continental Ill. Nat'l Bank & Trust Co.,* 889 F.2d 1248, 1255 (2d Cir.1989). Nor is "undue prejudice" established by allegations that an amendment will require the expenditure
300 of additional time, effort, or money. *Block v. First Blood Assocs.,* 988 F.2d 344, 351 (2d Cir.1993).*300 ***The Four Named Defendants Are Removed***

Plaintiff moves, at the Defendants' request, to remove Officers Wilson, Wall, O'Hare, and Hanley as Defendants. Pl.'s Mem. in Supp't 3–5. As this part of the motion is unopposed, these individuals are hereby removed. *See* City Defs.' Mem. in Opp'n 1.

## The First Claim Under 42 U.S.C. § 1983 Is Stricken

Plaintiff moves, at the Defendants' request, to strike its first claim under Section 1983 against all Defendants except JHMC. Pl.'s Mem. in Supp't 5. As this part of the motion is unopposed, that claim is stricken. *See* City Defs.' Mem. in Opp'n 1.

## Two Additional Defendants May Not Be Added to the Complaint

Plaintiff moves, over Defendants' objection, for leave to add Officers Weiss and Mascol as Defendants. *See* Pl.'s Mem. in Supp't 1–2.; City Defs.' Mem. in Opp'n 2–11.

Under federal law, which determines the accrual of a Section 1983 claim, a claim accrues "when the plaintiff knows or has reason to know of the injury which is the basis of his action." *See Howard v. City of New York, et al.,* 02–CV–1731, 2006 WL 2597857, at *4 (S.D.N.Y. September 6, 2006). As to Plaintiff's federal claims against Officers Weiss and Mascol, the limitations period for § 1983 claims brought in New York state is three years from date of accrual, i.e., October 31, 2012. *See Okure v. Owens,* 816 F.2d 45, 47 (2d Cir.1987), *aff'd* 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989). Those federal claims are therefore barred.

Plaintiff's state law claims are also barred. "[I]n a federal court, state notice-of-claim statutes apply to state law claims." *Hyde v. Arresting Officer Caputo,* 98 Civ. 6722, 2001 WL 521699, at *4 (E.D.N.Y. May 11, 2001). Section 50–i of the New York General Municipal Law requires a notice of claim to be filed when bringing an action against the City of New York. N.Y. Gen. Mun. L. § 50–i. Section 50–e of the statute requires a plaintiff to "file a notice of claim within ninety days after the claim arises and commence the action within one year and ninety days from the date the cause of action accrued." *Hyde,* 2001 WL 521699, at *4 ; N.Y. Gen. Mun. L. § 50–e. A plaintiff's "failure to comply with the mandatory New York statutory notice-of claim requirements results in dismissal of his claims." *Warner v. Village of Goshen Police Dep't,* 256 F.Supp.2d 171, 175 (S.D.N.Y.2003) ; *see also Mejia v. City of New York,* 119 F.Supp.2d 232, 255–56 (E.D.N.Y.2000) (suits for torts arising from conduct of police officers in the course of their employment must be filed in accordance with New York notice of claim statutes); *Hyde,* 2001 WL 521699, at *4 ; *Davidson v. Bronx Mun. Hosp.,* 64 N.Y.2d 59, 62, 484 N.Y.S.2d 533, 473 N.E.2d 761 (N.Y.1984). These provisions have been strictly construed. *Shakur v. McGrath,* 517 F.2d 983, 985 (2d Cir.1975). Because Plaintiff has failed to file a Notice of Claim against the newly named defendants, his state-law claims against them fail. *See* Plaintiff's Four Notices of Claim dated January 27, 2010, annexed to Mettham Decl. as Ex. C.

Since these claims are barred, adding Officers Weiss and Mascol is permissible only if these amended claims relate back to the original complaint under Rule 15(c) of the Federal Rules of Civil Procedure. *See Krupski v. Costa Crociere S.p.A.,* 560 U.S. 538, 541, 130 S.Ct. 2485, 177 L.Ed.2d 48 (2010) ; *Soto v. Brooklyn Correctional Facility,* 80 F.3d 34, 35 (2d Cir.1996) (a party may amend its complaint after the statute of
301 limitations expires *301 to add additional defendants only if the amendment would "relate back" to the date that the original complaint was filed).

Rule 15(c)(1)(C) of the Federal Rules of Civil Procedure provides that an amendment that attempts to bring a new party into a lawsuit will "relate back" to the date of the original pleading when (1) the claim arises out of the same conduct originally pleaded and (2) within 120 days of the original filing date, the party to be added both "received such notice of the action that it will not be prejudiced in defending on the merits;" and the party had actual or constructive notice that "that the action would have been brought against it, but for a mistake concerning the proper party's identity." Plaintiff argues this provision allow him to add Officers Weiss and Mascol. *See* Pl.'s Mem. in Supp't 6.

Claims against any newly added defendants will not "relate back" to the date of the original complaint where the plaintiff's failure to name the prospective defendant was "the result of a fully informed decision as opposed to a mistake concerning the proper defendant's identity." *See Krupski,* 560 U.S. at 541, 130 S.Ct. 2485 ; *Cornwell v. Robinson,* 23 F.3d 694, 705 (2d Cir.1994) (failure to name a known party constitutes a choice not to sue rather than a mistake of a party's identity). An amended complaint seeking to replace a John Doe with a named defendant after the expiration of the statute of limitations does not relate back to the initial complaint under Rule 15(c) because the "failure to identify individual defendants when the plaintiff knows that such defendants must be named cannot be characterized as a mistake." *Barrow v. Wethersfield Police Dep't,* 66 F.3d 466, 470 (2d Cir.1995) ; *see also Tapia–Ortiz v. Doe,* 171 F.3d 150, 152 (2d Cir.1999). Where a plaintiff is aware of the purported misconduct of certain individuals, and where a plaintiff "was not required to sue them ... her failure to do so in the original complaint, in light of her obvious knowledge and the detailed nature of that pleading[ ] ... must be considered a matter of choice, not mistake." *Cornwell v. Robinson,* 23 F.3d 694, 705 (2d Cir.1994) ; *see also Barrow,* 66 F.3d at 470 ("the failure to identify individual defendants when the plaintiff knows that such defendants must be named cannot be characterized as a mistake"); *Abdell v. City of New York,* 05–CV–8453, 2006 WL 2620927, at *7 (S.D.N.Y. Sept. 12, 2012) ("Where a plaintiff fails to timely sue a potentially liable party despite incriminating disclosures made within the statute of limitations, the Court cannot find that a mistake was made for relation back purposes.").

Here, Plaintiff knew the identities of Officers Mascol and Weiss within the applicable statute of limitations and did not name them as defendants or serve them with a summons and complaint during that time. This constitutes a deliberate choice, not a mistake of identity as contemplated by Rule 15. Since the claims would not relate back, this proposed amendment would be futile and this portion of the motion is denied.

## Plaintiff May Include Its Section 1983 Claim Against JHMC

Plaintiff moves, over JHMC's objection, for leave to reinstate a Section 1983 claim against JHMC. *See* Pl.'s Mem. in Supp't 7–15; JHMC Def.'s Mem. in Opp'n 3–16. As discussed above, undue delay, futility, bad faith, or undue prejudice to the opposing party warrant denial of a motion to amend under Rule 15. *See McCarthy,* 482 F.3d 184, 200 (2d Cir.2007).

With respect to futility: "to maintain a viable § 1983 action against a municipality, a government agent (such as
302 [a private corporation] ), or individual policymaking *302 defendants in their official capacities ..., a plaintiff must demonstrate that a constitutional deprivation occurred as the result of an express policy or custom promulgated by that entity or an individual with policymaking authority." *Schoolcraft,* 2011 WL 1758635, at *3 (internal quotations and citations omitted).

The deposition testimonies of two physicians involved in the decision to commit Schoolcraft, Drs. Bernier and Isakov, and the testimony of JHMC through Dr. Dhar, suggest that JHMC's policy was to "to involuntarily commit a patient where there was *any risk* of dangerousness" rather than the "*substantial risk* of dangerousness" standard which has been held to be constitutional. Pl.'s Mem. in Supp't 8–10 (emphasis added)

(citing *Project Release v. Prevost,* 722 F.2d 960, 972–74 (2d Cir.1983) ). Indeed, JHMC admitted that its practice, contrary to written policy, was to involuntarily commit for any risk, not simply for a substantial risk. Dhar Tr. at 134:21–135:04 ("Q. So under Jamaica's policy, any possible risk is a sufficient basis [upon] which to involuntary admit somebody, because of the conclusion that they are dangerous to themselves or others; is that correct? .... A. Yes."). The proposed amendment adequately alleges that the decision to involuntarily commit Schoolcraft was taken by "JMHC officers, employees or agents pursuant to the customs ... [of] JHMC" and that "Defendants ... while acting under color of state law, engaged in conduct which constituted a custom, usage or practice ... forbidden by the Constitution of the United States," specifically, failing to "perform the proper and necessary tests to determine" that Schoolcraft posed a substantial risk of physical harm to himself or others. TAC ¶¶ 243–44, 282–87. These allegations are sufficient to survive a motion to dismiss, and are therefore not futile.

Dr. Dhar's deposition took place in July 2014. Though Plaintiff has not justified the delay between the date of the deposition and the request for leave to amend, JHMC too has not explained how it would be prejudiced or otherwise harmed beyond the inconvenience of potentially having to amend its summary judgment briefing. JHMC has also not demonstrated Plaintiff's bad faith in making this request in December. While admittedly an inconvenience for the Defendants and the Court, the request came prior to the deadline for summary judgment briefings and the timing alone does not indicate bad faith. The amendment is permitted.

## Plaintiff May Request Declaratory and Injunctive Relief

Plaintiff moves, over JHMC's objection, for leave to add a claim seeking declaratory and injunctive relief, specifically, a declaration that the City Defendants' conduct was illegal and an injunction requiring JHMC and the City Defendants to expunge from Schoolcraft's medical files any "record or a finding that Officer Schoolcraft was mentally ill, dangerous or otherwise a person who required involuntary commitment to a psychiatric ward." Pl.'s Mem. in Supp't 15.

City Defendants object on the basis that the proposed injunctive relief would prejudice them, since they lacked sufficient notice upon which to develop the evidence that would constitute their defense to this proposed claim and would require extra time and pages in their summary judgment papers to respond. City Def.'s Mem. in Opp'n 15. Specifically, the City Defendants are concerned about their ability to address an April 2009 decision to remove Schoolcraft's weapon on the basis of the fact that Schoolcraft had a prescription for a psychotropic medication from his private doctor. *Id.* However, as noted above, "the adverse party's burden of undertaking
303 discovery, *303 standing alone, does not suffice to warrant denial of a motion to amend a pleading." *Continental,* 889 F.2d at 1255. Likewise, "expenditure of additional time, effort, or money" does not constitute prejudice. *Block,* 988 F.2d at 351. Therefore, Plaintiff may amend to include this claim.

## Plaintiff May Make His Proposed "Typographical or Editorial" Amendments

Plaintiff moves for leave to make various "typographical or editorial" modifications to the SAC. Pl.'s Mem. in Supp't 15–16. Both City Defendants and JHMC object, on the grounds that the proposed changes are substantive rather than editorial or typographical. *See* City Defs.' Mem. in Opp'n 11–15; JMHC Def.'s Mem. in Opp'n 17. The most significant amendments to which Defendants specifically object are discussed below seriatim.

City Defendants object to amendments alleging existence of quotas for stops, arrests, and summons, to paragraphs that previously alleged the existence of summons quotas only. City Defs.' Mem. in Opp'n 12. City Defendants contend that they have "spent considerable time researching and drafting their summary judgment motion based on the unique argument regarding a summons quota" and that the changes would alter the

"landscape of discovery and litigation to date," therefore the amendments should be barred. City Defs.' Mem. in Opp'n 12. Three considerations counsel against adopting the City Defendants' position. *First,* as discussed above, additional discovery, and expenditure time and effort do not warrant rejection of a motion to amend. *Continental,* 889 F.2d at 1255 ; *Block,* 988 F.2d at 351. *Second,* Defendants will be allotted additional time in which to prepare arguments addressing the TAC's new amendments. *Third,* the pre-existing allegations in the SAC commonly refer to quotas for "arrest/summons" or "arrests and summons," undermining City Defendants' argument that the SAC is currently limited to summons quotas alone. *See e.g.,* SAC ¶¶ 2, 38, 40, 54, 62–63, 83. These amendments are permitted.

City Defendants object to amendments changing allegations that Defendants "issued legal process" and "arrested plaintiff" to allegations that Defendants "issued and/or commenced legal process" and "arrested and/or instituted legal process [against] plaintiff." City Defs.' Mem. in Opp'n 12; Pl's Mem. in Supp't Ex. 3 (TAC with track changes showing current SAC) ¶¶ 266–67 (formerly ¶¶ 282–83 in SAC). They also object to additional language alleging that City Defendants destroyed evidence and that Defendant Sgt. Frederick Sawyer stated that "This is what happens to rats" while handcuffing Schoolcraft. City Defs.' Mem. in Opp'n 12–13; Pl's Mem. in Supp't Ex. 3 (TAC with track changes showing current SAC) ¶¶ 183, 291 (formerly ¶ 310 in SAC). City Defendants have not demonstrated how these amendments would be futile, how they would result in undue delay or prejudice, or that they were requested in bad faith. These amendments are permitted.

The same conclusion applies to: (a) City Defendants' contentions that Plaintiff should not be allowed to alter the attribution of a previously alleged statement, from Plaintiff's "supervisors" to a "PBA union officer;" (b) City Defendants' contentions that the proposed amendments omit "salient facts" that are "central facts in dispute in this litigation;" (c) City Defendants' and JMHC's contentions that Plaintiff should not be allowed to omit his race from the Complaint; and (d) City Defendant's bulleted list of objectionable modifications to factual allegations. City Defs.' Mem. in Opp'n 12, 14; JHMC Def.'s Mem. in Opp'n 17; Pl's Mem. in Supp't Ex. 3 (SAC with track changes showing proposed *304 TAC) ¶¶ 6, 33, 83, 106, 125, 130, 131, 136, 139, 146, 174, 188, 216, 343 (formerly 324).

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These proposed amendments are most fairly read as clarifications and corrections of the factual allegations rather than wholesale new allegations. Should these "corrections" in fact prove inaccurate, all parties will have the opportunity to demonstrate as much through the additional time afforded by the Court for modifications to the summary judgment submissions. In any event, the bases for denying Plaintiff's motion to amend with respect to this amendment have not been established. The proposed amendments are therefore permitted.

## Conclusion

Plaintiff's motion to amend the SAC is granted in part and denied in part. Specifically, all proposed amendments save the request to add Officers Weiss and Mascol are permitted. Plaintiff will file a new TAC in keeping with this Opinion within a week of the signing of this Opinion. Defendants need not file separate Answers to the TAC, and the TAC's allegations will be deemed denied by all Defendants on the basis of the briefing in opposition to the instant motion.

All parties shall have an additional week following filing of the TAC to file amended summary judgment papers referencing the TAC rather than the SAC. The hearing on all summary judgment motions in this case, consistent with this Court's Order dated January 15, 2015, is rescheduled for Wednesday February 11, 2015 in Courtroom 18C, United States Courthouse, 500 Pearl Street, to provide Defendants with additional time during which to prepare their modified summary judgment papers.

It is so ordered.

# Schoolcraft v. City of N.Y.

Decided Aug 29, 2014

10 Civ. 6005 (RWS)

08-29-2014

ADRIAN SCHOOLCRAFT, Plaintiff, v. CITY OF NEW YORK, et al., Defendants.

APPEARANCES: Attorneys for the Plaintiff LAW OFFICE OF NATHANIEL B. SMITH 111 Broadway Suite 1305 New York, NY 10006 By: Nathaniel B. Smith, Esq. Attorneys for the City Defendants MICHAEL A. CARDOZO CORPORATION COUNSEL OF THE CITY OF NEW YORK 100 Church Street New York, NY 10007 By: Ryan G. Shaffer, Esq. Attorneys for Jamaica Hospital Medical Center MARTIN CLEARWATER & BELL LLP 220 East 42nd Street, 13th Floor New York, NY 10017 By: Gregory John Radomisli, Esq. Attorneys for Dr. Isak Isakov IVONE, DEVINE AND JENSEN, LLP 2001 Marcus Avenue Lake Success, NY 11042 By: Brian Lee, Esq. Attorneys for non-party Dr. Indira Patel VOUTÉ, LOHRFINK, MAGRO & MCANDREW LLP 100 Park Avenue New York, NY 10017 By: Mark McAndrew, Esq.

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Sweet, D.J.

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*3

## Sweet, D.J.

Discovery disputes have plagued this highly controversial action, perhaps understandably. The letters submitted by Plaintiff Adrian Schoolcraft ("Schoolcraft" or the "Plaintiff") on July 23, July 25, August 5, and August 12, 2014, defendant the City of New York (the "City") on July 29 and August 12, 2014, defendant Dr. Isak Isakov ("Dr. Isakov") on August 5, 2014, defendant Jamaica Hospital Medical Center ("JHMC") on July 24, 2014, and non-party witness Dr. Indira Patel ("Dr. Patel") on July 31, August 14, and August 15, 2014 are being treated as motions to compel discovery and oppositions to such motions. **Prior Proceedings**

A detailed recitation of the facts of the case is provided in this Court's opinion dated May 6, 2011. See Schoolcraft v. City of N.Y., 10 Civ. 6005, 2011 WL 1758635, at *1 (S.D.N.Y. May 6, 2011). Familiarity with those facts is assumed.

The instant motion concerns several issues related to discovery. Plaintiff has moved for (1) continuation of the deposition of Sergeant Michael Purpi ("Sergeant Purpi"); (2) *4 continuation of the deposition of Dr. Khin Mar Lwin ("Dr. Lwin"); (3) several outstanding documents Plaintiff had requested from the City in discovery; and (4) an order for the counsel representing Dr. Patel to limit his interference in Plaintiff's deposition of Dr. Patel. The City has moved for Plaintiff to update his discovery responses pertaining to his financial and physical/emotional damages. Dr. Isakov has moved to suppress Plaintiff's use of deposition recordings in his current motions regarding the deposition of Dr. Patel. **The Deposition of Sergeant Purpi**

The deposition of Sergeant Purpi will be continued for one hour and a half. Short objections may be stated, but the witness will answer all questions other than those to which an objection based on privilege is made. **Document Production**

The following documents shall be produced by the City to Plaintiff:

Compstat, Trafficstat and comparable documents relating to Patrol Borough Brooklyn North in which defendant *5 Deputy Inspector Steven Mauriello ("Mauriello"), defendant Deputy Chief Michael Marino ("Marino") and defendant Captain Theodore Lauterborn's ("Lauterborn") participated or had knowledge concerning;

The Compstat-generated crime records of the 81st Precinct for October 31, 2009;

The Crime Reporting Handbook;

Documents demanded in Plaintiffs February 14, 2014 demand #51, 52 and Interrogatory #4;

The Early Intervention Unit file by Sergeant Weiss of early spring 2009; and

The file maintained by the NYPD on the Plaintiff's administrative appeal of his 2008 performance evaluation.

**The Deposition of Dr. Levin**

6 No further deposition of Dr. Levin will be taken. **The Deposition of Dr. Patel** *6

The deposition of Dr. Patel will be resumed for one hour. All questions will be answered except those asked and an objection on the ground of privilege is made. Grounds for any objection will be briefly stated in the deposition. **Plaintiff's Discovery Responses**

Plaintiff shall update his discovery responses pertaining to his financial and physical/emotional damages within two weeks of the filing of this Order. **Dr. Isakov's Request**

Given the aforementioned ruling on Dr. Patel's deposition, the motion of Dr. Isakov is denied as moot.

It is so ordered. Dated: New York, New York

August 29, 2014

/s/_____

Robert W. Sweet, U.S.D.J.

# Schoolcraft v. City of N.Y.

Decided Jul 30, 2014

10 Civ. 6005 (RWS)

07-30-2014

ADRIAN SCHOOLCRAFT, Plaintiff, v. CITY OF NEW YORK, et al., Defendants.

APPEARANCES: Attorneys for the Plaintiff LAW OFFICE OF NATHANIEL B. SMITH 111 Broadway Suite 1305 New York, NY 10006 By: Nathaniel B. Smith, Esq. Attorneys for the City Defendants MICHAEL A. CARDOZO CORPORATION COUNSEL OF THE CITY OF NEW YORK 100 Church Street New York, NY 10007 By: Ryan G. Shaffer, Esq.

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Sweet, D.J.

## OPINION

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2 *2

## Sweet, D.J.

Defendant City of New York (the "City" or "City Defendants") has written a letter moving for reconsideration of certain rulings made by this Court in a May 28, 2014 hearing (the "May 28 Hearing") for City Defendants' motion for a protective order pursuant to Local Civil Rule 6.3. For the reasons set forth below, the City's motion is denied. **Prior Proceedings**

A detailed recitation of the facts of the case is provided in this Court's opinion dated May 6, 2011. See Schoolcraft v. City of N.Y., 10 Civ. 6005, 2011 WL 1758635, at *1 (S.D.N.Y. May 6, 2011). Familiarity with those facts is assumed.

The instant motion is related to the May 28 Hearing regarding City Defendants' motion for a protective order (the "May 28 Hearing"). City Defendants submitted a letter on June 12, 2014 (the "June 12 Letter") seeking reconsideration of four orders (the "Orders") made at the May 28 Hearing. Treating the letter as a motion, the matter was marked fully submitted on July 2, 2014. **Standard of Review** *3

A motion for reconsideration is proper where "the moving party can point to controlling decisions or data that the court overlooked - matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir. 1995); *see also Farez-Espinoza v. Napolitano,* 08 Civ. 11060(HB), 2009 U.S. Dist. LEXIS 35392, at *9 (S.D.N.Y. Apr. 27, 2009). Pursuant to Local Civil Rule 6.3 the Court may reconsider a prior decision to "correct a clear error or prevent manifest injustice." *Medisim Ltd. v. BestMed LLC,* 2012 U.S. Dist. LEXIS 56800, at *2-3, 2012 WL 1450420 (S.D.N.Y. Apr. 23, 2012) (citing *RST (2005) Inc. v. Research in Motion Ltd.,* 597 F. Supp. 2d 362, 2009 WL 274467, at *1 (S.D.N.Y. 2009)).

Reconsideration of a court's prior order under Local Rule 6.3 "is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Ferring B.V. v. Allergan, Inc.,* No. 12 Civ. 2650(RWS), 2013 WL 4082930, at *1 (S.D.N.Y. Aug. 7, 2013) (quoting *Sikhs for Justice v. Nath,* 893 F. Supp. 2d 598, 605 (S.D.N.Y. 2012)). Accordingly, the standard of review applicable to such a motion is "strict." *CSX,* 70 F.3d at 257 (2d Cir. 1995). *4

The burden is on the movant to demonstrate that the Court overlooked controlling decisions or material facts that were before it on the original motion and that might "'materially have influenced its earlier decision.'" *Anglo Am. Ins. Group v. CalFed, Inc.,* 940 F. Supp. 554, 557 (S.D.N.Y. 1996) (quoting *Morser v. AT & T Info. Sys.,* 715 F. Supp. 516, 517 (S.D.N.Y. 1989)); *see also Analytical Surveys, Inc. v. Tonga Partners, L.P.,* 684 F.3d 36, 52 (2d Cir. 2012) ("[T]he standard for granting [a motion for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked.") . A party seeking reconsideration may neither repeat "arguments already briefed, considered and decided," nor "advance new facts, issues or arguments not previously presented to the Court." *Schonberger v. Serchuk,* 742 F. Supp. 108, 119 (S.D.N.Y. 1990) (citations omitted). **City Defendants' Motion for Reconsideration Is Denied**

The City seeks reconsideration of the four Orders made at the May 28 Hearing. The Orders are that: (1) Plaintiff is permitted to question a Fed. R. Civ. P. 30(b) (6) witness on the topic of the New York City Police Department's (the "NYPD") Gun Amnesty Program; (2) Plaintiff is permitted to question a Fed. R. Civ. P. 30(b) (6) witness on the allocation of overtime within the *5 81st Police Precinct; (3) the City is required to produce the 81st Precinct's Road Tow, Sick, and Gun Amnesty log books; and (4) the City is required to produce additional documents pertaining to an unrelated disciplinary proceeding against defendant Michael Marino ("Marino"). The City's contention with regards to the Orders do not meet the strict standards for reconsideration.

The June 12 Letter raises several arguments for reconsideration of the Orders, but its main argument against all four Orders pertains to the relevancy of the information sought. City Defendants at the May 28 Hearing repeatedly raised the issue of relevancy when discussing the underlying subject matters pertaining to the Orders. *See, e.g.,* May 28 Hearing Tr. 12:12-13, 14:22-24, 34:13-35:2. The City again raises the issue of relevancy of the four issues in its June 12 Letter. *See* June 12 Letter at 2 ("In neither his May 22 letter nor in his arguments before the Court on May 28th, has [P]laintiff gone beyond a conclusory statement that the information is relevant."), 3 ("if the Court believes that the topic of overtime use within the 81st precinct is relevant to this action ...." and "[i]n arguing for production of the aforementioned logs [P]laintiff never specified how they were relevant to this action .... at no time has [P]laintiff ever articulated the relevance of these three log."), 4 ("City [D]efendants ask that the Court reconsider its ruling to produce *6 the [report pertaining to disciplinary proceeding against Marino] .... because it is irrelevant."). The City contends that the information sought by Plaintiff is not relevant and therefore not discoverable. Notwithstanding such contentions, the City has not provided any overlooked controlling decisions or material facts that were not previously argued at the May 28 Hearing with respect to relevancy on any of the Orders and has, instead, merely restated its arguments. Given such, reconsideration of the relevancy arguments must be denied.

The City's remaining arguments similarly do not meet the high burden for reconsideration. With respect to the 30(b)(6) witness for the NYPD Gun Amnesty Program, the City contends that any inconsistencies regarding the Gun Amnesty Program would not make any material fact in dispute in this litigation any more or less probable. The City had previously raised this argument at the May 28 Hearing, *see* May 28 Hearing Tr. 14:22-24 (City attorney arguing that the gun amnesty program "has nothing to do with this case"), and provides no further support for the veracity of its contention. Given such, the City's urging for reconsideration on the 30(b)(6) witness for the NYPD Gun Amnesty Program is denied.

The City Defendants' contentions against having a 30(b)(6) witness on the allocation of overtime in the 81st Precinct *7 also does not meet the strict standards for reconsideration. Other than its relevancy argument, the City contends that the topic of overtime use is more appropriate for a fact witness and that two fact witnesses, defendants Steven Mauriello and Theodore Lauterborn, have already been deposed, likely had knowledge of overtime use within the 81st Precinct, and Plaintiff had failed to question them on the issue. However, Plaintiff seeks a 30(b)(6) witness for testimony on official NYPD overtime policy. A 30(b)(6) witness speaks for the corporation or entity. *See Soroof Trading Dev. Co., Ltd. v. GE Fuel Cell Sys.,* LLC, 10 CIV. 1391 LGS JCF, 2013 WL 1286078 (S.D.N.Y. Mar. 28, 2013) ("The 'plain[ ]' language of Rule 30(b)(6) 'makes clear that a designee is not simply testifying about matters within his or her own personal knowledge, but is speaking for the corporation about matters to which the corporation has reasonable access.'" (quoting *Great Am. Ins. Co. of New York v. Summit Exterior Works, LLC,* No. 3:10 CV 1669, 2012 WL 459885, at *3 (D. Conn. Feb. 13, 2012))); *Cipriani v. Dick's Sporting Goods, Inc.,* 3:12 CV 910 JBA, 2012 WL 5869818, at *2 (D. Conn. Nov. 19, 2012) ("The testimony provided by a corporate representative at a [Rule] 30(b)(6) deposition binds the corporation." (quoting *New Jersey v. Sprint Corp.,* No. 03-2071-JWL, 2010 WL 610671, at *1 (D. Kan. Feb. 19, 2010))). A fact witness is an inappropriate witness for the questions Plaintiff seeks to ask, and City Defendants have cited to no authority *8 suggesting otherwise. Consequently, the City Defendants request for reconsideration of this issue must be denied.

With regards to the road tow, sick and gun amnesty logs, City Defendants contend that production of the sick and gun amnesty logs may implicate the sealing provisions of Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and N.Y.C.P.L. §§ 160:50 and 160.55, respectively. However, the City has only cursorily raised this argument and has provided no further analysis. The June 12 Letter only states that "these

logs ... implicate additional concerns which the Court may not have considered .... the sick log potentially implicates the sealing provisions of HIPAA and the privacy rights of countless non-parties to this action .... the gun amnesty log ... may implicate the sealing provisions of N.Y.C.P.L. §§ 160:50/160.55." "[I]ssues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Lima v. Hatsuhana of USA, Inc.,* 13 CIV. 3389 JMF, 2014 WL 177412 (S.D.N.Y. Jan. 16, 2014) (quoting *Lyn v. Inc. Vill. of Hempstead,* No. 03 Civ. 5041(DRH), 2007 WL 1876502, at *16 n. 13 (E.D.N.Y. June 28, 2007), *aff'd,* 308 F. App'x 461 (2009) (summary order)); *see also, e.g., Chevron Corp. v. Donziger,* No. 11 Civ. 691(LAK) (JCF), 2013 WL 4045326, at *1 n. 3 (S.D.N.Y. Aug. 9, 2013) (noting that the plaintiff "ha[d] waived
9 [an] argument by failing to develop it"). *9 Apart from citing to the HIPAA or the N.Y. C.P.L., the City has not presented an argument as to why these provisions apply. Accordingly, reconsideration as to this issue is denied, and the City is to produce the requested information, although any privileged information may be redacted subject to later consideration and review.

The City also moved for reconsideration on the production of the findings on Marino. At the May 28 Hearing, the production of reports on certain disciplinary charges against Marino and the findings in the disciplinary proceedings on those charges (the "Marino Report") was ordered. In the June 12 Letter, City Defendants raised concerns of relevancy. As previously noted, the City's contentions regarding relevancy in the June 12 Letter as to the Marino Report does not present any controlling decisions or data that were overlooked or show any clear error or manifest injustice. The City's relevancy concerns are insufficient to compel reconsideration.

City Defendants next contend that the Marino Report contains only Marino's personnel medical history and that such private medical information is protected from unwarranted disclosure by HIPAA. The City has also cited
10 to cases that have found a privacy interest in a party's medical records. *See* *10 *Olszewski v. Bloomberg L.P.,* 2000 U.S. Dist. LEXIS 17951 (S.D.N.Y. Dec. 12, 2000); *Whalen v. Roe,* 429 U.S. 589, 598, 51 L. Ed. 2d 64, 97 S.Ct. 869 (1977). City Defendants did not raise these arguments either at the May 28 Hearing or in its briefing for the May 28 Hearing. New arguments advanced by a party without excuse as to why these arguments were not raised previously are not cognizable on a motion for reconsideration. *Richard Feiner & Co., Inc. v. BMG Music Spain,* 01 CIV. 0937 (JSR), 2003 WL 21496812 (S.D.N.Y. June 27, 2003); *see also Novomoskvsk Joint Stock Company "Azot" v. Revson,* 95 Civ. 5399(JSR), 1999 WL 767325 at *1 (S.D.N.Y. Sept. 28, 1999) ("[N]ew arguments ... are not to be considered [on a motion for reconsideration] unless there is some valid reason they could not have been previously advanced when the motion was originally argued." (citation omitted)); *Associated Press v. U.S. Dep't of Def.,* 395 F. Supp. 2d 17, 19 (S.D.N.Y. 2005) ("It is settled law in this District that a motion for reconsideration is neither an occasion for repeating old arguments previously rejected nor an opportunity for making new arguments that could have been previously advanced." (citation omitted)). The City has not put forward any excuse as to why these arguments were not previously raised. Accordingly, the City's new arguments cannot be considered at this time, and the City's motion for reconsideration on the
11 production of the Marino Report is denied. *11 **Conclusion**

Based on the reasoning set forth above, Defendant's motion for reconsideration is denied.

It is so ordered. **New York, NY**
**July 30, 2014**

**/s/**_____

**ROBERT W. SWEET**

**U.S.D.J.**

# Schoolcraft v. City of N.Y.

Decided May 7, 2014

10 Civ. 6005 (RWS)

05-07-2014

ADRIAN SCHOOLCRAFT, Plaintiff, v. CITY OF NEW YORK, et al., Defendants

Attorneys for the Plaintiff LAW OFFICE OF NATHANIEL B. SMITH By: Nathaniel B. Smith, Esq. Attorney for Defendant Mauriello SCOPPETTA SEIFF KRETZ & ABERCROMBIE By: Walter A. Kretz, Jr., Esq.

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## OPINION

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1 *1

## Sweet, D.J.

Plaintiff Adrian Schoolcraft ("Plaintiff" or "Schoolcraft") has moved pursuant to Fed. R. Civ. P. 12(f) to strike a portion of the counterclaims filed by Defendant Deputy Inspector Steven Mauriello ("Mauriello" or "Defendant") (the "Counterclaims"). For the reasons set forth below, Plaintiff's motion is denied. **Prior Proceedings**

A detailed recitation of the facts of the case is provided in this Court's opinion dated May 6, 2011, which granted in part and denied in part Defendant Jamaica Hospital Medical Center's motion to dismiss. *See Schoolcraft v. City of N.Y.,* 10 Civ. 6005, 2011 WL 1758635, at *1 (S.D.N.Y. May 6, 2011). Familiarity with those facts is assumed. The action involves claims brought by Plaintiff in the Second Amended Complaint, dated September 25, 2012 (the "SAC") against the City, Mauriello, several other members of the New York City Police Department ("NYPD"), Jamaica Hospital Medical Center ("JHMC"), two doctors employed by JHMC, and others.

2 The instant motion involves the Counterclaims filed by *2 Defendant Mauriello on March 18, 2014. The Counterclaims seek recovery from Plaintiff for the damages suffered by Mauriello as a result of Plaintiff's alleged interference with Mauriello's employment relationship with the NYPD. The Counterclaims allege that Plaintiff willfully and maliciously engaged in conduct to damage the career and reputation of Mauriello, which included Plaintiff's reports to the NYPD Quality Assurance Division ("QAD") that Mauriello imposed illegal quotas on his officers. The Counterclaims allege that Plaintiff undertook his actions to get revenge against Mauriello for signing off on Plaintiff's 2008 NYPD evaluation in which he received a sub-standard rating. (*See* Counterclaims ¶¶ 2, 3, 7.) Paragraph 6 of the Counterclaims contain an allegation that Schoolcraft made a racist statement concerning African Americans that Mauriello contends is contradictory to Plaintiff's stated reasons for his report to QAD. (*Id*. ¶ 6.) The statement was not directed at Mauriello, a Caucasian male. (*Id*.)

Plaintiff filed the instant motion on April 11, 2014. It seeks to strike the alleged racist statement said by Plaintiff in Paragraph 6 of the Counterclaims. Oral arguments were held and the matter was marked fully
3 submitted on April 30, 2014. **The Motion To Strike Is Denied** *3

Fed. R. Civ. P. 12(f) allows a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike under Rule 12(f) "are not favorably viewed, and will be granted only where 'there is a strong reason for so doing.'" *Hargett v. Metro. Transit Auth.*, 552 F. Supp. 2d 393, 404 (S.D.N.Y. 2008) (quoting *M'Baye v. World Boxing Ass'n*, No. 05 Civ. 9581(DC), 2007 WL 844552, at *4 (S.D.N.Y. Mar. 21, 2007)). To prevail on a motion to strike, a party must show that: "(1) no evidence in support of the allegations would be admissible; (2) the allegations have no bearing on the relevant issues; and (3) permitting the allegations to stand would result in prejudice to the movant." *Id.*

The allegation set forth in Paragraph 6 of the Counterclaim contains a statement by Plaintiff that includes a race-based discriminatory remark against African Americans. Plaintiff contends that there is no legitimate reason for this inflammatory material to be placed in the Counterclaims and that the statement serves no purpose other than to inflame the reader.

The Plaintiff has not shown that the allegation in Paragraph 6 is not relevant to the Counterclaims, as the
4 statement at issue may potentially shed light on issues at the crux of the *4 Counterclaims. The Counterclaims allege that Plaintiff had a personal grudge and bias against Defendant and this grudge was the true reason for Plaintiff's complaints to the QAD about Mauriello's alleged misconduct as the commanding officer of the 81st Precinct. (Counterclaims ¶¶ 3-7.) Central to this alleged resentment was Plaintiff's 2008 NYPD evaluation. The Counterclaims also challenge Plaintiff's purported motivation for bringing his complaints to the QAD: that Schoolcraft sought to fight for the interests of the minority community served by the 81st Precinct. (*Id*. ¶ 6.) Plaintiff's purported motivation for his reports to QAD is directly at odds with Defendant's version of Schoolcraft's motivations.

The statement in Paragraph 6 is pertinent in two ways to the Counterclaims. First, the statement is germane as to whether Plaintiff's 2008 performance evaluation was related to his alleged failure to comply with illegal quotas imposed by Mauriello or on his actual performance as a police officer. Second, it is also relevant to whether Plaintiff brought the QAD complaints because of his grudge against Mauriello or, as Plaintiff contends, of his concern towards the predominantly minority community served by the 81st Precinct. Given
5 that the statement allegedly made by Plaintiff bears on relevant issues, the statement's inflammatory *5 nature is not sufficient to grant the motion to strike.[1] "[I]t is not enough that the matter offends the sensibilities of the objecting party if the challenged allegations describe acts or events that are relevant to the action." 5C Fed. Prac. & Proc. Civ. § 1382 (3d ed. 2011); *see also Lynch v. Southampton Animal Shelter Foundation Inc.*, 278

F.R.D. 55, 65 (E.D.N.Y. 2011) (same). Even if an allegation "may not pass Rule 11 scrutiny at a later stage in the litigation" it may not be stricken if it has have some "possible bearing on the subject matter of the [party's] claim". *Velez v. Lisi,* 164 F.R.D. 165, 167 (S.D.N.Y. 1995); *see also Illiano v. Mineola Union Free School Dist.,* 585 F. Supp. 2d 341, 357 (E.D.N.Y. 2008) (denying a motion to strike allegations pertaining to a defendant's alleged anti-Semitic remarks because they were relevant to gender-based hostile work environment claims and
6 retaliation claims). *6 **Conclusion**

[1] The inflammatory nature of the derogatory remark is also softened by Plaintiff's allegations in the SAC of others using the same word: once allegedly by one officer speaking to another officer and another by one of the defendant officers to berate a subordinate officer. (*See* SAC ¶¶ 240-43.)

Based on the reasoning above, Plaintiff s motion for strike is denied.

It is so ordered. **New York, NY**
**May 7, 2014**

**ROBERT W. SWEET**

**U.S.D.J.**

# Schoolcraft v. City of N.Y.

Decided Apr 18, 2014

10 Civ. 6005 (RWS)

04-18-2014

ADRIAN SCHOOLCRAFT, Plaintiff, v. CITY OF NEW YORK, et al., Defendants.

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ROBERT W. SWEET

## OPINION

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2 *2

## Sweet, D.J.

Defendant City of New York ("City" or "City Defendants") has moved to compel non-party Graham Rayman ("Rayman") to produce documents related to the matter of *Schoolcraft v. City of New York, et al.*, 10 Civ. 6005. Upon the conclusions set forth below, City Defendants' motion is granted in part and denied in part. **Prior Proceedings**

A detailed recitation of the facts of the underlying case is provided in this Court's opinion dated May 6, 2011, which granted in part and denied in part Defendant Jamaica Hospital Medical Center's motion to dismiss. *See Schoolcraft v. City of N.Y.*, 10 Civ. 6005, 2011 WL 1758635, at *1 (S.D.N.Y. May 6, 2011). Familiarity with those facts is assumed. The action involves claims brought by Plaintiff Adrian Schoolcraft ("Plaintiff" or "Schoolcraft") in the Second Amended Complaint, dated September 25, 2012 (the "SAC") against the City, several members of the New York City Police Department ("NYPD"), Jamaica Hospital Medical Center ("JHMC"), two doctors employed by JHMC, and others (collectively the "Defendants"). *3

The instant motion involves a subpoena dated December 3, 2013 served by the City on Rayman (the "Subpoena"). The Subpoena had a return date of December 20, 2013. The Subpoena was made after City Defendants learned of the existence of several of these documents from Rayman's book, *The NYPD Tapes* (the "Book").

The Subpoena makes 23 requests ("Requests" or "Subpoena Requests") and seeks the following information or documents from Rayman:

- Written statements by Plaintiff (Subpoena Requests Nos. 5, 14 and 16);
- E-mails to Rayman (Subpoena Requests Nos. 2, 3 and 18);
- Recordings made by Plaintiff of his co-workers and Defendants (Subpoena Requests Nos. 4, 7, 11, 12, 20 and 21);
- Crime complaint reports (Subpoena Request No. 6);
- Memoranda from Plaintiff regarding NYPD misconduct (Subpoena Requests Nos. 8 and 10);
- Letter firing prior counsel (Subpoena Requests No. 13);
- Documents received from Larry Schoolcraft (Subpoena Requests Nos. 15, 17 and 19);
- Agreements and/or contracts between Rayman and Schoolcraft and Larry Schoolcraft (Subpoena Requests Nos. 22 and 23);
- Other documents (Subpoena Requests Nos. 14-21); and
- Moot requests (Subpoena Requests Nos. 1, 9, 13, 22 and 23).

*4

To date, Rayman has not complied with the Subpoena. He has cited reporter's privilege regarding all of the Subpoena Requests, as well as claimed that several of the requests are unduly burdensome or too vague. Subsequently, City Defendants filed the instant motion to compel on March 5, 2014. Briefing was submitted by the City and Rayman; oral arguments were held and the matter was marked fully submitted on April 8, 2014.

**The Applicable Standard**

Federal Rules of Civil Procedure 37 permits a party to move for an order compelling disclosure or discovery from a non-party to an action. *See* Fed. R. Civ. P. 37(a)(2). A court must quash or modify a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies." *See* Fed. R. Civ. P. 45 (d)(3)(iii).

Both the Second Circuit and New York State law recognizes the existence of a qualified reporter's privilege. The Second Circuit has recognized a qualified reporter's privilege, based in the First Amendment and federal common law, which protects journalists from having to produce information obtained during the course of newsgathering. *See*, *e.g.*, *5 *Gonzales v. National Broadcasting Co.*, 194 F.3d 29, 35 (2d Cir. 1999); *In re Petroleum Prods. Antitrust Litig. (Petroleum Prods.)*, 680 F.2d 5, 7-8 (2d Cir. 1982); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972). See *also United States v. Treacy*, 639 F.3d 32, 42 (2d Cir. 2011); *Chevron Corp. v.*

*Berlinger,* 629 F.3d 297, 306 (2d Cir. 2011); *In re McCray,* 928 F. Supp. 2d 748, 754 (S.D.N.Y. 2013), *adopted,* No. 03 Civ. 9685 (DAB), 2013 WL 6970907, at *4 (S.D.N.Y., Sept. 23, 2013); *Sokolow v. PLO,* No. 04 Civ.397 (GBD) (RLE), 2012 U.S. Dist. LEXIS 127040 (S.D.N.Y. Sept. 6, 2012). The privilege protects both confidential and nonconfidential information. *Gonzales,* 194 F.3d at 35-36.

The privilege seeks to prevent the unnecessary enmeshing of the press in litigation that arises from events they cover. *Id.* at 35. "The privilege, which exists to support the press's important public service function to seek and reveal truthful information, protects newsgathering efforts from the burdensome wholesale production of press files that risk impeding the press in performing its duties." *In re McCray,* 928 F. Supp. 2d at 753 (internal citations omitted).

*Gonzales* sets out two tests for invocation of the privilege, one applicable to instances where the sought-after
6 evidence pertains to confidential information and the second *6 applicable to subpoenas where no confidential material is involved. City Defendants seek information from Rayman in which Plaintiff is identified as the source in the Book. Rayman has not contended nor established that the information he received from Schoolcraft was conveyed in confidence. Where, as here, the information comes from a nonconfidential source, the *Gonzales* test for nonconfidential information applies. *Gonzales,* 194 F.3d at 32-33; *see also Schiller v. City of New York,* 245 F.R.D. 112, 119-20 (S.D.N.Y. 2007) (finding information at issue was not conveyed in confidence where conveyers of information understood that it could be made public).

Under the *Gonzales* test for non-confidential information "the nature of the press interest protected by the privilege is narrower. . . . . when protection of confidentiality is not at stake, the privilege should be more easily overcome." *Id.* at 36. Under this test, a subpoena must be quashed unless the issuing party demonstrates (1) "that the materials at issue are of likely relevance to a significant issue in the case," and (2) the materials at issue "are not reasonably obtainable from other available sources." *Id.* The showing needed to overcome the
7 privilege is less than the "clear and specific" showing required under the test for confidential *7 information. *Id.*

The first prong of *Gonzales* requires the party seeking to compel disclosure to demonstrate that the information sought is of "likely relevance" and goes to a "significant issue" in the case. *Gonzales,* 194 F.3d at 36; *McCray,* 928 F. Supp. 2d at 757-58. The relevancy requirement is not met if the information sought in the subpoena is merely duplicative or serving a "solely cumulative purpose." *United States v. Burke,* 700 F.2d 70, 76 (2d Cir. 1983). While "this standard is less exacting than that which applies to confidential materials, a litigant seeking nonconfidential materials will not be granted unfettered access." *Sikelianos v. City of N.Y.,* No. 05 Civ. 7673, 2008 WL 2465120, at *1 (S.D.N.Y. June 18, 2008).

The second prong of *Gonzales* requires the issuers of subpoenas to make reasonable efforts through discovery to obtain the information from alternative sources to defeat the privilege. Exhaustion of all other available sources of information is sometimes required. *See*, *e.g.*, *Krase v. Graco Children Prods. (In re National Broadcasting Co.),* 79 F.3d 346, 353 (2d Cir. 1996) (requiring that party seeking journalist's materials exhaust
8 alternatives); *Shoen v. Shoen,* 5 F.3d 1289, 1297 (9th Cir. 1993) (stating exhaustion of alternate sources is *8 nearly implausible early in the discovery process); *Petroleum Prods.,* 680 F.2d at 9 (holding that even though 100 witnesses had been deposed, that was not sufficient to establish exhaustion); *Zerilli v. Smith,* 656 F.2d 705, 713 (D.C. Cir. 1981) (requiring subpoenaing party to show "he has exhausted every reasonable alternative source of information"); *Carey v. Hume,* 492 F.2d 631, 638 (D.C. Cir. 1974) (60 depositions may be appropriate before compelling reporter to testify); *In re McCray,* 928 F. Supp. 2d 748, 758 (S.D.N.Y. 2013) ("Defendants have failed to establish that the information sought is not obtainable elsewhere"); *Application of Behar,* 779 F.

Supp. 273, 276 (S.D.N.Y. 1991) (stating alternate sources, including depositions, must first be exhausted before any deposition seeking privileged information would be warranted); *Hutira v. Islamic Republic of Iran,* 211 F. Supp. 2d 115, 120 n.4 (D.D.C. 2002) (failure to exhaust alternative sources weighed "so heavily in favor of quashing the subpoena" that court declined to consider the remaining analysis).

Reporter's privilege is also recognized under the New York Shield Law, N.Y. Civ. Rights Law § 79-h. New York Shield law provides qualified protection for "nonconfidential news." N.Y. Civ. Rights Law § 79-h(c). To
9 obtain any such nonconfidential information, a party must make a "clear and *9 specific showing" that the information "(i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim . . . ; and (iii) is not obtainable from any alternative source." *Id.*; *see also Holmes v. Winter,* 3 N.E.3d 694, 699, 22 N.Y.3d 300, 362, 980 N.Y.S.2d 357 (N.Y. 2013).

The SAC alleges federal claims and state law claims under the Court's supplemental jurisdiction. (*See* SAC ¶¶ 255-397). Rayman raises New York State Shield Law as a ground for asserting privilege on the information related to Plaintiff's state law claims. However, "asserted privileges in actions that raise both federal and pendent state law claims are governed by the principles of federal law." *In re McCray,* 928 F. Supp. 2d at 753; *see also von Bulow by Auersperg v. von Bulow,* 811 F.2d 136, 144 (2d Cir. 1987) (stating that court "may consider . . . the applicable state law," but that it "[was] not bound to follow New York law"). Moreover, "the federal and state policies" on nonconfidential reporter's privilege "are 'congruent.'" *In re McCray,* 928 F. Supp. 2d at 753 (citing *von Bulow,* 811 F.2d at 144). "Both reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment." *Id.*
10 (internal *10 quotation marks and citations omitted). The Plaintiff's federal and state law claims conflate and overlap in issues substantially. The appropriate action in this instance, where both the federal and state policies reflect the fundamentally same principles, is to consider the motion under the federal articulation of the privilege. **City Defendants' Motion Is Granted In Part And Denied In Part**

City Defendants have made 23 Subpoena Requests, some of which seek specific documents from Rayman. Others do not seek specific information, but rather whole categories of documents. *Rayman Has Not Waived Any Privilege*

As an initial matter, City Defendants contend that Rayman has waived his privilege because he has not provided a privilege log. City Defendants has cited Fed. R. Civ. P. 26(b)(5)(ii), but Rule 26(b)(5)(ii) is specific to a party's assertion of privilege. Rule 45(e)(2)(A) does require nonparties to provide a privilege log, but there is no relevant case law in this Circuit regarding whether the press can waive its *Gonzales* privilege from failing
11 to produce a privilege log *11 three months after the service of the subpoena.

As the Second Circuit noted in *Gonzales:*

> If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties-particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation. Incentives would also arise for press entities to clean out files containing potentially valuable information lest they incur substantial costs in the event of future subpoenas. And permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties.

194 F.3d at 35.

The "heavy costs of subpoena compliance" would be a significant issue if reporters have to immediately prepare a privilege log upon being served with a subpoena. Such a requirement would incur a heavy burden on the press that would inhibit its ability to perform its duties. This is especially true where City Defendants seek
12 "any written accounts" or "any *12 documents, emails, text messages, and/or recordings" of several categories of issues (*See* Mettham Decl. Ex. A); any effort by Rayman to produce a privilege log by the less-than-a-month long period afforded by the Subpoena's return date would have been costly and extremely time consuming. Finding waiver of privilege here would serve against the policy reasons for the privilege delineated in *Gonzales*.

That is not to say that it is impossible for Rayman to waive his privilege in the future if he fails to provide a privilege log. *See*, *e.g.*, *In* re *Application of Chevron Corp.,* 736 F. Supp. 2d 773, 782 (S.D.N.Y. 2010) (noting journalist "has advanced no persuasive reason why he should not be compelled to claim privilege . . . in the same manner as any other litigant-providing a privilege log enumerating the documents as to which privilege is claimed and including as to each such information as may be necessary to make out his claim of qualified journalist privilege"). However, given the notable reasons against finding waiver in this instance, the lack of a privilege log does not waive Rayman's privilege at this time. *City Defendants' General Subpoena Requests Are Denied On Privilege Grounds*

13 *13

Subpoena Requests Nos. 14 through 21 are generalized subpoena requests for documents regarding the issues in this case. These requests do not described with any particular detail as to what documents the City seeks. Subpoena Request No. 14, for example, seeks "[a]ny written account of Larry Schoolcraft regarding alleged misconduct by any current or former members of the NYPD not otherwise listed above."

The reporter's privilege protects the press from wholesale discovery of its documents. The privilege protects journalists from a party's "unfettered access to 'sift through [journalists] files in search of information supporting [his] claims.'" *Sikelianos,* 2008 WL 2465120, at *1 (quoting *Gonzales,* 194 F.3d at 35 (alterations in original)). The Subpoena Requests were made without particularity and essentially seek widespread access to all of Rayman's files. Wholesale exposure of press files to litigation scrutiny is an impermissible burden, *Gonzales,* 194 F.3d at 35, and the motion is denied with respect to these requests. *The Written Statements of Plaintiff Regarding Confinement At JHMC Are Not Protected By Privilege*

14 Subpoena Request No. 5 seeks the written statements of *14 Plaintiff regarding Plaintiff's confinement at JHMC, specifically a "ten-page single-spaced account Schoolcraft himself wrote." (Reply at 4). City Defendants initially inquired about any written statements by Plaintiff regarding his confinement at JHMC in Plaintiff's deposition, to which Plaintiff denied having done so. (Mettham Decl. Ex. D at 266:25-267:8). The Book was subsequently published, and it stated that Plaintiff provided Rayman with this ten-page account in which Schoolcraft discusses his confinement in JMC. On September 17, 2013, City Defendants requested Plaintiff produce the document. Plaintiff responded by letter dated October 23, 2013 that Plaintiff "has looked for [the ten-page account] in his files and has not been able to locate it." (Mettham Decl. Ex. G).

Plaintiff's ten-page account of his time at JHMC concerns one of the central issues in Plaintiff's claims; the document is thus clearly relevant to the litigation. However, Rayman contends that the information contained in Schoolcraft's written account is available to the City, given that Plaintiff, several other police officers and the supervisors, nursing staff and psychiatric staff at JHMC have provided testimony regarding the incident. Rayman's interpretation of the information the City is seeking is too limited. If the City sought the document
15 *15 only to impeach Plaintiff's testimony of his time at JHMC then relevancy of the document is doubtful given the number of other witnesses that can provide an account of the issue. *See, e.g., Burke,* 700 F.2d at 78 (where witness was impeached by other evidence, reporter's privilege was not defeated as the information would serve solely cumulative purposes). But the factual accounts in the ten-page paper also provide Plaintiff's impression at the time of writing of his confinement at JHMC. This information is relevant to issues beyond impeachment and speaks directly to the events at the hospital.

With regards to the availability of the document from other available sources, City Defendants seek the ten-page statement only after deposition of the Plaintiff and Plaintiff's statement that he is not in possession of the document. The information sought is thus not available through other sources. City Defendants have shown that the material is not reasonably obtainable from other available sources. As such, City Defendant's motion with regards to Subpoena Request No. 5 is granted. *Several E-mails To Rayman Sought By The City Are Not Protected By Privilege*

16 *16

Subpoena Request Nos. 2 and 3 seek emails from Schoolcraft or his father, Larry Schoolcraft ("Larry Schoolcraft") to Rayman. The emails include the Plaintiff stating, "Nothing has changed regarding my [suspension] status . . . Pay me or fire me ... I'm never quitting . . . Never!" and an excerpt from a tape of an NYPD sergeant. (Mettham Decl. Ex. A).

The emails are relevant to the claims and defenses of the instant action, as they relate to the events surrounding Plaintiff's dismissal from the NYPD and Plaintiff's motivations for his actions, central issues to Plaintiff's and City Defendants' claims.

City Defendants have previously requested from Plaintiff any emails sent to and from Schoolcraft to journalists. (Mettham Decl. Ex. H). In response, Plaintiff has represented to City Defendants and the Court that, other than some previously disclosed contact with journalists, he did not have any of these statements. (*Id.* Ex. J). Plaintiff later admitted that he had been in email contact with Rayman, but indicated that he "does not have access to his old email communications with the press that he was examined about at his deposition." (*Id.* Ex.
17 G). *17

With respect to the email regarding Schoolcraft's suspension status, only Plaintiff, the recipient and any individuals with whom Plaintiff or the recipient shared this email would have access to the information on the document. The only other individuals who would have access other than Plaintiff or Rayman are other

journalists. (*Id.* Ex. E at 155, 169). Plaintiff's inability to produce this document and City Defendants' exploration of other possible avenues of obtaining the document demonstrates that the information cannot be reasonably obtained from other available sources. The motion is granted with regards to Subpoena Request No. 3.

With respect to the email containing an excerpt from a tape of an NYPD sergeant, City Defendants have not provided a particularized explanation as to why they are seeking the email; City Defendants presumably want the email for its information on the tape excerpt. The Defendants have numerous recordings from Plaintiff, and the City has not indicated whether they have the recording the email transcribes. City Defendants have not shown that they are unable to reasonably obtain the information contained in the email from alternative
18 sources, and the motion is denied with respect to Subpoena Request No. 2. *18 *The Recordings Made By Plaintiff Of His Co-Workers And Defendants Are Privileged*

Subpoena Request Nos. 4, 7, 11, 12, 20 and 21 seek recordings made by Schoolcraft and provided to Rayman. City Defendants state that they have received recordings from Plaintiff, but are concerned that Plaintiff may not have produced the entirety or all of his recordings. The City contends that several recordings mentioned in the Book were not produced by Plaintiff: Subpoena Request Nos. 7, 11 and 12 refer to recordings that the Defendants did not receive from Plaintiff. City Defendants have not made any particularized statement regarding Subpoena Request Nos. 4, 20 and 21, which seek the CD containing all recordings made by Schoolcraft and provided to Rayman, any recordings regarding alleged misconduct by the NYPD and any recordings regarding Schoolcraft's confinement at JHMC. (Mettham Decl. Ex. A).

City Defendants have not shown that any of the recordings are relevant to the litigation. City Defendants central contention regarding the relevancy of these tapes is that they were not produced by Plaintiff but mentioned in the Book. The City has not provided any specific arguments as to why the actual content of the
19 recordings goes to a "significant *19 issue" in the case. *Gonzales,* 194 F.3d at 36. Moreover, the City has information as to Plaintiff's failure to produce recordings, including a recording obtained by the Internal Affairs Bureau of the NYPD ("IAB"). (Reply at 6). City Defendants seek these recordings for a "solely cumulative purpose," to show that Plaintiff altered potential evidence, which cannot defeat the reporter's privilege. *Burke,* 700 F.2d at 78. The Motion is denied with regards to Subpoena Request Nos. 4, 7, 11, 12, 20 and 21. *The Crime Complaint Reports Are Protected Documents*

Subpoena Request No. 6 seeks a copy of "questionable crime reports [Schoolcraft] gave [the NYPD's Quality Assurance Division ('QAD'] which Schoolcraft provided to Rocco Parascandola." (Mettham Decl. Ex. A). Plaintiff has claimed that the NYPD "stole" these crime complaint reports from Plaintiff's apartment on October 31, 2009. The Book suggests that Plaintiff provided the crime complaint reports to Rayman following the October 31, 2009 incident.

City Defendants seek information as to the veracity of Plaintiff's allegations and whether or not Plaintiff was
20 still in possession of the reports after the October 31, 2009 *20 incident. However, Subpoena Request No. 6 would not provide this information for the former, only the latter. The City contends that possession of the reports by Rayman would exonerate the City with respect to Plaintiff's claims that the NYPD stole his evidence of NYPD misconduct. But City Defendants have not sufficiently shown how Rayman's possession of the crime complaint reports or a copy thereof would be relevant to Plaintiff's allegations of theft, and the City has not claimed that Plaintiff has denied having copies of the crime complaint reports. The relevant issue is the NYPD's conduct and motivation for such in the October 31, 2009 incident. Obtaining copies of the reports in Rayman's

possession would not provide any insight as to the truth of Plaintiff's version of the October 31, 2009 incident. The City's motion with regards to the crime complaint reports is denied. The Memoranda From Plaintiff Regarding NYPD Misconduct
*Is Not Privileged*

Subpoena Requests Nos. 8 and 10 seek two written memoranda Plaintiff alleges to have written to former 91st Precinct Commanding Officer Deputy Inspector Robert Brower in 2006 and 2007 regarding NYPD
21 misconduct. The Book indicates that Plaintiff provided copies of these memoranda to Rayman. *21 (Mettham Decl. Ex. E at 41, 44). City Defendants have searched for and are unable to locate any record of these memoranda being provided to any employees of the NYPD. The Court has previously ordered Plaintiff to produce the memoranda, but Plaintiff insists that the memoranda are no longer in Plaintiff's possession.

The existence of the memoranda and the information contained therein are relevant to Plaintiff's claims of retaliation from his whistle-blowing of illegal practices at the 81st Precinct. It is a disputed material issue of fact regarding what alleged misconduct Plaintiff was aware of at the 81st Precinct, whether he was retaliated against as a result of such whistle-blowing and whether the memoranda actually exists. Obtaining the memoranda would provide information on all of these issues.

While the Plaintiff has testified regarding these alleged memoranda, the memoranda have not been produced through discovery and the NYPD and City Defendants have been unable to locate them. As far as City Defendants are aware, Rayman is the only individual who has a copy of these documents. City Defendants have shown that the memoranda are of likely relevance to a significant issue that is not reasonably obtained
22 from *22 other available sources. The motion with regards to Subpoena Requests Nos. 8 and 10 is granted. *The Letter Firing Prior Counsel Are Protected By Privilege*

Subpoena Request No. 13 seeks a letter from Plaintiff firing his prior counsel. City Defendants contend that the letter indicates that Plaintiff had fired his prior counsel because he wanted "a more media-driven, public airing than is now occurring" in the litigation. (Def. Br. at 15). This statement was referred to in an article by Leonard Levitt. City Defendants note that at oral arguments on November 13, 2013, Plaintiff made representations to this Court that the Levitt statement was false. The Court permitted the City to depose Plaintiff to determine whether he provided a copy of this document to any third parties; City Defendants noticed Plaintiff's deposition but also offered Plaintiff the ability to avoid the deposition if he agreed to sign an affidavit indicating that he did not provide the document to any third parties. Plaintiff has refused to sit for the deposition or sign the proposed affidavit. The Book suggests that Rayman may have a copy of the letter. (Mettham Decl. Ex. E at 240).

23 City Defendants have not shown that the letter or that *23 Rayman's possession of the letter is a "significant issue in the case." The City has the Levitt article and the Book, both of which refer to the letter. City Defendants seek the letter presumably to show Plaintiff as a source of media "leaks," which the City contends have plagued this lawsuit. Notwithstanding this concern, media leaks are peripheral issues in this litigation and not a significant issue in the parties' cases. The City has not shown the relevancy of the letter, or how it is important to any of the issues raised by Plaintiff's or Defendants' cases. Given such, the motion with respect to Subpoena Request No. 13 is denied. *The Documents Received From Larry Schoolcraft Are Protected By Privilege*

Subpoena Requests Nos. 15, 17 and 19 seek documents in the possession of Rayman that he received from Larry Schoolcraft. Larry Schoolcraft was ordered by the Honorable Judge Peebles in the Northern District of New York to appear for a deposition and to produce the requested documents on December 11, 2013. (Mettham

Decl. Ex. N). However, no documents were brought by Larry Schoolcraft to his deposition.

24 As an initial matter, City Defendants seek these *24 documents based on their belief that Larry Schoolcraft provided the documents to Rayman. The City does not know what specific documents, if any, were actually provided. They have not provided any information as to whether Rayman even has the documents. As previously noted, a party "will not be granted unfettered access to 'sift through [journalists] files in search of information supporting [his] claims.'" *Sikelianos,* 2008 WL 2465120, at *1 (quoting *Gonzales,* 194 F.3d at 35 (alterations in original)). City Defendants, with these unspecified Requests in the Subpoena, has failed to make the necessary showing to overcome the asserted privilege. *The Agreements And Contracts Between Rayman And*
*Schoolcraft And Larry Schoolcraft Are Protected*

Subpoena Requests Nos. 22 and 23 seek any agreements, contracts or proof of payment to Schoolcraft or Larry Schoolcraft from Rayman. City Defendants seek this information on the grounds that whether Plaintiff made any money from his story regarding NYPD misconduct bares on Plaintiff's bias and motivations in bringing this lawsuit. The City has not provided any information as to whether the information at issue is not reasonably
25 obtainable from other available sources. It is possible that whether Plaintiff or Larry Schoolcraft received *25 payment from Rayman can be determined from other documentary evidence or from the deposition of Plaintiff or Larry Schoolcraft. Thus, these requests cannot be compelled. *See, e.g.*, *Sikelianos,* 2008 WL 2465120, at *1 (where information sought was available from other sources, privilege could not be overcome). *The Motion Is Denied With Respect To Moot Requests*

Due to intervening circumstances, Subpoena Requests Nos. 1, 9, 13, 22 and 23 are now moot. The motion with respect to these Subpoena Requests is denied. *There Is No Undue Harm Or Burden On Rayman*

Rayman has objected to the production of the documents in Subpoena Requests Nos. 1 through 13, 22 and 23 on the basis that these requests are unduly burdensome. With regards to the Requests that are not protected by privilege, the Subpoena provides substantial detail as to the exact document it seeks. Finding such documents will likely not cause Rayman a significant amount of time or cost, and the Subpoena with respect to these
26 documents will not cause undue harm or burden on Rayman. *26 **Conclusion**

Upon the conclusions set forth above, City Defendants' motion to compel is granted with respect to Subpoena Requests Nos. 3, 5, 8 and 10. The City's motion is denied with respect to all other Subpoena Requests. It is so ordered. **New York, NY**
**April 18, 2014**

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**ROBERT W. SWEET**

**U.S.D.J.**

10 Civ. 6005 (RWS)
United States District Court, S.D. New York

# Schoolcraft v. City of New York

298 F.R.D. 134 (S.D.N.Y. 2014)
Decided Mar 14, 2014

Decided: March 13, 2014.

For the Plaintiff: Nathaniel B. Smith, Esq., LAW OFFICE OF NATHANIEL B. SMITH, New York, NY.

For Mauriello, Defendant: Walter A. Kretz, Jr., Esq., SCOPPETTA SEIFF KRETZ & ABERCROMBIE, New York, N.Y.

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**OPINION**

136 *136

ROBERT W. SWEET, D.J.

Defendant Deputy Inspector Steven Mauriello (" Mauriello" or " Defendant" ) has moved pursuant to Local Rule 6.3 for reconsideration of the Court's November 21, 2013 *Opinion, Schoolcraft v. City of New York,* 296 F.R.D. 231, 2013 WL 6139647 (S.D.N.Y. 2013) (the " November 21 Opinion" or " Opinion" ), denying Defendant's motion for leave to file an answer amended with counterclaims. Plaintiff Adrian Schoolcraft (" Plaintiff" or " Schoolcraft" ) opposes Mauriello's motion.

Based on the conclusions set forth below, Defendant Mauriello's motion is granted.

**Prior Proceedings**

A detailed recitation of the facts of this case is provided in this Court's opinion dated May 6, 2011, see *Schoolcraft v . City of N.Y.,* 10 Civ. 6005, 2011 WL 1758635, at *1 (S.D.N.Y. May 6, 2011), and the November 21 Opinion, see November 21 Opinion, 296 F.R.D. 231, [WL] at *4-7. Familiarity with those facts is assumed.

Defendant Mauriello filed the instant motion for reconsideration on November 25, 2013. The motion was heard on submission, briefing was submitted by Mauriello and Plaintiff only, and the matter was marked fully submitted on December 18, 2013.

**The Motion For Reconsideration Is Granted**

***Standard Of Review***

The standards governing motions under Local Rule 6.3 along with Fed.R.Civ.P. 59 are the same, and a court may grant reconsideration where the party moving for reconsideration demonstrates an " intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Henderson v. Metro. Bank & Trust Co.,* 502 F.Supp.2d 372, 375-76 (S.D.N.Y. 2007)

(quotation marks and citations omitted); *Parrish v. Sollecito,* 253 F.Supp.2d 713, 715 (S.D.N.Y. 2003) (" Reconsideration may be granted to correct clear error, prevent manifest injustice or review the court's decision in light of the availability of new evidence." ) (citing *Virgin A. Airways, Ltd. v. Nat'l Mediation Bd.,* 956 F.2d 1245, 1255 (2d Cir. 1992)).

Reconsideration of a court's prior order under Local Rule 6.3 or Rule 59 " is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Ferring B.V. v. Allergan, Inc., No.* 12 Civ. 2650 (RWS), 2013 WL 4082930, at *1 (S.D.N.Y. Aug. 7, 2013) (quoting *Sikhs for Justice v. Nath,* 893 F.Supp.2d 598, 605 (S.D.N.Y. 2012). Accordingly, the standard of review applicable to such a motion is " strict." *Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir. 1995).

The burden is on the movant to demonstrate that the Court overlooked controlling decisions or material facts that were before it on the original motion, and that might " 'materially have influenced its earlier decision.'" *Anglo Am. Ins. Group v. CalFed, Inc.,* 940 F.Supp. 554, 557 (S.D.N.Y. 1996) (quoting *Morser v. AT& T Information Sys.,* 715 F.Supp. 516, 517 (S.D.N.Y. 1989)); *see also Analytical Surveys, Inc. v. Tonga Partners, L.P.,* 684 F.3d 36, 52 (" [T]he standard for granting [a motion for reconsideration] is strict, and
137 reconsideration will generally be denied unless *137 the moving party can point to controlling decisions or data that the court overlooked." ). A party seeking reconsideration may neither repeat " arguments already briefed, considered and decided," nor " advance new facts, issues or arguments not previously presented to the Court." *Schonberger v. Serchuk,* 742 F.Supp. 108, 119 (S.D.N.Y. 1990) (citations omitted).

The reason for the rule confining reconsideration to matters that were " overlooked" is to " ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." *Polsby v. St. Martin's Press, Inc., No.* 97-690 (MBM), 2000 WL 98057, at *1 (S.D.N.Y. Jan. 18, 2000) (citation and quotation marks omitted). Motions for reconsideration " are not vehicles for taking a second bite at the apple, . . . and [the court] [should] not consider facts not in the record to be facts that the court overlooked." *Rafter v. Liddle,* 288 Fed. App' x 768, 769 (2d Cir. 2008) (citation and quotation marks omitted). Thus, a court must narrowly construe and strictly apply Local Rule 6.3, so as to avoid duplicative rulings on previously considered issues, and to prevent the rule from being used as a substitute for appealing a final judgment. *See In re Bear Stearns Cos., Inc. Sec., Derivative and ERISA Litig.,* 08 M.D.L. No.1963, 2009 WL 2168767, at *1 (S.D.N.Y. Jul. 16, 2009) (" A motion for reconsideration is not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved." ) (citation and quotation omitted).

***Defendant Mauriello Raises Overlooked Facts That Warrant Reconsideration***

The standard for a reconsideration motion is strict, but Defendant Mauriello has provided additional explanation regarding facts that warrants granting his motion for reconsideration. As an initial matter, Mauriello counterclaims are based upon a portion of a recorded conversation that was not produced by Plaintiff and was discovered by Defendant one month before he filed his motion to amend. Defendant contends that Plaintiff deleted portions of recordings made on October 7, 2009, including a " critical conversation" between Plaintiff and his father and Plaintiff subsequently produced only the altered recordings. Mauriello's proposed counterclaims are based upon the information gained from this " critical conversation."

Defendant's briefings for the instant motion provide additional color to the circumstances surrounding the exposition of the conversation at issue. The allegedly altered recordings were first produced to Defendant Mauriello in or around September 2012 by Defendant City of New York (" City Defendant" or " City" ) when

the City Defendant provided to Mauriello copies of Plaintiff's April 9, 2012 production to City Defendant. Over the course of the next four weeks, City Defendant produced to Mauriello additional documents and recordings, which were understood by Mauriello to include duplicates of the recordings produced by the Plaintiff. Defendant Mauriello only reviewed Plaintiff's recordings of the October 7, 2009 conversation, which did not contain the " critical conversation," while the recordings produced by City Defendant did. Mauriello and his counsel knew nothing of the recorded conversation until one month before the motion for leave to file an answer amended with counterclaims was filed, whereby they learned of the recorded conversation through the book The NYPD Tapes by Graham A. Rayman. Plaintiff has not provided an explanation as to why Plaintiff's produced recording provided to Mauriello was altered. The November 21 Opinion overlooked these critical facts.

Another factor that favors reconsideration is the current pace of discovery in the matter. At the time Mauriello filed his motion for leave to amend, document production was still far from completed, even though the case had been pending for three years. In the two months between the time Mauriello filed his motion to amend and his motion for reconsideration, the parties have deposed only Plaintiff, Michael Marino (" Marino" ) and Theodore Lauterborn (" Lauterborn" ) and completed inspection of the 81st Precinct and Jamaica Hospital. According to Mauriello, none of completed discovery would have to be revisited on account of the
138 counterclaims. Plaintiff has also indicated that he wishes to *138 conduct a second session of the Marino and Lauterborn depositions for reasons unrelated to Defendant's counterclaims and requested for extensions of the discovery schedule. Defendant's counterclaims do not allege any new matter not already at issue in the case, and Mauriello assures the Court that his alleged harms can be covered at his deposition and would only minimally expand the scope of discovery. It does not appear that the counterclaims will cause any delay to this already protracted and long discovery or significantly expand its scope, factors that were overlooked in the November 21 Opinion.

With the above factors, the Court's reliance *on Evans v. Syracuse City Sch. Dist.,* 704 F.2d 44, 47 (2d Cir. 1983), and *Continental Bank, N . A . v. Meyer,* 10 F.3d 1293, 1298 (7th Cir. 1993), was misplaced *and State Teachers Ret. Bd. v. Fluor Corp.,* 654 F.2d 843, 856 (2d Cir. 1981), is more applicable in this instance. In Evans, the Circuit Court found a two-year delay to defendant's motion to amend sufficient to deny the motion. *Evans,* 704 F.2d at 47. In Continental Bank, the Seventh Circuit also upheld the district court's decision to refuse to allow defendant to amend an answer to add counterclaims where defendant waited more than two years and the amendment would require additional discovery. Continental Bank, 10 F.3d at 1298. In this instance, Mauriello did not know of the " critical conversation" until one month before filing his motion to amend, and this delay was caused, in significant part, by Plaintiff's actions. In addition, an amendment with counterclaims would not significantly expand the scope of the already delayed discovery. Thus, Defendant's proposed amendment " may result in [some] delay, [but] it will not unduly prejudice" *Plaintiff. Fluor,* 654 F.2d at 856.

Defendant Mauriello has provided additional color to several facts that the November 21 Opinion overlooked. These additional facts " alter the conclusion reached by the court," *Sikhs for Justice,* 893 F.Supp.2d at 606 (quoting Shrader, 70 F.3d at 257), and reconsideration is warranted.

**Conclusion**

Given the reasoning above, Defendant Mauriello's motion for reconsideration is granted. Defendant has leave to file an answer amended with counterclaims.

It is so ordered.

# Schoolcraft v. City of N.Y.

Decided Mar 13, 2014

10 Civ. 6005 (RWS)

03-13-2014

ADRIAN SCHOOLCRAFT, Plaintiff, v. CITY OF NEW YORK, et al., Defendants

Attorneys for the Plaintiff LAW OFFICE OF NATHANIEL B. SMITH By: Nathaniel B. Smith, Esq. Attorney for Defendant Mauriello SCOPPETTA SEIFF KRETZ & ABERCROMBIE By: Walter A. Kretz, Jr., Esq.

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ROBERT W. SWEET

## OPINION

APPEARANCES:

Attorneys for the Plaintiff

LAW OFFICE OF NATHANIEL B. SMITH

By: Nathaniel B. Smith, Esq.

Attorney for Defendant Mauriello

SCOPPETTA SEIFF KRETZ & ABERCROMBIE

By: Walter A. Kretz, Jr., Esq.

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## Sweet, D.J.

Defendant Deputy Inspector Steven Mauriello ("Mauriello" or "Defendant") has moved pursuant to Local Rule 6.3 for reconsideration of the Court's November 21, 2013 Opinion, Schoolcraft v. City of New York, No. 10 Civ. 6005 (RWS), 2013 WL 6139647 (S.D.N.Y. Nov. 21, 2013) (the "November 21 Opinion" or "Opinion"), denying Defendant's motion for leave to file an answer amended with counterclaims. Plaintiff Adrian Schoolcraft ("Plaintiff" or "Schoolcraft") opposes Mauriello's motion.

Based on the conclusions set forth below, Defendant Mauriello's motion is granted. **Prior Proceedings**

A detailed recitation of the facts of this case is provided in this Court's opinion dated May 6, 2011, see Schoolcraft v. City of N.Y., 10 Civ. 6005, 2011 WL 1758635, at *1 (S.D.N.Y. May 6, 2011), and the November 21 Opinion, see November 21 Opinion, at *4-7. Familiarity with those facts is assumed. *3

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Defendant Mauriello filed the instant motion for reconsideration on November 25, 2013. The motion was heard on submission, briefing was submitted by Mauriello and Plaintiff only, and the matter was marked fully submitted on December 18, 2013. **The Motion For Reconsideration Is Granted**

***Standard Of Review***

The standards governing motions under Local Rule 6.3 along with Fed. R. Civ. P. 59 are the same, and a court may grant reconsideration where the party moving for reconsideration demonstrates an "intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Henderson v. Metro. Bank & Trust Co., 502 F. Supp. 2d 372, 375-76 (S.D.N.Y. 2007) (quotation marks and citations omitted); Parrish *v.* Sollecito, 253 F. Supp. 2d 713, 715 (S.D.N.Y. 2003) ("Reconsideration may be granted to correct clear error, prevent manifest injustice or review the court's decision in light of the availability of new evidence.") (citing Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992)). *4

Reconsideration of a court's prior order under Local Rule 6.3 or Rule 59 "is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." Ferring B.V. v. Allergan, Inc., No. 12 Civ. 2650 (RWS), 2013 WL 4082930, at *1 (S.D.N.Y. Aug. 7, 2013) (quoting Sikhs for Justice v. Nath, 893 F. Supp. 2d 598, 605 (S.D.N.Y. 2012). Accordingly, the standard of review applicable to such a motion is "strict." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995).

The burden is on the movant to demonstrate that the Court overlooked controlling decisions or material facts that were before it on the original motion, and that might "'materially have influenced its earlier decision.'" Anglo Am. Ins. Group v. CalFed, Inc., 940 F. Supp. 554, 557 (S.D.N.Y. 1996) (quoting Morser v. AT&T Information Sys., 715 F. Supp. 516, 517 (S.D.N.Y. 1989)); see also Analytical Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 ("[T]he standard for granting [a motion for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked."). A party seeking reconsideration may neither repeat "arguments already briefed, considered and decided," nor "advance new facts, issues or arguments not previously presented *5 to the Court." Schonberger v. Serchuk, 742 F. Supp. 108, 119 (S.D.N.Y. 1990) (citations omitted).

The reason for the rule confining reconsideration to matters that were "overlooked" is to "ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." Polsby v. St. Martin's Press, Inc., No. 97-690(MBM), 2000 WL 98057, at *1 (S.D.N.Y. Jan. 18, 2000) (citation and quotation marks omitted). Motions for reconsideration "are not vehicles for taking a second bite at the apple, . . . and [the court] [should] not consider facts not in the record to be facts that the court overlooked." Rafter v. Liddle, 288 Fed. App' x 768, 769 (2d Cir. 2008) (citation and quotation marks omitted). Thus, a court must narrowly construe and strictly apply Local Rule 6.3, so as to avoid duplicative rulings on previously considered issues, and to prevent the rule from being used as a substitute for appealing a final judgment. See In re Bear Stearns Cos., Inc. Sec, Derivative and ERISA Litig., 08 M.D.L. No.1963, 2009 WL 2168767, at *1 (S.D.N.Y. Jul. 16, 2009) ("A motion for reconsideration is not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved.") (citation and quotation omitted). *6

***Defendant Mauriello Raises Overlooked Facts That Warrant Reconsideration***

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Defendant Mauriello has provided additional color to several facts that the November 21 Opinion overlooked. These additional facts "alter the conclusion reached by the court," Sikhs for Justice, 893 F. Supp. 2d at 606 (quoting Shrader, 70 F.3d at 257), and reconsideration is warranted. *10 **Conclusion**

Given the reasoning above, Defendant Mauriello's motion for reconsideration is granted. Defendant has leave to file an answer amended with counterclaims.

It is so ordered. **New York, NY**
**March 13, 2014**

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**ROBERT W. SWEET**

No. 08 Civ. 6893(VM)
United States District Court, S.D. New York.

# Kregler v. City of N.Y.

987 F. Supp. 2d 357 (S.D.N.Y. 2013)
Decided Dec 9, 2013

No. 08 Civ. 6893(VM).

2013-12-9

William KREGLER, Plaintiff, v. CITY OF NEW YORK et al., Defendants.

Nathaniel B. Smith, Law Office of Nathaniel B. Smith, New York, NY, for Plaintiff. Christopher Aaron Seacord, Maxwell Douglas Leighton, New York City Law Department, Zev Samuel Singer, Office of The Corporation Counsel, New York, NY, for Defendants.

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VICTOR MARRERO

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Nathaniel B. Smith, Law Office of Nathaniel B. Smith, New York, NY, for Plaintiff. Christopher Aaron Seacord, Maxwell Douglas Leighton, New York City Law Department, Zev Samuel Singer, Office of The Corporation Counsel, New York, NY, for Defendants.

## *DECISION AND ORDER*

**VICTOR MARRERO, District Judge.**

Plaintiff William Kregler ("Kregler" or "Plaintiff") brought this action pursuant to 42 U.S.C. § 1983 ("§ 1983") raising a claim of First Amendment retaliation against the City of New York (the "City") and individual defendants Louis Garcia ("Garcia"), Rose Gill Hearn ("Hearn"), Keith Schwam ("Schwam"), Darren Keenaghan ("Keenaghan"), Brian Grogan ("Grogan"), and Jayme Naberezny ("Naberezny"). The Court granted summary judgment on the claims against Hearn, Schwam, Keenaghan, Grogan, and Naberezny in a Decision and Order dated October 26, 2011. *See Kregler v. City of New York,* 821 F.Supp.2d 651 (S.D.N.Y.2011). Now before the Court is the motion of the remaining defendants—the City and Garcia (collectively, "Defendants")—for summary judgment. For the reasons discussed below, Defendants' motion for summary judgment is GRANTED in part and DENIED in part.

## I. *BACKGROUND* [1]

[1] The Court derives the factual summary from (1) the recitation of the pertinent pleadings and other matters of record set forth in the Decision and Order, *see Kregler v. City of New York,* 821 F.Supp.2d 651 (S.D.N.Y.2011); (2) the First Amended Complaint (Dkt. No. 39); (3) Defendants' Local Civil Rule 56.1 Statement of Undisputed Material Facts, dated October 25, 2013; and (4) Plaintiff's Local Civil Rule 56.1 Opposition Statement of Disputed Facts in Opposition

to Motion for Summary Judgment, dated November 29, 2013. Except where specifically referenced, no further citation to these sources will be made.

In April of 2004, one month after retiring from his position as a Fire Marshal with the City's Fire Department
360 ("FDNY"), Kregler filed a preliminary application*360 and questionnaire for appointment by the City's Mayor as a City Marshal. Candidates for appointment as City Marshals are subject to an investigation of their personal and financial background by the City's Department of Investigations ("DOI") and also must complete a DOI-administered training program. In January of 2005, Kregler was interviewed by representatives of the Mayor's Committee on City Marshals and was later notified by Schwam, an Assistant Commissioner at DOI, that DOI would commence its personal and financial review of Kregler's background. As a follow-up, Kregler met in April of 2005 with Keenaghan, a DOI investigator, to discuss Kregler's preliminary application. Kregler then made minor modifications to the application, signed the revised form, and provided authorizations for release of his personal information.

On May 25, 2005, Kregler, in his capacity as President of the Fire Marshals Benevolent Association, publicly endorsed the candidacy of Robert Morgenthau ("Morgenthau") for reelection as District Attorney for New York County. At that time, all other law enforcement associations in the City supported Morgenthau's opponent, Leslie Crocker Snyder ("Snyder"). An article that appeared in a June 2005 edition of *The Chief,* a local newspaper, reported on Kregler's endorsement of Morgenthau. Grogan, an FDNY Supervising Fire Marshal, posted a copy of that article in a public area within one of the FDNY offices. Kregler alleges that Grogan then "berated" him for the endorsement, stating: "[W]ho the f___ do you think you are. Louie [Garcia] makes the endorsement." (Compl. ¶ 29.) At the time of that incident, Garcia was the Chief Fire Marshal of the FDNY's Bureau of Fire Investigation. Both Garcia and Grogan supported Snyder's political campaign against Morgenthau.

On July 7, 2005, Kregler was interviewed by staff of the Mayor's Office in connection with his City Marshal application. The following day Schwam told Kregler that the next step in the process would be the completion of the DOI background check. To that end, Kregler met a second time with Keenaghan, the DOI investigator, to update and refile his application. In September of 2005, Schwam invited Kregler to begin the DOI training classes, which Kregler successfully completed. In November of 2005, Kregler satisfied the last requirement for appointment by demonstrating his ability to obtain a bond. In March of 2006, Kregler was informed by letter from Schwam that he would not be appointed as a City Marshal.

Kregler filed this action in August of 2008, raising a claim of First Amendment retaliation in violation of § 1983. Kregler contends that the explanation proffered to him for the denial of his application—Kregler's failure to disclose details of a Command Discipline he had received in 1999 during his employment by the FDNY—was merely a pretext for Garcia's unlawful retaliation. Kregler alleges that Garcia was "personally and socially acquainted" with Naberezny, the Inspector General for the DOI (Compl. ¶ 40), and that the two "agreed to cause Kregler's application for appointment as a City Marshal to be rejected by DOI in retaliation for Kregler's support of Morgenthau." (Compl. ¶ 43.)

## II. *LEGAL STANDARDS*

### A. *SUMMARY JUDGMENT*

In connection with a Rule 56 motion, "[s]ummary judgment is proper if, viewing all the facts of the record in a light most favorable to the non-moving party, no genuine issue of material fact remains for adjudication."
361 *Samuels v. Mockry,* 77 F.3d 34, 35 (2d Cir.1996) ( *citing* *361 *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The role of a court in ruling on such a motion "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. United States Fire Ins. Co.,* 804 F.2d 9, 11 (2d Cir.1986).

The moving party bears the burden of proving that no genuine issue of material fact exists, or that due to the paucity of evidence presented by the non-movant, no rational jury could find in favor of the non-moving party. *See Gallo v. Prudential Residential Servs., L.P.,* 22 F.3d 1219, 1223 (2d Cir.1994). **B. *FIRST AMENDMENT CLAIM***

To succeed on his First Amendment retaliation claim under § 1983, Kregler must show that: (1) he engaged in constitutionally protected speech; (2) he suffered an adverse employment action; and (3) a causal connection exists between the speech and the adverse employment action "so that it can be said that the speech was a motivating factor in the determination." *Washington v. County of Rockland,* 373 F.3d 310, 320 (2d Cir.2004) ( *citing Morris v. Lindau,* 196 F.3d 102, 110 (2d Cir.1999)).

## 1. *Individual Actors*

It is well settled in the Second Circuit that "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994) ( *quoting Moffitt v. Town of Brookfield,* 950 F.2d 880, 885 (2d Cir.1991)). "Personal involvement," however, is not limited to direct participation in the deprivation of rights at issue. Kregler may show the personal involvement of Garcia in several ways, such as by: (1) directly participating in the infraction; (2) failing to remedy the wrong after learning of the violation; (3) creating a policy or custom under which unconstitutional practices occurred or allowing such a policy or custom to continue; (4) being grossly negligent in managing subordinates who caused the unlawful condition or event; or (5) exhibiting "gross negligence" or "deliberate indifference" to the constitutional rights of Kregler by having actual or constructive notice of the unconstitutional practices and failing to act. *See Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995); *see also Wright,* 21 F.3d at 501.

## 2. *Municipal Liability*

Municipal entities are "persons" within the meaning of § 1983 and therefore subject to suit under that provision. *Monell v. Department of Soc. Servs.,* 436 U.S. 658, 663, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Back v. Hastings on Hudson Union Free Sch. Dist.,* 365 F.3d 107, 128 (2d Cir.2004). But municipalities are not liable "on a *respondeat superior* theory," simply because an employee committed a tort. *Monell,* 436 U.S. at 691, 98 S.Ct. 2018.Section 1983 "distinguish[es] acts of the *municipality* from acts of *employees* of the municipality," and imposes liability only for "action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati,* 475 U.S. 469, 479, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (emphasis in original).

The municipality is responsible if a violation of an individual's rights resulted from the "government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Monell,* 436 U.S. at 694, 98 S.Ct. 2018. When " 'an official has final authority over significant matters
362 involving the exercise of discretion,*362 the choices he makes represent government policy.' " *Clue v. Johnson,*

179 F.3d 57, 62 (2d Cir.1999) ( *quoting Rookard v. Health & Hosps. Corp.,* 710 F.2d 41, 45 (2d Cir.1983)). As a result, "municipal liability may be imposed for a single decision by municipal policymakers." *Pembaur,* 475 U.S. at 480, 106 S.Ct. 1292.

## III. *DISCUSSION*

### A. *CLAIMS AGAINST GARCIA*

Kregler advances the theory that the personal relationship between Naberezny and Garcia provided the impetus for their alleged collusion to cause the denial of Kregler's application for City Marshal in retaliation for supporting Morgenthau.

Defendants argue that summary judgment should be granted as to Garcia on two main grounds: first, that plaintiff cannot establish a *prima facie* case of First Amendment retaliation, and second, that Garcia is entitled to qualified immunity.[2] (Defs.' Mem. Supp. Mot. Summ. J. ("Defs.' Mem."), at 5, 12 (Dkt. No. 139).)

2 Defendants also argue that, even if Kregler can establish retaliatory animus and causation, a defense exists under *Mount Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). (Defs.' Mem. at 10–11.) It is unclear from Defendants' memorandum whether Defendants raise this defense with regards to Garcia, the City, or both defendants. The *Mount Healthy* defense relies on the argument that Hearn would have reached the same adverse employment decision even in the absence of Garcia's alleged retaliatory act. Such an argument turns on the very same set of facts that relate to Kregler's *prima facie* case. Because the Court finds, as discussed below, that disputed issues of material fact exist, the Court denies summary judgment on *Mount Healthy* grounds.

#### 1. *Factual Basis for Retaliation Claim*

Kregler argues that it is premature for the Court to decide the issue of Garcia's involvement in the adverse employment decision without providing Plaintiff an opportunity to demonstrate causation at trial. The Court agrees. Whether or not Kregler's arguments regarding Garcia's liability will prove meritorious, the Court cannot conclude at this point that the claim against Garcia fails as a matter of law. There are disputed issues of material fact that, if viewed in the light most favorable to Kregler, suggest that Garcia may have been the causal link between the adverse employment action and Kregler's constitutionally protected speech.

Defendants argue that Kregler lacks any relevant evidence to suggest that Garcia, possessing a retaliatory animus, "channeled" that animus to Naberezny who in turn conveyed it to Hearn. (Defs.' Mem., at 2.) Defendants state that there is no evidence establishing that Garcia, or anyone else at the FDNY, "catalyzed" the process of Hearn's search for more information concerning Kregler's 1999 Command Discipline. ( *Id.,* at 5–8.) Defendants advance a version of the facts under which Hearn "unilaterally sought more information concerning" the Command Discipline. ( *Id.,* at 8.) Defendants further argue that there is no evidence suggesting that Hearn and Garcia communicated directly concerning Kregler. ( *Id.*)

As to the latter point, whether or not there was direct communication between Garcia and Hearn is immaterial to Kregler's claim. As long as Garcia communicated to Naberezny false or derogatory information about Kregler in retaliation for Kregler's exercise of First Amendment rights, and Naberezny, in turn, communicated information to Hearn with similar knowledge and intent, Kregler's theory of Garcia's retaliatory animus causing
363 the adverse employment action *may* hold up—*363 that is, if Kregler can prove that link at trial.

As for whether Hearn unilaterally sought more information, the relevant point—in the context of a claim that Garcia had retaliatory animus—is who initiated the search for information from Garcia, in particular. On this question, the Court finds that there is a disputed issue of material fact. A November 14, 2005 email from Naberezny to Hearn stated, in reference to following up on Kregler concerning his Command Discipline: "I will ask Chief Garcia—he was the supervisor at the time and if it happened he will know about it." (Pl.'s Rule 56.1 Statement of Undisputed Facts ("Pl.'s 56.1 St."), Ex. 6.)

In addition to the dispute regarding who initiated the conversation with Garcia, there is also a disputed issue of material fact in connection with the timing of any conversation between Naberezny and Garcia. Defendants argue that Garcia was on vacation the week that Naberezny obtained the information about the Command Discipline. (Defs.' Mem., at 9.) However, Kregler cites several factual sources, including testimony from both Garcia and Naberezny in depositions as well as testimony from Garcia at a hearing before this Court, stating that Naberezny consulted with Garcia regarding Kregler's disciplinary violations. ( *See, e.g.,* Pl.'s 56.1 St., Ex. 3, at 166–68 (Garcia hearing transcript); Pl.'s 56.1 St., Ex. 23, at 69–73 (Naberezny deposition transcript); Pl.'s 56.1 St., Ex. 26, at 172–174 (Garcia deposition transcript).) Portions of the evidence Kregler cites are inconsistent with some of the information Defendants cite. For example, Defendants claim that Garcia was on vacation when Naberezny learned more details about the Command Discipline, but the hearing and deposition transcripts Kregler cites suggest that Naberezny learned of the details of the Command Discipline from Garcia. ( *See, e.g.,* Pl.'s 56.1 St., Ex. 23, at 71–73 (excerpt of Naberezny deposition transcript covering Naberezny's conversation with Garcia concerning "something to do with a helicopter and a fax machine"); *id.* at 70 ("Q: Well, in this case you were asked to vet William Kregler, so who'd you go to? A: Chief Garcia." [3]); Pl.'s 56.1 St., Ex. 26, at 172–174 (Garcia deposition transcript covering Garcia's conversation with Naberezny, in which Garcia states that Naberezny "asked [Garcia] what was in the file" and Garcia told her about the command discipline); Pl.'s 56.1 St., Ex. 3, at 166–68 (hearing transcript in which Garcia states that he remembers speaking with Naberezny one time regarding Kregler in Garcia's office, and that they discussed the disciplinary action)). Neither Garcia nor Naberezny give a precise date for this meeting when the two discussed the Command Discipline. ( *See* Pl.'s 5 6.1 St., Ex. 3, at 168 (Garcia: "I can't even give you the month"); Pl.'s 56.1 St., Ex. 23, at 168 (Naberezny: "I'm not good with dates, but maybe 2005. I don't remember the dates.").) Taken in the light most favorable to Kregler, the evidence that Naberezny received the information about the Command Discipline from Garcia, at an unknown time, disputes at least one of the facts Defendants state: the
364 fact that Garcia was on vacation or that Naberezny *364 learned of the Command Discipline from a source other than Garcia.

3 The Court notes a discrepancy between the deposition transcript and a video of the deposition. The deposition transcript reads "Q: Well, in this case you were asked to vet William Kregler, so where would you go?" (Pl.'s 56.1 St., Ex. 23, at 70.) However, the Court, on listening to the question in the video, hears "who'd you go to?" Another possible interpretation of the video is "who would you go to?" but the Court considers the subsequent question—"Q: And what did he tell you?"—to be more logically consistent with the declarative "who'd" than the conditional "who would."

On a motion for summary judgment it is not appropriate for the Court to make findings requiring determinations of credibility. Viewed in the light most favorable to Kregler, there are at least some facts suggesting that Garcia was Naberezny's initial source of information regarding the details of the Command Discipline, which could in turn support Kregler's argument of causation. Whether this version of the facts holds up in light of other evidence is a matter best suited for trial.

Accordingly, upon review of the record and the parties' submissions, the Court finds that, while it is premature to determine whether Garcia was personally involved in the alleged constitutional violation, Kregler has established a disputed issue of material fact with regard to the causal link between Garcia's statements to Naberezny and Hearn's adverse employment decision. Therefore, Defendants' motion for summary judgment as to Garcia on the basis of failure to establish a *prima facie* case for his § 1983 claim of First Amendment retaliation is denied.

## 2. *Qualified Immunity*

Defendants argue that, even if the Court does not grant their summary judgment motion on the basis of Kregler's failure to establish causation on his § 1983 claim, the Court should find that Garcia is entitled to qualified immunity from suit. The doctrine of qualified immunity shields government officials performing discretionary functions from liability for civil damages under federal claims insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Wilson v. Layne,* 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999); *Ayers v. Ryan,* 152 F.3d 77, 82 (2d Cir.1998). A government official is entitled to qualified immunity when "(1) Plaintiff fails to allege a violation of a federal right; (2) the right alleged was not clearly established at the time of the alleged violation; or (3) the Defendant's actions were objectively reasonable in light of the legal rules that were clearly established at the time it was taken." *Burns v. Citarella,* 443 F.Supp.2d 464, 469 (S.D.N.Y.2006) ( *citing Harhay v. Town of Ellington Bd. of Educ.,* 323 F.3d 206, 211–12 (2d Cir.2003); *X–Men Sec., Inc. v. Pataki,* 196 F.3d 56, 65–66 (2d Cir.1999)). Where the plaintiff alleges a violation of a clearly established federal right, "defendants bear the burden of showing that the challenged act was objectively reasonable in light of the law existing at that time." *Varrone v. Bilotti,* 123 F.3d 75, 78 (2d Cir.1997) ( *citing Harlow v. Fitzgerald,* 457 U.S. 800, 815, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

Here, Kregler alleges that Garcia violated his clearly established constitutional rights by retaliating against Kregler based on Kregler's political opinions. Specifically, Kregler claims that Garcia colluded with Naberezny to sabotage Kregler's City Marshal application based on Kregler's endorsement of a particular political candidate. Defendants deny that Garcia ever communicated with Naberezny before the decision was made not to offer Kregler a City Marshal position, and that therefore Garcia's actions could not have influenced Hearn's ultimate decision not to approve Kregler's application.

If Garcia did act as Kregler alleges, his actions violated Kregler's clearly established constitutional rights. *See DePace v. Flaherty,* 183 F.Supp.2d 633, 641 (S.D.N.Y.2002) ("It long has been established by the Supreme Court and the Second Circuit that, '[a]s a general rule, employees may not be dismissed for the exercise of their
365 First Amendment rights.' ") ( *citing* *365 *Kaluczky v. City of White Plains,* 57 F.3d 202, 208 (2d Cir.1995); *Elrod v. Burns,* 427 U.S. 347, 360, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Pickering v. Board of Educ.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)). Furthermore, Garcia's actions cannot be considered objectively reasonable. *See id.* at 642 ("It would have been objectively unreasonable for [defendant] to believe that adverse employment action against ... an employee who exercised his First Amendment rights was permissible.").

Because these questions turn on the parties' conflicting accounts of Garcia's actions discussed above, the Court finds that issues of material fact remain in dispute regarding Garcia's qualified immunity claim. Dismissal on the basis of a qualified immunity defense is not appropriate where there are facts in dispute that are material to a determination of reasonableness. *See Thomas v. Roach,* 165 F.3d 137, 143–45 (2d Cir.1999); *Lennon v. Miller,* 66 F.3d 416, 421 (2d Cir.1995). Without a fuller factual record to be developed at trial, the Court is not in a

position to determine whether Defendants have satisfied their burden of proving that Garcia's actions were objectively reasonable. Therefore, at this time the Court denies Defendants' motion for summary judgment predicated on Garcia's claim of qualified immunity.[4] **B. *CLAIMS AGAINST THE CITY***

[4] In a letter dated November 12, 2013, Defendants misstate the Court's responsibility regarding Garcia's qualified immunity claim, arguing that "before trial, a district court must decide a defendant's invocation of qualified immunity." (Dkt. No. 143.) The Court need not make an ultimate determination regarding qualified immunity if material facts remain in dispute. *See Thomas v. Roach,* 165 F.3d 137, 143–45 (2d Cir.1999).

A municipality may be held liable only "when execution of [its] policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury [.]" *Monell,* 436 U.S. at 694, 98 S.Ct. 2018. Kregler advances the theory that Hearn's decision regarding Kregler's City Marshal application constitutes an act of the City and that this employment decision represents a municipal policy. Kregler cites cases establishing that a single decision can represent municipal policy, *see, e.g., Pembaur,* 475 U.S. at 480, 481, 106 S.Ct. 1292;*Jeffes v. Barnes,* 208 F.3d 49, 57 (2d Cir.2000), and cases establishing that the decision of a city's authorized decisionmaker represents an act of official government policy, *see Pembaur,* 475 U.S. at 481, 106 S.Ct. 1292.

Although Hearn made the employment decision, the actor alleged to have committed the First Amendment retaliation is Garcia, not Hearn. Kregler argues that the City is liable to Kregler for Hearn's decision under the "cat's paw" theory of liability. "In a cat's paw scenario, a nondecisionmaker with a discriminatory motive dupes an innocent decisionmaker into taking action against the plaintiff." *Saviano v. Town of Westport,* No. 04 Civ. 522, 2011 WL 4561184, at *7 (D.Conn. Sept. 30, 2011) ( *citing Staub v. Proctor Hosp.,* —— U.S. ——, 131 S.Ct. 1186, 179 L.Ed.2d 144 (2011)).

The development of Second Circuit case law concerning the cat's paw theory is relatively new and evolving. Under the cat's paw theory as described in *Nagle v. Marron,* "a final decisionmaker that relies entirely on an improperly motivated recommendation from a subordinate may render the municipality liable because the subordinate, although not formally delegated the power to make decisions, acts as the municipality's agent." 663 F.3d 100, 117 (2d Cir.2011). The *Nagle* Court discussed*366 the underlying rationale for the cat's paw theory: "Some Circuits have held that 'an employer cannot shield itself from liability ... by using a purportedly independent person or committee as the decisionmaker where th[at] decisionmaker merely serves as the conduit, vehicle, or rubber stamp by which another achieves his or her unlawful design.' " *Id.* ( *quoting Dedmon v. Staley,* 315 F.3d 948, 949 n. 2 (8th Cir.2003)).

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As of the time of the *Nagle* decision, "our Circuit has neither accepted nor rejected the cat's paw approach." *Id.* at 118. The Second Circuit has not ruled on the issue of cat's paw liability since the *Nagle* case. However, several cases in district courts in this Circuit have considered the application of the cat's paw theory of liability —in other employment discrimination contexts, but not in § 1983 actions—and these cases generally endorse the cat's paw theory.[5]

[5] *See, e.g., Zagaja v. Village of Freeport,* No. 10 Civ. 3660, 2013 WL 2405440, at *12 (E.D.N.Y. June 3, 2013) (denying motion for reconsideration of order denying summary judgment in Title VII discrimination and retaliation claims where plaintiff relied in part on cat's paw theory of liability); *Pietri v. New York State Office of Court Admin.,* 936 F.Supp.2d 120, 133 n. 13 (E.D.N.Y.2013) (discussing cat's paw theory in Title VII context but declining to extend cat's paw liability to individual defendants because "individuals are not subject to liability under Title VII"); *Daniels v. Pioneer Cent. Sch. Dist.,* No. 08 Civ. 767, 2012 WL 1391922, at *2–*4 (W.D.N.Y. Apr. 20, 2012) (dismissing defendant's

argument that cat's paw liability does not apply to age discrimination claim under the Age Discrimination in Employment Act ("ADEA")); *Herbert v. National Amusements, Inc.,* No. 08 Civ.1945, 2012 WL 201758 (D.Conn. Jan. 23, 2012) (denying motion to exclude cat's paw liability in a "traditional employment discrimination case" involving ADEA and state law employment discrimination claims).

The Second Circuit has not held that the cat's paw theory applies in the context of a § 1983 claim, although the *Nagle* Court noted that "several Circuits have either held or assumed that cat's paw liability would be available under § 1983." *Id.* at 117–18 (citing cases from the Sixth, Seventh, and Eight Circuits). In *Nagle,* the Second Circuit remanded the question of cat's paw liability to the district court for determination in the first instance. *See id.* at 118. However, the parties settled before the district court made such determination, and the Circuit Court has not yet had another occasion to rule on the issue.

In each of the two post-*Nagle* district court cases in this Circuit to consider the applicability of cat's paw liability to a § 1983 claim—*Monz v. Rocky Point Fire District* [6] and *Rajaravivarma v. Board of Trustees for Connecticut State University System* [7]—the court dismissed the case for other reasons before reaching a decision on whether cat's paw liability applies.

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6 In *Monz v. Rocky Point Fire District,* the court granted judgment as a matter of law for defendants after a jury trial in a First Amendment retaliation case brought under § 1983. 853 F.Supp.2d 277 (E.D.N.Y.2012), *aff'd,*519 Fed.Appx. 724 (2d Cir.2013). In that case, the plaintiff claimed that the defendants—a fire department and other parties related to the fire department—retaliated against plaintiff's allegedly protected speech in declining to reinstate plaintiff to the fire department after his resignation and subsequent application for reinstatement. *See id.* The *Monz* Court decided in favor of defendants as a matter of law because, among other reasons, the court determined that the plaintiff did not establish the causal connection between his protected speech and the adverse employment action. *See id.* at 288–89. Nonetheless, the decision contained dicta declining to extend cat's paw liability to a § 1983 action: The *Monz* Court stated that "the Second Circuit has yet to determine whether this approach—the so-called 'cat's paw' theory of liability—is applicable in the context of § 1983 actions." *Id.* at 288 n. 13 ( *citing Nagle,* 663 F.3d at 118). The *Monz* Court went on to state explicitly that "the Court will not do so here." *Id.*

However, the *Monz* case is distinguishable from the present case in several ways. The *Monz* plaintiff, unlike Kregler, "did not explicitly argue [the cat's paw] theory of liability." *Id.* at 288 n. 13. Moreover, in *Monz* "no facts were introduced to establish" the impermissible motive of the particular defendants whose alleged retaliatory animus could potentially be attributed to their employer under the cat's paw theory. *Id.* Thus, considering that plaintiff did not argue the cat's paw theory and the *Monz* Court did not see facts sufficient to support cat's paw liability, this Court finds that the *Monz* case neither supports nor rejects the applicability of the cat's paw theory to § 1983 cases but does serve as a reminder that a district court should proceed with caution in extending legal theories from one context to another without sufficient guidance from the appellate court.

7 In *Rajaravivarma v. Board of Trustees for Connecticut State University System,* the court granted summary judgment on Title VII retaliation and § 1981 race discrimination claims based on a determination that the plaintiff failed to establish that the defendant's "legitimate" reasons for the adverse employment action were merely pretextual. *See*862 F.Supp.2d 127, 166–67 (D.Conn.2012). In discussing whether cat's paw liability could apply to § 1981 claims brought pursuant to § 1983, the *Rajaravivarma* Court found that the plaintiff's allegations could not survive summary judgment, even assuming, "without holding," that the cat's paw theory applied in the context of § 1981 discrimination claims brought pursuant to § 1983. *See id.* at 167.

This Court is not persuaded that, even when viewed in the light most favorable to Kregler, the facts at issue in the instant case, combined with the numerous complex legal issues described below, present the appropriate circumstances for a court to determine whether to apply the cat's paw theory to a § 1983 claim. The Court finds the facts involved in this case distinguishable from those underlying the decisions in the Sixth, Seventh, and Eighth Circuits that "held or assumed that cat's paw liability would be available under § 1983." *Nagle,* 663 F.3d at 117 ( *citing Campion, Barrow & Assocs., Inc. v. City of Springfield, Ill.,* 559 F.3d 765, 771 (7th Cir.2009) ("[E]vidence could support a finding that X (the [City] Council) relied on Y's (the Mayor's or [an alderman's] ) intent, making it permissible to base municipal liability on Y's discriminatory animus."); *Arendale v. City of Memphis,* 519 F.3d 587, 604 n. 13 (6th Cir.2008) ("When an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias, this Court has held that the employer may be held liable under a 'rubber-stamp' or 'cat's paw' theory of liability."); *Dedmon,* 315 F.3d at 949 n. 2 ("[A]n *employer* can be liable, under certain circumstances, where the formal decisionmaker is not the person who harbored an unlawful motive to terminate the employee.") (emphasis in original)).

None of these decisions dealt with a factual pattern analogous to that of the instant case. Here, Kregler alleges that a tainted act was committed by Garcia, then the Chief Fire Marshal. Garcia was neither the subordinate of nor even employed by the same New York City agency as the decisionmaker, Hearn. To be sure, the FDNY and DOI shared information, but the relationship between Garcia and Hearn was unlike the typical cat's paw case, where the fabled "monkey," or bad actor, is an agent of the "cat," or innocent decisionmaker. [8] In *Campion,* the
368 City Council *368 played the part of the "cat" acting as the decisionmaker on an employment contract, and the "monkey" with the allegedly discriminatory animus was an alderman who sat on the City Council. *See Campion,* 559 F.3d at 769–770. In *Arendale,* both the decisionmaker and the bad actor were members of the Memphis Police Department. *See Arendale,* 519 F.3d at 590–593. In *Dedmon,* the bad actor was an employee of the Pulaski County Circuit Clerk's office and the decisionmaker was the Pulaski County Circuit Clerk. *Dedmon,* 315 F.3d at 949.

[8] The source of the term "cat's paw" is an Aesop's fable as relayed in a 1679 La Fontaine poem and "injected into United States employment discrimination law by [Judge] Posner in 1990." *Staub v. Proctor Hosp.,* —— U.S. ——, 131 S.Ct. 1186, 1190 n. 1, 179 L.Ed.2d 144 (2011) ( *citing Shager v. Upjohn Co.,* 913 F.2d 398, 405 (7th Cir.1990)). In the fable, a monkey induces a cat to extract roasting chestnuts from a fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. *Id.*

In none of these cases did the two principal players work in different offices, departments, or agencies with no direct relationship or channel of communication with one another. This distinction is important. Cat's paw liability is based on agency principles. Thus a substantial question arises as to whether a bad actor with whom the decisionmaker has no official connection, and to whom the decisionmaker has not delegated authority to carry out any official action, may legally be deemed an agent of that decisionmaker. The doctrine is also premised on the theory, as the court noted in *Saviano,* 2011 WL 4561184, at *7, that a bad actor with discriminatory intent "dupes" the unsuspecting decisionmaker, who thus serves as a mere "conduit" or "rubber stamp" of the subordinate. *Nagle,* 663 F.3d at 117. Such deliberate deception assumes a close enough personal or official relationship by reason of which the decisionmaker places reliance and trust in the tainted recommendation of a bad actor who happens to occupy a position of sufficient confidence with the decisionmaker to be able to corrupt the determination at issue, and thus achieve the biased subordinate's own wrongful end.[9] Ordinarily, persons unknown to a decisionmaker would not be empowered to exercise that

degree of decisive machination. And if, as Kregler alleges, the bad actor seeks to taint a decision by using intermediaries—if in the fable the monkey had not used his malice to dupe the cat directly, but had instead employed a lamb or a snake as a conduit for harmful conduct—some conceptual difficulties regarding causation would arise to complicate application of the cat's paw principle. If the third-person intermediary serves as an unwitting pawn of the malevolent actor, it would render it much harder to assess the extent to which the wrongdoer's poison actually infected the decisionmaker with the requisite knowledge and discriminatory intent. If, on the other hand, the bad actor employs a subordinate of the decisionmaker as a surrogate whose official duty the wrongdoer corrupts by working in concert to improperly taint the determination in question, the circumstances would raise another substantial issue: whether in view of the treachery, the subordinate may still be deemed to be serving as agent of the decisionmaker. In either event, the chain of causation leading to the decisionmaker is thrown into doubt for the purposes of imposing municipal liability.

[9] This close relationship of the bad actor situated in a position which creates opportunities to improperly influence the decisionmaker makes Iago a more apt model to play the villainous subordinate.

In this case, not only did Garcia lack an official or personal relationship with Hearn that would enable him to "dupe" her into rubber-stamping his wrongful purpose, it was Hearn herself who initiated further inquiry into Kregler's Command Discipline. Hearn was in a position far from any situation in which she could fall prey to being used by Garcia as a conduit for retaliatory discrimination. Moreover, to the extent Kregler would argue
369 that it was Naberezny who played the bad actor in the *369 role of manipulating Hearn, the Court finds no evidentiary support in the record from which a reasonable jury could conclude that Naberezny harbored animus toward Kregler and transmitted it to Hearn to achieve the retaliatory end that allegedly motivated Garcia. In other words, unlike the typical pattern in cat's paw theory, Naberezny was not the decisionmaker herself, nor was she the decisionmaker's subordinate who, acting on her own malice towards Kregler, initiated the recommendation that resulted in an unlawful official decision.

Moreover, unlike the typical cat and monkey roles, here there were additional layers of attenuation between Garcia and Hearn. Kregler's theory that Garcia gave information to Naberezny that was tainted by retaliatory animus, and that Naberezny in turn provided information to Hearn which was also tainted, strains the cat's paw theory beyond existing case law. In *Arendale,* there was one alleged bad actor reporting directly or in a direct chain of command to multiple supervisors acting as decisionmakers. *See Arendale,* 519 F.3d at 603–604 (affirming district court grant of summary judgment on a disparate treatment claim because, in part, "[e]ven if this Court were to assume that Lieutenant Cox exerted sufficient influence over his white supervisors to impute his alleged racial animus onto them," plaintiff still had not demonstrated disparate treatment). In *Dedmon,* there was a direct relationship between the decisionmaker and the alleged bad actor. *See Dedmon,* 315 F.3d at 949 (Pulaski County Circuit Clerk and her subordinate). In *Campion,* the alleged bad actor was himself a member of the decisionmaking body. *See*559 F.3d at 769–770 (alderman on City Council).

In light of the lack of precedent in the Second Circuit applying the cat's paw theory of liability to the context of a § 1983 action, and the gulf between the facts in this case and the facts in a typical cat's paw case for employer liability, the Court grants Defendants' motion for summary judgment as to the City.

## III. ORDER

For the reasons discussed above, it is hereby

**ORDERED** that the motion (Docket No. 138) of defendants the City of New York and Louis Garcia is **GRANTED** as to defendant the City of New York; and it is further

**ORDERED** that the motion (Docket No. 138) of defendants the City of New York and Louis Garcia is **DENIED** as to defendant Louis Garcia.

The Clerk of Court is directed to terminate any pending motions.

SO ORDERED.

# Schoolcraft v. City of N.Y.

Decided Nov 20, 2013

10 Civ. 6005 (RWS)

11-20-2013

ADRIAN SCHOOLCRAFT, Plaintiff, v. CITY OF NEW YORK, et al., Defendants.

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Sweet

## OPINION

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## Sweet, D.J.

Defendant City of New York ("City" or "City Defendants"), Defendant Deputy Inspector Steven Mauriello ("Mauriello") and Defendants Jamaica Medical Center ("JMC"), Dr. Isak Isakov ("Isakov") and Dr. Lillian Aldana-Bernier ("Aldana-Bernier", collectively with JMC and Isakov the "Medical Defendants") have made several motions before the Court. City Defendants have moved for the lifting of the injunction dated June 28, 2013, which enjoined all further administrative proceedings by the New York Police Department ("NYPD") against Plaintiff Adrian Schoolcraft ("Plaintiff" or "Schoolcraft"). Defendant Mauriello has moved for leave to file an answer amended with counterclaims. Medical Defendants have moved for a protective order. Plaintiff has moved to strike certain portions of Mauriello's counterclaims and for deposition expenses related to the cancelling of the Aldana-Bernier deposition.

For the reasons set forth below, City Defendants' motion is denied, Defendant Mauriello's motion is denied and
4 Medical Defendants' motion is denied in part. Plaintiff's motions are denied. *4 **Prior Proceedings**

A detailed recitation of the facts of the case is provided in this Court's opinion dated May 6, 2011, which granted in part and denied in part Defendant Jamaica Hospital Medical Center's motion to dismiss. See Schoolcraft v. City of N.Y., 10 Civ. 6005, 2011 WL 1758635, at *1 (S.D.N.Y. May 6, 2011). Familiarity with those facts is assumed. **City Defendants' Motion to Lift the Injunction Is Denied**

## Prior Proceedings and Facts

In or about May 2013, Plaintiff became concerned that City Defendants may claim the defense of collateral estoppel regarding disciplinary charges against Plaintiff by the NYPD in future motions and/or trial of the instant matter. On June 10, 2013, Plaintiff filed an order to show cause as to why an order should not be issued staying all further administrative proceedings against Plaintiff by the City and the NYPD. At the time, an administrative hearing was scheduled to begin on June 17, 2013 (the "Hearing"):

5 There [were] two disciplinary matters pending against *5

> Plaintiff. The first charges that on October 31, 2009 - the date of the incident giving rise to the instant action - Plaintiff failed to comply with orders, was absent from work without leave, failed to safeguard Departmental property, impeded an investigation, and failed to surrender a rifle in his possession. The second, which primarily deals with Plaintiff's conduct after October 31, 2009, charges that Plaintiff failed to appear at the Department Advocate's Office, was absent from work without leave, failed to make himself available to be examined by a Department Surgeon, failed to report to his resident precinct, failed to appear at the Department Advocate's Office for restoration of duty, failed to notify the Department of his current residence, and impeded investigators.

Schoolcraft v. City of N.Y., 10 Civ. 6005, 2013 WL 3283848, at *2 (S.D.N.Y. June 28, 2013) ("Schoolcraft I"). (internal citations omitted). The Court granted the order and temporarily stayed the Hearing against Plaintiff until July 1, 2013.

The parties then submitted briefing on two central issues: "(1) whether the outcome of the Hearing would have a preclusive effect, pursuant to the doctrine of collateral *6 estoppels, so as to interfere with the Court's ability to fully adjudicate this action; and (2) even if so, whether the Court can and should enjoin the Hearing." The Court granted the preliminary injunction in its June 28, 2013 Opinion, and enjoined all further administrative proceedings by the NYPD against Plaintiff (the "Injunction"). Schoolcraft I, 2013 WL 3283848, at *7. The Court found that the Hearing could have a preclusive effect and that the Hearing was enjoined. Id.

City Defendants moved to lift the Injunction via letter on October 9, 2013. In its letter, City Defendants state that it has agreed to not raise the affirmative defense of collateral estoppel in the instant matter concerning any issues addressed in the NYPD disciplinary Hearing. The parties submitted briefing on the motion, and oral arguments were held on October 16, 2013, with supplemental arguments on November 13, 2013. The matter was marked fully submitted on November 13, 2013.

The Hearing currently seeks disciplinary action for (i) Plaintiff's failure to appear at the NYPD Department Advocate's Office while on suspension and absent without leave on or about December 3, 2009; (ii) Plaintiff's refusal to allow entry to an NYPD Surgeon who sought to examine Plaintiff on or *7 about December 3, 2009; (iii) Plaintiff's failure to report to his precinct; (iv) Plaintiff's failure to report to the NYPD's Advocate Office on or about December 4 and December 7, 2009; (v) Plaintiff's failure to reside within the City of New York or Westchester, Rockland, Orange, Putnam, Nassau or Suffolk Counties and failure to notify the NYPD of his residence and telephone number; and (vi) Plaintiff's impediment of NYPD investigators who were attempting to notify Plaintiff of his ability to be restored to duty on January 31, 2010.

## The Motion to Lift the Injunction Is Denied

At issue is whether City Defendants' waiver of collateral estoppel is sufficient to warrant the removal of the Injunction. In Schoolcraft I, the Court set the Injunction "pending the resolution of this action or a determination by the City that its departmental proceeding will not have a preclusive effect on the issues raised in this action." Schoolcraft I, 2013 WL 3283848, at *7. While the City has waived collateral estoppel on the issues raised in the Hearing, Plaintiff objects to the lifting of the Injunction. As such, the Court will reexamine whether the Injunction should be maintained in place at this time. *8

As previously noted in Schoolcraft I, whether the Court should maintain the Injunction must be analyzed within the framework of Younger v. Harris, 401 U.S. 37 (1971). Younger held that "principles of federalism and comity preclude a district court from interfering with pending state criminal proceedings 'except in very unusual situations, where necessary to prevent immediate irreparable injury.'" Bess v. Spitzer, 459 F. Supp. 2d

191, 203 (E.D.N.Y. 2006) (quoting Samuels v. Mackell, 401 U.S. 66, 69 (1971)). Younger abstention has been applied to administrative proceedings by a police department against an officer. See McDonald, 565 F. Supp. at 38; see also McCune v. Frank, 521 F.2d 1152, 1158 (2d Cir. 1975) ("That we are dealing with a county police department's disciplinary proceeding rather than a state court action is of little moment. A proceeding in a state court is not a pre-requisite to the applicability of Younger.") (citations omitted).

As the Court explained in Schoolcraft I:

> "Younger abstention is required when three conditions are met: (1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial
> 9 *9 review of the federal constitutional claims." Diamond, 282 F. 3d at 198. However, "a federal court may nevertheless intervene in a state proceeding upon a showing of 'bad faith, harassment or any other unusual circumstance that would call for equitable relief.'" Id. (quoting Younger, 401 U.S. at 54).

Schoolcraft I, 2013 WL 3283848, at *3.

There is an "ongoing state proceeding" to which Younger abstention could apply. However, the City has not established an interest in conducting a departmental hearing rather than dismissing Plaintiff via summary dismissal. See Schoolcraft I, 2013 WL 3283848, at *3 (noting that the City had taken the position that no administrative proceeding was necessary in order to dismiss Plaintiff since NYC Administrative Code allows any member of the NYPD who has been absent without leave for five consecutive days to be dismissed by the NYPD without notice).

The NYPD waited three years after filing administrative charges against Plaintiff to initiate the Hearing and the City waited three months after Schoolcraft I and the Injunction to indicate its desire to waive collateral
10 estoppel. *10 The City has not established that an important state interest is implicated if the Injunction were to continue, and the date for trial in this case approaches. See Schoolcraft, 2013 WL 3283848, at *5. As such, the circumstances do not support a finding of Younger abstention.

Having concluded that abstention is not required under Younger, the Court must again determine whether continuation of the Injunction is merited. In order to obtain a preliminary injunction, the movant must demonstrate "(1) the possibility of irreparable harm; and (2) either (a) a likelihood of success on the merits, or (b) a sufficiently serious question going to the merits combined with a balance of the hardships tipping decidedly in favor of the moving party." Mullins v. City of New York, 554 F. Supp. 2d 483, 487 (S.D.N.Y. 2008). Plaintiffs have established both elements.

The Plaintiffs note that an interceding NYPD administrative trial would interfere with this current action as any NYPD proceeding would take time and energy away from getting the instant matter ready for trial. The parties are currently in a heavy, extensively negotiated discovery schedule. The issues presented in the NYPD Hearing
11 likely will relate to the topics at issue in this litigation. It will also allow *11 Defendants, who have already deposed Officer Schoolcraft for over 21 hour of examination, another opportunity to examine him again. As noted above, the City has not provided any explanations as to why the disciplinary charges must be resolved at this time. Given such factors, the removal of the Injunction would constitute irreparable harm. See Schoolcraft I, 2013 WL 3283848, at *5-6; Mullins, 554 F. Supp. 2d 483 (finding irreparable harm and granting a preliminary injunction where the NYPD sought to question a plaintiff regarding statements made during a deposition).

As to the second factor in this Court's determination of whether to maintain the Injunction, City Defendants appeared to concede in Schoolcraft I Plaintiff's contention that "the detailed allegations in the Second Amended Complaint and the dramatic recordings of the unlawful and unjustified assault and abduction of Officer Schoolcraft from his home on October 31, 2009 demonstrate that there is a likelihood of success on the merits and serious questions going to the merits of this action". Id. at *6 (citation omitted). City Defendants again have not responded to this argument in its latest briefing, and the City appears to concede this point.

12 City Defendants contend that the stay has already *12 prejudiced Defendants. However, the NYPD delays counter this contention since if the charges are established the result will be Schoolcraft's discharge and the termination of his rights, the same result as dismissing Plaintiff via summary dismissal. The delays counter the City Defendants' plea for efficiency and promptness, and no prejudice will occur to the City if the Hearing is enjoined until resolution of the instant matter. **Defendant Mauriello's Motion to Amend And Plaintiff s Motion To Strike Are Denied**

## Prior Proceedings and Facts

Mauriello, a Deputy Inspector in the NYPD, is a named defendant in the instant matter. On September 24, 2013, Mauriello moved this Court to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over counterclaims proposed by Mauriello and grant Defendant Mauriello leave to serve the answer amended with counterclaims (the "Proposed Answer").

Mauriello's Proposed Answer includes state law counterclaims against Plaintiff in his individual capacity for tortious interference with Mauriello's employment relationship with the City of New York and prima facie tort.
13 The gravamen of *13 Mauriello's counterclaims branch from his defense against Plaintiff's claims. Plaintiff's Second Amended Complaint ("SAC") alleges that, in response to his refusal to adhere to and later attempts to expose the strict enforcement of an illegal quota policy in his precinct, defendant NYPD officers instigated a campaign to intimidate and discredit him. SAC ¶¶ 25-254. Plaintiff named Mauriello as a defendant for Mauriello's role in the quota policy. Due to Plaintiff's failure to comply with the quotas, Mauriello allegedly gave Plaintiff a sub-standard evaluation in 2008 and retaliated against Plaintiff.

The Proposed Answer alleges that on or around October 7, 2009, Plaintiff planned, with the aid of his father, to lay a false foundation for claims Plaintiff intended to assert against the City in order to harm Mauriello. Declaration of Walter A. Kretz, Jr. ("Kretz Decl.") ¶ 4; Kretz Decl. Ex. A ¶ 3. Mauriello alleges that Plaintiff intended to carry out the plan by making unfounded and/or exaggerated accusations against the supervising officers of the 81st precinct, and Plaintiff and his father hoped to make Mauriello the scapegoat for the alleged wrongdoing in the 81st precinct and throughout the NYPD, causing Mauriello to get fired. Kretz Decl. ¶¶ 4-5.
14 Mauriello's defense and proposed counterclaims rely primarily on the recording of a *14 conversation between Plaintiff and his father on October 7, 2009, which was produced by the City from recordings IAB was able to retrieve from a computer in Plaintiff's apartment.

Mauriello alleges that to help create the appearance that crime reports routinely were improperly downgraded, Plaintiff caused at least three incidents, two involving grand larceny and one of burglary, all reported directly to him, to be recorded instead as lost property, and caused at least three other incidents of crime not to be recorded at all. Id. ¶ 6. Mauriello contends that while Plaintiff identified sixteen instances of downgrades to NYPD's Quality Assurance Division ("QAD") of improper crime reporting, Plaintiff actually was responsible for six such incidents. Mauriello alleges that Plaintiff anticipated that the crime victims would later return to the 81st

Precinct, and in some instances Plaintiff reached out to them to do so, to complain that their reports were not taken or not followed up. This would then result in documentation of improper handling of crime reports that QAD could readily discover. Id.

15 The issue was marked fully submitted and arguments held on November 13, 2013. *15 Defendant Mauriello's Motion To Amend His Answer
With Proposed Counterclaims Is Denied

Fed. R. Civ. P. 15(a) sets forth the general procedure for amending pleadings before trial:

> (1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:
> (A) 21 days after serving it, or
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
>
> (2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Fed. R. Civ. P. 15(a). "A decision to grant or deny a motion to amend is within the sound discretion of the trial
16 court." *16 Krurnme v. West Point Stevens Inc., 143 F. 3d 71, 88 (2d Cir. 1998); see also Nordco, A.S. v. Ledes, 95 Civ. 7753, 1999 WL 1243883, at *2 (S.D.N.Y. Dec. 21, 1999) ("[T]he grant or denial of an opportunity to amend is within the discretion of the District Court and leave sought should, as the rules require, be freely given.") (internal quotation marks and citations omitted). "[Considerations of undue delay, bad faith, and prejudice to the opposing party [are] touchstones of a district court's discretionary authority to deny leave to amend." Krurnme, 143 F.3d at 88 (quoting Barrows v. Forest Laboratories, 742 F. 2a 54, 58 (2d Cir. 1984)). "One of the most important considerations in determining whether amendment would be prejudicial is the degree to which it would delay the final disposition of the action." Krurnme, 143 F.3d at 88 (quoting H.L. Hayden Co. v. Siemens Medical Systems, 112 F.R.D. 417, 419 (S.D.N.Y. 1986)).

The Court shall first examine whether the proposed counterclaims are time-barred. "[T]he applicable statute of limitations is a substantive question and thus defined by state law . . . ." In re Mission Const. Litig., 10 Civ. 4262, 2013 WL 4710377, at *14 n.16 (S.D.N.Y. Aug. 30, 2013). The state statute of limitations for defendant
17 Mauriello's prima facie tort counterclaim is either one year or three years, depending *17 on what the essence of the claim is deemed to be. See Morrison v National Broadcasting Co., 19 N.Y.2d 453, 459 (N.Y. 1967). The statute of limitations for Mauriello's tortious interference counterclaim is three years. CPLR § 214(4); see also, IDT Corp. v Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132, 141 (N.Y. 2009).

The Proposed Answer seeks to amend Mauriello's previous answer, and the federal rules for whether the amendment relates back, a procedural question, applies. In re Mission Const. Litig., 2013 WL 4710377, at *14 n.16 ("[T]he standard for evaluating whether a proposed amendment relates back is a procedural question and is, therefore, governed by federal law."). Fed. R. Civ. P. 15(c) allows an amendment to a pleading to relate back to the date of the original pleading when " (A) the law that provides the applicable statute of limitations allows relation back; [or] (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading." Fed. R. Civ. P. 15(c)(1). However, "[s]tate law also determines the related questions of what events serve to commence an action and to toll the statute of limitations in such
18 cases." [1] Sea Trade *18 Co. Ltd. v. FleetBoston Financial Corp., 03 Civ. 10254, 2006 WL 2786081, at *2 (S.D.N.Y. Sept. 26, 2006) (quoting Personis v. Oiler, 889 F.2d 424, 426 (2d Cir. 1989)). Under N.Y. C.P.L.R. §

203 (d) , a claim is "not barred if it was not barred at the time the claims asserted in the complaint were interposed." In Sea Trade, the court engaged in a two-step process, where the proposed counterclaims first were related back to the date of the original answer pursuant to Rule 15 and then to the date of the complaint as per New York's tolling provision. Id. The Sea Trade court found that New York's tolling provision rendered the counterclaims timely if they would have been timely as of the date of the filing of the complaint. Id.

[1] When Fed. R. Civ. P. 15 was amended in 1991, the Commentary noted with regards to Fed. R. Civ. P. 15(c), "Whatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim." Fed. R. Civ. P. 15 advisory committee's note.

The Complaint was filed and interposed on August 10, 2010. Defendant Mauriello alleges that Plaintiff enacted the plan against Mauriello on or around October 7, 2009. Mauriello suffered his alleged injuries as a result of the scheme at some subsequent time. Thus, Mauriello's counterclaims would have accrued less than one year before the Complaint was filed. Adopting the Sea Trade court's tolling analysis, the Proposed Answer would relate back to when the Complaint was filed. N.Y. C.P.L.R. § 203(d). Neither the one-year period nor the three-
19 year statute of limitation periods for Mauriello's counterclaims *19 would have expired as of August 10, 2010. As such, Mauriello's proposed counterclaims are timely.

While the Proposed Answer is not time-barred, the Court may deny the leave to amend for undue delay, bad faith, futility of the amendment or undue prejudice to the opposing party. State Teachers Ret. Bd. V. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981) ("Reasons for a proper denial of leave to amend include undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party."); Hillair Capital Invs., L.P. v. Integrated Freight Corp., 12 Civ. 7164, 2013 WL 4539691, at *2 (S.D.N.Y. Aug. 28, 2013) ("Leave to amend an answer 'should not be denied unless there is evidence of undue delay, bad faith, undue prejudice to the non-movant, or futility.'") (quoting Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001)).

The Complaint in this action was filed on August 10, 2010, with an Amended Complaint filed on September 13, 2010, and the SAC on October 1, 2012. Mauriello filed an Answer to the SAC on January 10, 2013, and filed the Proposed Answer on September 24, 2013. Mauriello waited three years since the filing of the initial
20 Complaint, one year after the filing of the SAC and nine months after the filing of his first answer to *20 bring forth his proposed counterclaims. Further, over the past three years, the parties have engaged in extensive motion practice, thousands of documents have been exchanged, the Plaintiff has been deposed for three full days of testimony, inspections of the 81st Precinct and Jamaica Hospital have been conducted and the depositions of the Defendants have begun. Mauriello's proposed amendment will require additional rounds of document discovery on Mauriello and on specifics of the downgrading of crime reports at the 81st Precinct. The amendment will also require additional discovery and the deposition of several other senior NYPD superiors relating to the alleged damage to Mauriello's reputation. Allowing the counterclaims will certainly delay the final resolution of the action. The proposed counterclaims would force Plaintiff to expend additional resources in conducting discovery and preparing for trial and delay the underlying dispute's resolution, which will cause undue prejudice on Plaintiff. See Evans v. Syracuse City Sch. Dist., 704 F. 2d 44, 47 (2d Cir. 1983) (stating that "the longer the period of an unexplained delay, the less will be required of the nonmoving party in terms of a showing of prejudice" and upholding the district court's decision to reject the proposed amendment due to an over two-year delay in defendant's motion to amend); Continental Bank, N.A. v. Meyer, 10 F.3d
21 1293, 1298 (7th Cir. 1993) (district *21 court did not abuse its discretion in refusing to allow defendant to

amend answer to add counterclaims where the defendant waited more than two years and the amendment would require additional discovery). As such, the Court finds that granting leave to serve the Proposed Answer would cause undue delay and prejudice Plaintiff.

## Plaintiff's Motion To Strike Is Denied

Given that Mauriello's motion to amend is denied, Plaintiff's motion to strike is denied as moot. **The Medical Defendants' Motion For A Protective Order**
**Is Granted In Part And Denied In Part**
**And Plaintiff's Motion For Expenses Is Denied**

## Prior Proceedings and Facts

Medical Defendants have moved the Court for a protective order enjoining Plaintiff's method of video recording the depositions of the Medical Defendants. Plaintiff's attorney was scheduled to depose Aldana-Bernier on October 25, 2013. For the deposition, Plaintiff's attorney brought his personal Sony Handycam video camera, and indicated at the deposition that he intended to use the video camera to videotape the
22 deposition. *22 Aldana-Bernier's attorney objected to Plaintiff's use of the camera, objecting specifically to the lack of a Fed. R. Civ. P. 30 notice of intent to videotape and the methods used by Plaintiff's counsel for the deposition. An official court recorder was present.

Medical Defendants submitted a letter motion requesting for a protective order on October 30, 2013. The issue was marked as fully submitted and arguments were held on November 13, 2013. The Motion For A Protective Order Is
Granted In Part And Denied In Part

At issue is whether (1) Plaintiff's counsel violated the Federal Rules of Civil Procedure in failing to provide notice of his intent to videotape the Aldana-Bernier deposition and (2) Plaintiff's attorney can videotape a deposition with himself as the video camera operator where an official court reporter is also present. Fed. R. Civ. P. 30(b) provides that a party who notices the deposition must state the method for recording the testimony and any additional methods for recording must be noticed as well. Rule 28 provides that a deposition must be
23 taken before an officer authorized to administer oaths *23 by law. Rule 28(c) disqualifies an attorney for the parties to qualify as an officer under Rule 28.

Plaintiffs and City Defendants previously had entered into a stipulation that allowed for the video recording of depositions of parties represented by attorneys for City Defendants to be videotaped (the "Video Recording Stipulation"). Defendants Deputy Chief Marino's ("Marino") and Captain Theodore Lauterborn's ("Lauterborn") depositions were videotaped in the manner Plaintiff seeks to depose Aldana-Bernier. The Video Recording Stipulation does not waive the City's right to object to any video recordings made. City Defendants have subsequently noted their intent to withdraw from the Video Recording Stipulation.

Medical Defendants were not a party to the Video Recording Stipulation entered into between Plaintiff and City Defendants. Medical Defendants contend, and Plaintiff does not dispute, that at the time of the Aldana-Bernier deposition, Plaintiff had not served a Rule 30(b) notice of counsel's intent to videotape.[2] As such, the Court
24 finds that Plaintiff failed to provide proper notice required under Fed. R. Civ. P. 30(b). *24

[2] Plaintiff's counsel has subsequently served a Fed. R. Civ. P. 30(b) notice on the parties.

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Turning to the issue of whether Plaintiff's attorney can himself operate a video recorder to record a deposition if proper notice is served, the Court notes that Plaintiff's method of video recording has caused the Medical and City Defendants significant concern. Plaintiff's method of video recording, used in the Marino and Lauterborn depositions and which Plaintiff's counsel states he intends to use for all subsequent depositions, does not follow the requirements and safeguards set out in the Federal Rules of Civil Procedure. Plaintiff's counsel did not comply with the requirements of Fed. R. Civ. P. 30(b)(5), including the technical requirements of Rule 30(b)(5)(A)(i) through (v), in the Marino and Lauterborn depositions. Medical Defendants also note that Plaintiff's counsel himself operated the video recorder and not a Fed. R. Civ. P. 28 officer, since Fed. R. Civ. P. 28(c) disqualifies an attorney for the parties to qualify as an officer.

Other logistical issues indicate difficulty in Plaintiff's method of videotaping. This instant case contains several layers of confidentiality, and the parties have faced and will face difficulty in characterizing the level of confidentiality that applies for each portion of a testimony. Currently, confidential testimony is transcribed into
25 a separate *25 transcript from non-confidential testimony. Plaintiff's counsel uses a single video camera, and for the confidential portions of testimony, counsel states the video is going to the confidential portion, stops the recording and then continues the recording. Plaintiff's counsel has not indicated how the recordings will be edited to separate the various confidentiality levels. The Medical Defendants also note of technical issues. There are no microphones for the video camera other than the internal microphone built into the camera. There will be no way to ascertain as to who is speaking on the tape at any particular time unless it was the witness. Plaintiff's counsel has also failed to provide City Defendants with a copy of the recording that was made for Marino's deposition, while the court reporter has already provided copies of the transcript. Plaintiff's counsel also failed to record portions of Lauterborn's deposition when the video camera's memory ran out prior to the deposition's completion. The video camera was also left on and captured off the record discussions between counsel in the Marino and Lauterborn depositions. Medical Defendants express concern that Plaintiff's counsel has made several mistakes that may prevent matching the video with the stenographic record transcript.

26 There is dearth of case law in the Southern District *26 regarding whether a party's attorney can videotape a deposition where an official court reporter is also present. In Carvalho v. Reid, 193 F.R.D. 148 (S.D.N.Y. 2000), the magistrate judge ruled via a telephonic ruling that a pro se plaintiff was not allowed to videotape her own deposition where she did not provide proper Rule 30(b) notice and for failure to arrange to have the videotaping conducted by an appropriate person pursuant to Rules 30(b)(4) and 28(c). Id. at 152. In contrast, the court in Marlboro Products Corp. v. N. Am. Philips Corp., 55 F.R.D. 487 (S.D.N.Y. 1972), allowed plaintiff to operate a tape recorder in depositions for purposes of economy. Id. at 489. Petitioners in Marlboro did not challenge the recording on Rule 30(b) notice grounds.

Given the manner in which Plaintiff's counsel has chosen to operate the video camera there is a risk that any videos taken pursuant to such methods is subject to interpretation. The failure to serve proper Rule 30(b) notice to the Medical Defendants and the potential difficulties surrounding the video recordings were appropriate grounds for adjourning the deposition. Although the Plaintiff may take video recordings in depositions for his own purposes, those recordings taken by counsel will not be admissible. See Rice's Toyota World, Inc. v. S.E.
27 Toyota Distributors, Inc., 114 F.R.D. *27 647, 651 (M.D.N.C. 1987) ("[T]he issue of whether to permit plaintiff to video record the deposition is not governed by Rule 30(b)(4) as much as by the Court's general authority to regulate the deposition process.").

The cases cited by Plaintiff's are inapposite. Other than Marlboro, none of the cases cited by Plaintiff were in the Southern District or a district in the Second Circuit. Petitioners in the cases did not challenge any video recordings based on respondents' failure to comply with Rule 30(b) notice requirements. Importantly, all of the

cases involved the routine operation of video camera equipment; the confidentiality levels present in the instant matter propels the task of videotaping a deposition beyond a simple task to a complicated one. See Marlboro, 55 F.R.D. 487; Maranville v. Utah Valley Univ., 11 cv 958, 2012 WL 1493888 (D. Utah April 27, 2012); Pioneer Drive, LLC v. Nissan Diesel Am., Inc., 262 F.R.D. 552 (D. Mont. 2009); Hearn v. Wilkins Tp., Pa., 06-120, 2007 WL 2155573 (W.D. Pa. July 25, 2007); Anderson v. Dobson, 627 F.Supp.2d 619 (W.D.N.C. 2007); Ott v. Stipe Law Firm, 169 F.R.D. 380 (E.D. Okl. 1996); Rice's Toyota World, 114 F.R.D. 647. Plaintiff's
28 Motion For Deposition Expenses Is Denied *28

Plaintiff has also requested for an order requiring Aldana-Bernier's counsel to pay the expenses associated with the canceling of the Aldana-Bernier deposition. Fed. R. Civ. P. 30(c) (3) states: "An objection at the time of the examination— whether to . . . a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds." Sanctions are appropriate under Rule 37(d)(1)(A)(i) where "a party . . . fails, after being served with proper notice, to appear for that person's deposition." "Failure to appear is strictly construed in this Circuit and only occurs where a deponent literally fails to show up for a deposition session." Salahuddin v. Harris, 782 F.2d 1127, 1131 (2d Cir. 1986).

As noted above, because of Plaintiff's failure to serve a proper Rule 30 notice no fines or sanctions will be
29 imposed. *29

It is so ordered. **New York, NY**
**November 20, 2013**

_____

**ROBERT W. SWEET**

No. 12-3699-cv
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# Tech. in P'ship, Inc. v. Rudin

538 F. App'x 38
Decided Sep 17, 2013

No. 12-3699-cv

2013-09-17

TECHNOLOGY IN PARTNERSHIP, INC., Plaintiff-Appellee, v. EDWARD M. RUDIN, ALYSE RUDIN, GLORIA RUDIN, ALYFUNKIDS INC., D/B/A MY GYM CHILDREN'S FITNESS, MY GYM WESTFIELD INC., D/B/A MY GYM CHILDREN'S FITNESS CENTER, MY GYM GLEN ROCK, INC., RUDIN APPRAISALS, LLC, Defendants-Appellants, ALAN ZVERIN, ZVERIN & FISHER, LLP, EISMAN, ZUCKER, KLEIN & RUTTENBERG, LLP, Defendants.

JARRETT M. BEHAR, Sinnreich Kosakoff & Messina LLP, Central Islip, NY, for Plaintiff-Appellee.

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GUIDO CALABRESI

## SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of September, two thousand thirteen. PRESENT: GUIDO CALABRESI,

DEBRA ANN LIVINGSTON,

DENNY CHIN,

CIRCUIT JUDGES.

JANE SIMKIN SMITH (Nathaniel B. Smith, Law Office

of Nathaniel B. Smith, New York, NY, *on the brief*),

Millbrook, NY, *for Defendants-Appellants.*

2 *2

JARRETT M. BEHAR, Sinnreich Kosakoff & Messina

LLP, Central Islip, NY, *for Plaintiff-Appellee.*

Appeal from the judgment of the United States District Court for the Southern District of New York (Patterson, Jr., *J.*) denying Defendants-Appellants' motion to compel arbitration.

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED.**

Defendants-Appellants Edward M. Rudin, Alyse Rudin, Gloria Rudin, Alyfunkids Inc., d/b/a My Gym Children's Fitness, My Gym Westfield Inc., d/b/a My Gym Children's Fitness Center, My Gym Glen Rock, Inc., Rudin Appraisals, LLC ("Appellants" or "Rudins") appeal from the Opinion and Order of the United States District Court for the Southern District of New York (Patterson, Jr., *J.*), dated August 30, 2012, denying Appellants' motion to compel arbitration. The district court denied the motion on the ground that the Rudins had waived their right to arbitrate. On appeal, Appellants contend that: (1) the district court improperly denied their motion to compel arbitration on the grounds of waiver, and (2) the Second Circuit's waiver of arbitration doctrine is inconsistent with the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2 *et seq.,* and recent Supreme Court cases interpreting the FAA. We assume the parties' familiarity with the facts and procedural history of the case.

Federal policy strongly favors arbitration and waiver of a right to arbitrate is not lightly inferred, but a party can waive its right to arbitration "when it engages in protracted litigation that prejudices the opposing party." *In re Crysen/Montenay Energy Co.,* 226 F.3d 160, 162 (2d Cir. 2000) (quoting *PPG Indus., Inc. v. Webster Auto Parts, Inc.,* 128 F.3d 103, 107 (2d Cir. 1997)). "There is no bright-line rule . . . for determining when a party
3 has waived its right to arbitration," *3 but courts consider such factors as "(1) the time elapsed from commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice." *Id.* at 163 (quoting *PPG Indus.,* 128 F.3d at 107-08). "The key to a waiver analysis is prejudice." *Thyssen, Inc. v. Calypso Shipping Corp., S.A.,* 310 F.3d 102, 105 (2d Cir. 2002) (per curiam). "We have recognized two types of prejudice: substantive prejudice and prejudice due to excessive cost and time delay." *La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.,* 626 F.3d 156, 159 (2d Cir. 2010). Substantive prejudice might occur "when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration"; time and expense prejudice "can be found when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur unnecessary delay and expense." *Thyssen,* 310 F.3d at 105 (quoting *Kramer v. Hammond,* 943 F.2d 176, 179 (2d Cir. 1991)). "We review the district court's determination that a party has waived arbitration *de novo,* although the factual findings upon which it bases its determination are reviewed for clear error." *S & R Co. of Kingston v. Latona Trucking, Inc.,* 159 F.3d 80, 83 (2d Cir. 1998).

We agree with the district court that Appellants waived their right to arbitrate. Beginning with the time elapsed, Appellants raised their contractual right to arbitrate some fifteen months after the complaint was filed by Plaintiff-Appellee Technology in Partnership, Inc. ("TIP"). By that time, in January 2012, the district court had granted a separate motion to dismiss and had ordered the deposition of a key TIP witness in order to resolve the

Rudins' statute of limitations defense, which the Rudins raised in January 2011. As for the amount of litigation, TIP had to defend two substantive motions to dismiss, then produce its witness for deposition, comply with an
4 extensive document request, and participate in extended discovery disputes with the Rudins. *4

As to proof of prejudice, the district court found that Appellants had access to and knowledge of the agreements containing the arbitration provision prior to November 3, 2011, when Robert Baker, a key TIP witness, was deposed. Therefore, knowing of the arbitration provision, the Rudins deposed Baker and requested extensive discovery from TIP. Then in January 2012, during a discovery conference in which the district court first ordered the Rudins to produce documents and after the Rudins for the first time allegedly mentioned arbitration, the parties engaged in extended disputes over the Rudins' compliance with document production. TIP maintains that it will need non-party discovery to prove its claims given spoilation of evidence. Our Court has found prejudice where "a party seeking to compel arbitration engages in discovery procedures not available in arbitration, makes motions going to the merits of an adversary's claims, or delays invoking arbitration rights while the adversary incurs unnecessary delay or expense." *Cotton v. Slone,* 4 F.3d 176, 179 (2d Cir. 1993) (internal citations omitted). Given the Rudins' active participation in pretrial discovery after spending a year litigating a motion to dismiss on the merits, all while having knowledge of the arbitration provision, and considering the prejudice to TIP in moving to the arbitration forum while awaiting reciprocal discovery from the Rudins, we conclude that the district court did not err in denying Appellants' motion to compel arbitration due to waiver.

Appellants also argue, for the first time on appeal, that our Court's waiver doctrine is inconsistent with FAA Section 2, providing that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Appellants cite the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011), as evidencing a federal policy that arbitration agreements be enforced as a matter of contract, and striking down defenses to
5 arbitrability "that apply only to *5 arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746. Unlike the state law doctrine at issue in *Concepcion* (a doctrine that found bilateral arbitration agreements waiving class action rights unconscionable and unenforceable), our Circuit's waiver case law does not invalidate arbitration agreements on grounds peculiar to such agreements but instead derives from the uncontroversial premise that affirmative defenses like arbitrability "are subject to forfeiture if not raised in a timely fashion." *Schipani v. McLeod,* 541 F.3d 158, 164 (2d Cir. 2008); *see* Fed. R. Civ. P. 8(c)(1) (listing affirmative defenses, including arbitration); *cf. Arizona v. California,* 530 U.S. 392, 410 (2000) (noting that the affirmative defense of res judicata is lost if not timely raised, and citing to Rule 8(c)); *Kramer,* 943 F.2d at 179 (recognizing a right to arbitrate as an affirmative defense). We do not read *Concepcion* as inconsistent with this case law, which itself recognizes that waiver in the arbitration context "is not to be lightly inferred." *PPG Indus.,* 128 F.3d at 107; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

We have considered Appellants' remaining arguments and find them to be without merit. For the reasons stated herein, the judgment of the district court is **AFFIRMED.**

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

# Schoolcraft v. City of N.Y.

Decided Aug 24, 2013

10 Civ. 6005 (RWS)

08-24-2013

ADRIAN SCHOOLCRAFT, Plaintiff, v. CITY OF NEW YORK, et al., Defendants,

APPEARANCES: Attorneys for the Plaintiff LAW OFFICE OF NATHANIEL B. SMITH By: Nathaniel B. Smith, Esq. Attorneys for the Medical Defendants MARTIN CLEARWATER & BELL, LLP By: Gregory J. Radomisli, Esq. Attorneys for defendant Jamaica Hospital Medical Center IVONE, DEVINE & JENSEN, LLP By: Brian E. Lee, Esq. Attorneys for defendant Isak Isakov, M.D, CALLAN KOSTER BRADY & BRENNAN, LLP By: Bruce M. Brady, Esq. Attorneys for defendant Lillian Aldana-Bernier, M.D.

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ROBERT W. SWEET

## OPINION

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Sweet, D.J.

Defendants Jamaica Hospital Medical Center ("JHMC"), Isak Isakov, M.D. ("Dr. Isakov") and Lillian Aldana-Bernier, M.D. ("Dr. Aldana-Bernier" and collectively, the "Medical Defendants") have moved for an order prohibiting the Plaintiff and his counsel from speaking to the media or communicating via the internet and social media regarding the instant case (the "Gag Order"). In the alternative, the Medical Defendants have moved for a protective order pursuant to Fed. R. Civ. P. 26(c) ("Rule 26(c)") prohibiting Plaintiff and his counsel from publicizing information and documents learned or obtained in the course of discovery requests to outside parties (the "Protective Order").

Upon the conclusions set forth below, the Medical Defendants' motion is denied with respect to the request for a gag order, and granted with respect to the for a protective order pursuant to Rule 26(c). **Prior Proceedings**

4 A detailed recitation of the facts of the case is *4 provided in this Court's opinion dated May 6, 2011, which granted in part and denied in part JHMC's motion to dismiss. See Schoolcraft v. City of N.Y., No. 10 Civ. 6005 (RWS), 2011 WL 1758635, at *1 (S.D.N.Y. May 6, 2011). Familiarity with those facts is assumed.

On March 28, 2013, the Medical Defendants submitted a letter requesting imposition of the Gag Order, which would prohibit both Plaintiff and his counsel "from speaking to the media regarding this [case] until it is resolved," and "utilizing the internet and social media to stigmatize the defendants in an effort to prejudice a potential jury." Letter of Gregory J. Radomisli dated March 28, 2013 ("Def. Mem.") at 3.[1] The Court opted to treat the letter as a motion for a gag order.

[1] Although the language suggested by the Medical Defendants applies the internet and social media prohibition only on the Plaintiff, see Def. Mem. at 3, the overall content of the submission makes clear that the Medical Defendants are requesting that all of the suggested restrictions - including those regarding internet and social media - apply to both Plaintiff and his counsel. See, e.g., Def. Mem. at 2 ("In addition, it appears that the plaintiff and/or his attorneys have created or used a Twitter account and an on-line Blog to increase the case's online presence and amass 'support.'").

In addition, in the Medical Defendants' reply brief on the instant motion, they suggested as an alternative to the
5 *5 Gag Order that the Court implement a protective order pursuant to Rule 26(c) prohibiting Plaintiff and his counsel from publicizing information and documents learned or obtained in the course of discovery requests to outside parties (the "Protective Order"). Reply Memorandum of Law in Support of Motion to Limit Plaintiff's and His Attorneys' Contact With the Media ("Def. Reply.") at 3-4. The Court opted to treat this suggestion as supplementing the Medical Defendants' initial motion with a proposed alternative remedy.

The motion for a gag order or, in the alternative, for a protective order pursuant to Rule 26(c), was argued and marked fully submitted on April 10, 2013. **The Request For A Gag Order Is Denied**

The Gag Order sought by the Medical Defendants would "prohibit[] the utterance or publication of particular information or commentary[,] [and therefore] imposes a 'prior restraint' on speech," U.S. v. Salameh, 992 F.2d 445, 446 (2d Cir. 1993), which is "the most serious and least tolerable infringement on First Amendment
6 rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). Accordingly, even though *6 the Medical Defendants contend that the restraint on speech contemplated by the Gag Order is justified because it is "intended to protect a defendant's Sixth Amendment right to trial before an impartial jury[,] [such restraint] normally carries a heavy presumption against its constitutional validity." Salameh, 992 F.2d at 446-47.

With respect to the element of the proposed Gag Order that would restrict the speech of Plaintiff's counsel, see Def. Mem. at 3, the Second Circuit has held that "though the speech of an attorney participating in judicial proceedings may be subjected to greater limitations than could constitutionally be imposed on other citizens or

on the press, the limitations on attorney speech should be no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial." Salameh, 992 F.2d at 447 (citing Gentile v. State Bar of Nevada, 111 S.Ct. 2720, 2737 & 2744-45) (internal citation omitted).[2] *7

[2] In support of their motion, the Medical Defendants have cited to Rule 3.6 of the New York Rules of Professional Conduct, which, *inter alia,* prohibits an attorney from making extrajudicial statements that are likely to prejudice a matter in which the attorney is participating. Id. at 3.6(a). However, the mere existence of this rule does not buttress the Medical Defendants' request that Plaintiff's counsel be prohibited from making any statements regarding the instant case; to the contrary, Rule 3.6 specifically provides for certain circumstances under which an attorney is permitted to speak about a pending case with the press. See id. at 3.6(c) & (d). Moreover, "the appropriate remedy for any violation of Rule 3.6 is a disciplinary complaint, not a protective [or gag] order in this case." Munoz v. City of New York, No. 11 Civ. 7402 (JMF), 2013 WL 1953180, at *1 (S.D.N.Y. May 10, 2013).

The Gag Order as proposed by the Medical Defendants would restrict Plaintiff's counsel from making communications "regarding this matter," i.e., the instant action. Before a court issues this type of "blanket prior restraint" on an attorney's speech, it must "make a finding that alternatives to this blanket prohibition would be inadequate to protect defendants' rights to a fair trial before an impartial jury." Id.

The Medical Defendants have not provided any evidence upon which the Court could base such a finding. Moreover, the Medical Defendants appear to have implicitly acknowledged the overbroadness of their proposed gag order, noting in their reply brief that "[i]n retrospect, the medical defendants recognize that the relief requested in the 3/28/13 Radomisli letter could have been worded more carefully." Def. Reply at 3. *8

Given the lack of evidence supporting the necessity of the "blanket prior restraint" that would be entailed by the proposed Gag Order, the Medical Defendants have failed to overcome the "heavy presumption against [the] constitutional validity," of the type of restraint sought. Salameh, 992 F.2d at 446-47.

The Medical Defendants' citation to Rule 3.6 of the New York Rules of Professional Conduct ("Rule 3.6") is also unavailing. Rule 3.6 prohibits, *inter alia,* an attorney from making extrajudicial statements that are likely to prejudice a matter in which the attorney is participating. Id. at 3.6(a). However, Rule 3.6 specifically provides for certain circumstances under which an attorney is permitted to speak about a pending case with the press, see id. at 3.6(c) & (d), and therefore does not support the Medical Defendants' request for a blanket gag order prohibiting any and all speech "regarding" the instant case. Moreover, Rule 3.6 is inapposite because "the appropriate remedy for any violation of Rule 3.6 is a disciplinary complaint, not a protective [or gag] order in this case." Munoz v. City of New York, No. 11 *9 Civ. 7402 (JMF), 2013 WL 1953180, at *1 (S.D.N.Y. May 10, 2013). **The Request For A Protective Order Is Granted**

Subsection (c) of Rule 26 of the Federal Rules of Civil Procedure provides, in pertinent part:

> A party or any person from whom discovery is sought may move for a protective order, [and] [t]he court may, for good cause, issue an order to protect a party or person . . . [by] specifying terms . . . for the disclosure or discovery.

Fed. R. Civ. P. 26(c)(1)(B).

In the instant motion, the Medical Defendants have requested the issuance of a protective order pursuant to Rule 26(c) that "prohibit[s] the plaintiff and his counsel from . . . disseminating information and documents (e.g., defendant deposition transcripts) learned or obtained in the course of discovery to outside parties." Def. Reply at 3-4. *10

As opposed to the Gag Order requested by the Medical Defendants, an order pursuant to Rule 26(c) "prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984). Rather, such an order may be issued provided (i) the order is limited to the context of pretrial civil discovery, (ii) the order does not restrict the dissemination of information if gained from other sources, and (iii) there is a showing of good cause as required by Rule 26(c). Id. at 37. "[I]t is the burden of the party seeking the order to show that good cause exists for issuance of the order." Mazzocchi v. Windsor Owners Corp., No. 11 Civ. 7913 (LBS), 2012 WL 3288240, at *9 (S.D.N.Y. Aug. 6, 2012) (quoting Gambale v. Deutsche Bank AG, 377 F.3d 133, 142 (2d Cir. 2004)) (quotation marks and alterations omitted).

The plain language of the proposed Protective Order satisfies the first two requirements. The salient question, therefore, is whether the Medical Defendants have satisfied their burden of establishing that there is "good
11 cause" to issue such an order. *11

There is a split within the district courts of this Circuit as to the showing necessary to establish that good cause exists. Some courts have held that "[t]he party opposing disclosure must make a *particular and specific demonstration of fact* showing that disclosure would result in an injury sufficiently serious to warrant protection[, and thus] broad allegations of harm unsubstantiated by specific examples or articulated reasoning fail to satisfy the test." In re Parmalat Sec. Litig., 258 F.R.D. 236, 244 (S.D.N.Y. 2009) (emphasis added); see also id. at n. 4 (describing split within this Circuit). Other courts, however, have "dispensed with the specificity requirement, only demanding that the moving party show good cause." Topo v. Dhir, 210 F.R.D. 76, 77 (S.D.N.Y. 2002).[3]

[3] The same split exists on an inter-circuit level as well. See In re Parmalat, 258 F.R.D. at 244 n. 4 (recognizing circuit split as to "the specificity of proof necessary for good cause under Rule 26(c)"),

Although the Second Circuit has not directly addressed this matter, it has issued several opinions that cite to Rule 26(c)'s good cause requirement without noting an attendant specificity requirement. See Dove v. Atl.
12 Capital Corp., 963 F.2d 15, 19 (2d Cir. 1992); Penthouse Int'l, Ltd. *12 v. Playboy Enters., Inc., 663 F.2d 371, 391 (2d Cir. 1981). Moreover, "[t]he majority of the courts within this district have only used the specificity requirement . . . when dealing with protective orders seeking to prevent injury to business. Topo, 210 F.R.D. at 78 (collecting cases). Here, the Medical Defendants have requested a protective order to avoiding prejudicing the potential jury pool and thereby jeopardizing the Medical Defendants' right to a fair trial. See Def. Reply at 4. Accordingly, in the instant case the weight of authority militates against requiring "a particular and specific demonstration of fact," In re Parmalat, 258 F.R.D. at 244, in order to establish the requisite good cause.

In support of their contention that the Protective Order is merited in order to prevent jury bias, the Medical Defendants have cited to a news article quoting Plaintiff's father, wherein the father "is specifically quoted as having said that he and his son replaced his attorneys because they 'want[ed] a more media-driven, public airing,' in contrast to his former attorneys who were litigating this case [x]in the traditional manner - through the courts.'" Def. Reply at 1 (quoting Def. Mem., Ex. A). In addition, as evidence that "the plaintiff and his
13 attorneys are affirmatively seeking out *13 the press in an effort to prosecute their case," the Medical Defendants have referenced "an abundance of press releases" from Plaintiff's counsel, as well as "a Twitter account and an on-line Blog [intended] to increase the case's on-line presence and amass 'support'" for the Plaintiff. Def. Mem. at 2. Finally, the Medical Defendants have referenced a news article quoting one of Plaintiff's attorneys as having commented as follows regarding defendant Dr. Isakov's treatment of Plaintiff while Plaintiff was detained in Jamaica Hospital's psychiatric ward:

> This was supposed to be an Independent medical examination . . . This doctor [i.e., Dr. Isakov] is not supposed to make his decisions based on what the Police Department says.

Def. Mem., Ex. B. As the Medical Defendants note, this comment goes directly to an issue that is "at the heart of plaintiff's case against the medical defendants." Def. Reply at 5.

Based upon the above, the Medical Defendants have shown good cause for limiting the public disclosure of
14 *certain* materials produced during the course of pre-trial discovery *14 that, if released to the public, may tend to jeopardize the Medical Defendants' constitutional right to a fair trial. However, the Medical Defendants have failed to show why good cause exists with respect to *all* "information and documents . . learned or obtained in the course of discovery . . . ." Def. Reply at 4-5.

Accordingly, the Medical Defendants are directed to submit to the Court a (i) proposed protective order specifically identifying the "information and documents" whose disclosure they propose to be restricted, and (ii) an accompanying letter explaining why the public disclosure of each of the identified pieces of information and/or documents would raise a concern regarding the Medical Defendants' ability to receive a fair trial by
15 jury.[4] *15 **Conclusion**

[4] To avoid the possibility of negating its very purpose, the letter shall be filed under seal.

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Based upon the conclusions set forth above, the Medical Defendants' motion is denied with respect to their request for a gag order, and granted with respect to their request for a protective order, pursuant to the provisions set forth above.

It is so ordered. **New York, NY**
**August 24, 2013**

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**ROBERT W. SWEET**

**U.S.D.J.**

No. 10 Civ. 6005(RWS)
United States District Court, S.D. New York.

# Schoolcraft v. City of N.Y.

955 F. Supp. 2d 192 (S.D.N.Y. 2013)
Decided Jun 28, 2013

No. 10 Civ. 6005(RWS).

2013-06-28

Adrian SCHOOLCRAFT, Plaintiff, v. CITY OF NEW YORK, et al., Defendants.

Law Office of Nathaniel B. Smith, by: Nathaniel B. Smith, Esq., New York, NY, for the Plaintiff. Michael A. Cardozo Corporation Counsel of the City of New York, by: Rachel Seligman Weiss, Esq., New York, NY, for the City Defendants.

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SWEET

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Law Office of Nathaniel B. Smith, by: Nathaniel B. Smith, Esq., New York, NY, for the Plaintiff. Michael A. Cardozo Corporation Counsel of the City of New York, by: Rachel Seligman Weiss, Esq., New York, NY, for
194 the City Defendants.*194

## *OPINION*

**SWEET, District Judge.**

Plaintiff Adrian Schoolcraft ("Plaintiff" or "Schoolcraft") has moved to enjoin [1] all further administrative proceedings by defendant the City of New York ("City") and the New York Police Department ("NYPD") against him, including the administrative hearing that had been scheduled to begin on June 17, 2013 (the "Hearing").

[1] Although Plaintiff has styled his motion as a request to "stay" the administrative proceedings against him, Defendants have contended that it should in fact be construed as a motion for injunctive relief, since "that is precisely what plaintiff seeks and that is precisely what the Court has temporarily granted to plaintiff." Defendants Memorandum of Law in Opposition to Plaintiff's Request to Stay the NYPD Administrative Trial at 1. Courts in this District have adopted that approach in cases involving similar requests, *see, e.g., Mullins v. City of New York,* 554 F.Supp.2d 483, 487 (S.D.N.Y.2008), and such an approach will be taken here as well.

Upon the conclusions set forth below, the motion is granted.

## *Prior Proceedings*

A detailed recitation of the facts of the case is provided in this Court's opinion dated May 6, 2011, which granted in part and denied in part Defendant Jamaica Hospital Medical Center's motion to dismiss. *See Schoolcraft v. City of N.Y.,* No. 10 Civ. 6005(RWS), 2011 WL 1758635, at *1 (S.D.N.Y. May 6, 2011). Familiarity with those facts is assumed.

On June 10, 2013, Plaintiff filed an order to show cause as to why an order should not be issued staying all further administrative proceedings against Plaintiff by the City and the NYPD. The Court granted the order, and temporarily stayed the administrative proceedings against Plaintiff until July 1, 2013. The parties submitted briefing on the motion, and the matter was marked fully submitted on June 19, 2013.

## *The Preliminary Injunction Is Granted*

The instant motion presents two issues: (1) whether the outcome of the Hearing would have a preclusive effect, pursuant to the doctrine of collateral estoppel, so as to interfere with the Court's ability to fully adjudicate this action; and (2) even if so, whether the Court can and should enjoin the Hearing.

## A. The Outcome of the Hearing May Preclude A Full *Adjudication of the Instant Case*

With respect to the first issue, "[t]he Supreme Court has held that, as a matter of federal common law issue preclusion, 'when a state agency acting in a judicial capacity ... resolves issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.' " *Locurto v. Giuliani,* 447 F.3d 159, 170 (2d Cir.2006) ( *quoting Univ. of Tennessee v. Elliott,* 478 U.S. 788, 799, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986)). In addition, under New York law, "collateral estoppel, or issue preclusion, gives conclusive effect to an administrative agency's quasi-judicial determination when two basic conditions are met: (1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal." *Jeffreys v. Griffin,* 1 N.Y.3d 34, 39, 769 N.Y.S.2d 184, 801 N.E.2d 404 (N.Y.2003); *see also Burkybile v. Bd. of Educ.,* 411 F.3d 306, 310 (2d Cir.2005) ("New York courts give quasi-judicial administrative fact-finding
195 preclusive*195 effect where there has been a full and fair opportunity to litigate").

Although there have been instances where a particular governmental entity's administrative procedure has been deemed to have too much "procedural laxity" for collateral estoppel to apply, *see Colon v. Coughlin,* 58 F.3d 865, 869 (2d Cir.1995), the Second Circuit has tacitly recognized that no such issue exists with respect to NYPD administrative disciplinary hearings, such as the one that Plaintiff currently faces. *See Locurto,* 447 F.3d at 170–72 (recognizing that NYPD disciplinary hearings can have preclusive effect, but ultimately holding that collateral estoppel did not apply due to issues specific to the administrative proceedings in that case).

Having determined that collateral estoppel could theoretically operate to preclude the Court from making findings in the instant action, the salient question is whether the Hearing will, in fact, result in findings on any issue that is "identical to a material issue necessarily decided [at the Hearing]." *Jeffreys,* 1 N.Y.3d at 39, 769 N.Y.S.2d 184, 801 N.E.2d 404.[2]

[2] Of course, in order for collateral estoppel to apply, the Court, looking in hindsight at the administrative proceeding, would also have to conclude that Plaintiff had enjoyed a "full and fair opportunity to litigate" that particular issue. Since that portion of the collateral estoppel analysis can only be conducted *ex post,* the discussion here will be limited to the question of identity and materiality of issues.

There are two disciplinary matters pending against Plaintiff. The first charges that on October 31, 2009—the date of the incident giving rise to the instant action—Plaintiff failed to comply with orders, was absent from work without leave, failed to safeguard Departmental property, impeded an investigation, and failed to surrender a rifle in his possession. Declaration of Rachel Seligman Weiss in Opposition to Plaintiff's Motion for a Stay ("Weiss Decl."), Ex. A. The second, which primarily deals with Plaintiff's conduct after October 31, 2009, charges that Plaintiff failed to appear at the Department Advocate's Office, was absent from work without leave, failed to make himself available to be examined by a Department Surgeon, failed to report to his resident precinct, filed to appear at the Department Advocate's Office for restoration of duty, failed to notify the Department of his current residence, and impeded investigators. *Id.*

In the Second Amended Complaint, Plaintiff has asserted a host of claims arising from the NYPD's seizure of Plaintiff on the evening of October 31, 2009 and the subsequent involuntary commission of Plaintiff to a psychiatric hospital for six days, including claims under 42 U.S.C. § 1983 for false arrest, malicious abuse of process, excessive force, failure to intercede, unlawful search and entry, and involuntary confinement, *id.* ¶¶ 278–306, as well as state law claims including assault, battery, false arrest, and false imprisonment, *id.* ¶¶ 339–55. Plaintiff has also asserted a First Amendment claim arising from allegations of Defendants' alleged conduct for "an extended period of time," *id.* ¶ 277, following Plaintiff's release from the psychiatric hospital. *See id.* ¶¶ 261–277.

Accordingly, if the trier(s) of fact at the Hearing were make findings of fact relating to, for instance, the charge that Plaintiff failed to comply with orders, such findings could overlap with factual issues relating to Plaintiff's claims arising from the NYPD's seizure of Plaintiff, since a finding that Plaintiff failed to obey orders, and related findings as to Plaintiff's general comportment during the day and evening of October 31, 2009, could in
196 turn have significant implications as to the viability of Plaintiff's claims asserted here *196 that the NYPD violated his rights in seizing him and committing him to a psychiatric hospital.

Defendants cannot, and do not, deny this possibility, but rather merely attempt to minimize its likelihood, stating that "it appears unlikely that the majority, if any, of the potential administrative factual determinations will have a preclusive effect on the issues central to this civil litigation." Defendants' Memorandum of Law in Opposition to Plaintiff's Request to Stay the NYPD Administrative Trial ("Def. Opp.") at 10. Defendants moreover acknowledge that it is impossible to come to a definitive conclusion on this question, since "it is unknown what issues will be presented during the administrative trial, whether the issues presented will be identical to any issues in the civil trial, or whether the disputed issues were material to the resolution of the NYPD trial." Def. Opp. at 10–11. Accordingly, as to the first question presented by Plaintiff's motion, the best answer that can be divined at the present time is "maybe."

## B. *Younger Abstention Does Not Apply*

To answer the second question presented by the instant motion—whether the Court can and should enjoin the Hearing—Plaintiff's motion must first be analyzed in light of the *Younger* abstention doctrine, articulated by the Supreme Court in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), which held that "principles of federalism and comity preclude a district court from interfering with pending state criminal proceedings 'except in very unusual situations, where necessary to prevent immediate irreparable injury.' " *Bess v. Spitzer,* 459 F.Supp.2d 191, 203 (E.D.N.Y.2006) ( *quoting Samuels v. Mackell,* 401 U.S. 66, 69, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971)). Though the doctrine of *Younger* abstention was initially set forth in the context of a state criminal proceeding, "[c]ases subsequent to *Younger* have made clear that the same principle applies to ongoing state civil proceedings, whether judicial or administrative." *McDonald v. Metro–North Commuter R.R. Div. of Metropolitan Transit Auth.,* 565 F.Supp. 37, 40 (S.D.N.Y.1983); *Diamond "D" Const. Corp. v.*

*McGowan,* 282 F.3d 191, 198 (2d Cir.2002). Of particular significance to the instant case is the fact that *Younger* abstention has specifically been applied to administrative proceedings by a police department against an officer. *See McDonald,* 565 F.Supp. at 38;*see also McCune v. Frank,* 521 F.2d 1152, 1158 (2d Cir.1975) ("That we are dealing with a county police department's disciplinary proceeding rather than a state court action is of little moment. A proceeding in a state court is not a pre-requisite to the applicability of *Younger*." ) (citations omitted).

"*Younger* abstention is required when three conditions are met: (1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal constitutional claims." *Diamond,* 282 F.3d at 198. However, "a federal court may nevertheless intervene in a state proceeding upon a showing of 'bad faith, harassment or any other unusual circumstance that would call for equitable relief.' " *Id.* ( *quoting Younger,* 401 U.S. at 54, 91 S.Ct. 746).

The parties do not dispute that there is an "ongoing state proceeding" to which *Younger* abstention could theoretically apply. However, Plaintiff has contended that *Younger* abstention is inapposite because there is no important state interest implicated in the departmental proceeding, and also because that proceeding will not
197 *197 afford him an adequate opportunity for judicial review of his federal constitutional claims, whereas Defendants adopt the opposite positions as to those elements of the *Younger* analysis.

It is uncontroversial that the City has an important interest in disciplining its police officers and "ensuring the[ir] honesty and integrity," *McDonald,* 565 F.Supp. at 40, issues that are certainly implicated by the departmental charges levied against Plaintiff. *See* Weiss Decl., Ex. A.. However, the City has taken the position that no administrative proceeding is necessary in order to take disciplinary action against Plaintiff since "[p]ursuant to NYC Administrative Code § 14–126, any member of the service who has been absent without leave for five consecutive days will be dismissed from the Department without notice, and that the Police Department is electing to proceed with a hearing merely because "the Department *prefers* not to take any employment action regarding [Plaintiff] without a full hearing regarding all pending charges." Memorandum of Law in Support of Motion For a Stay ("Pl. Mem."), Ex. 2 (emphasis added). As such, it is not apparent why the City's undoubtedly compelling interest in disciplining its officers must be vindicated by conducting a departmental hearing rather than via summary dismissal of Plaintiff, and Defendants have offered no explanation in their submissions to the Court.

The fact that the City waited three years after filing administrative charges against Plaintiff to initiate a hearing further erodes the contention that the hearing is necessary for a prompt and efficient disposition of the disciplinary matter. *Cf. Mullins v. City of New York,* 554 F.Supp.2d 483, 492–93 (enjoining of NYPD disciplinary proceedings during the pendency of federal lawsuit, and noting that, given the NYPD's initiation of a disciplinary investigation regarding statements given in a deposition more than three years prior, the NYPD's "own actions belie their attempt to characterize the need for investigations as time-sensitive or otherwise warranted while this action is ongoing"). Under these circumstances the departmental proceedings do not serve as the basis for a decision to engage in *Younger* abstention.

With respect to the question of whether the departmental proceeding will afford Plaintiff an adequate opportunity for judicial review of his claims, the Second Circuit's opinion in *McCune, supra,* is instructive. *McCune* involved a county police officer, McCune, who had been cited by his department for having facial hair that was in violation of department policy. *See*521 F.2d at 1153. McCune filed suit in the Eastern District of New York, alleging that the departmental grooming policy was unconstitutional, and also alleging that the

disciplinary board assigned to hear his case was institutionally biased against him, thereby violating his right to due process. *Id.* at 1153–54. After McCune filed his complaint, the district court signed an order temporarily restraining the departmental proceedings against McCune pending the outcome of the federal suit. *Id.* at 1154. The district court subsequently issued a memorandum and order wherein it declined to rule on McCune's bias claim, but did reach the constitutional claim regarding grooming, and held the departmental regulation invalid. *Id.* On appeal, the Circuit held that the district court had reached the constitutional issue prematurely, and remanded with instructions to consider, *inter alia,* the question of whether the district court was barred from restraining the departmental proceedings pursuant to *Younger* abstention. *Id.* at 1157–59. The Circuit
198 specifically noted as follows:*198

"McCune's complaint, it will be remembered, alleged that the disciplinary board hearing his case was biased, and therefore constitutionally defective as a matter of procedural due process. Since *Younger* presupposed the existence of a competent state forum, that doctrine is no bar to an action seeking to enjoin a proceeding claimed to be constitutionally defective. [...] If [the court] finds no merit to the claims of bias, it may not proceed to determine the challenge to the grooming regulation unless it finds both Res judicata and *Younger* inapplicable. If[, however,] there is merit to the bias argument, then *Younger* will be no bar to deciding the validity of the regulation ...."
*Id.* at 1158.

Here, Plaintiff has also alleged bias, as his complaint is grounded upon allegations that both individual members of the NYPD as well as the department as a whole harbor strongly negative feelings toward Plaintiff due to his whistleblowing activities purporting to expose the NYPD's implementation of arrest quotas and other illegal policies. *See* Second Amended Complaint ¶ 2. Plaintiff has alleged that the existence of these negative feelings is evidenced by the NYPD's decision to send officers to his home on the night of October 31, 2009, to forcibly remove Plaintiff and have him involuntarily committed him to a psychiatric hospital for six days "in an effort to tarnish plaintiff's reputation and discredit his allegations should he succeed in disclosing evidence of widespread corruption within the NYPD." *Id.* While the Second Circuit in *McCune* did not elucidate the precise threshold necessary for a bias allegation in a federal lawsuit to be characterized as having "merit" and thereby render *Younger* abstention inapplicable, *id.* at 1158, presumably such a threshold has been exceeded by Plaintiff's allegations here, since the City and the City Defendants have elected to submit an answer to Plaintiff's second amended complaint rather than move to dismiss for failure to state a claim.[3] *See* Dkt. No. 110.

[3] Moreover, as set forth below, *see infra,* Defendants have effectively conceded that there is a likelihood of success on the merits of Plaintiff's claims.

In addition, there is evidence of bias against Plaintiff in the timing of the decision to proceed with the Hearing, as the NYPD's charges against Plaintiff have been pending since June 2010, *see* Pl. Mem. Ex. 2, and Defendants have failed to explain why they waited to schedule the Hearing until now, three years hence and, as Plaintiff notes, "as the date for trial in this case approaches." Pl. Mem. at 1. *Cf. Mullins,* 554 F.Supp.2d at 492 (noting that NYPD's decision to delay the investigation of an officer for more than one year after deciding that such an investigation was necessary "points strongly in favor of retaliation").

## C. The Possibility Of Irreparable Harm And A Likelihood Of *Success On The Merits Have Been Demonstrated*

Having concluded that abstention is not required under *Younger,* it must next be determined whether an injunction of the Hearing is affirmatively merited. In order to obtain a preliminary injunction, the movant must demonstrate "(1) the possibility of irreparable harm; and (2) either (a) a likelihood of success on the merits, or (b) a sufficiently serious question going to the merits combined with a balance of the hardships tipping decidedly in favor of the moving party." *Mullins v. City of New York,* 554 F.Supp.2d 483, 487 (S.D.N.Y.2008).
199 As set forth below, Plaintiff has established both elements.*199

With respect to the question of irreparable harm, *Mullins, supra,* is instructive. In *Mullins,* a group of NYPD sergeants brought suit against the NYPD for allegedly illegal pay practices (the "FLSA Action"), and during the pendency of the FLSA Action, the NYPD's Bureau of Internal Affairs ("IAB") ordered one of the sergeant-plaintiffs, Sergeant Cioffi ("Cioffi") to submit to questioning regarding statements made during a deposition taken in the course of the FLSA Action, pursuant to an investigation by the NYPD into whether Cioffi committed perjury during that deposition. 554 F.Supp.2d at 484. Cioffi was interrogated by the IAB, and the next day the plaintiffs in the FLSA Action (the "FLSA Plaintiffs") subsequently requested, and the court granted, a temporary restraining order enjoining the NYPD from engaging in any further investigation of Cioffi or pursuing any disciplinary proceedings against Cioffi based on his IAB interrogation. *Id.* The court subsequently granted the FLSA Plaintiffs motion for a preliminary injunction, and in doing so found that the threat of irreparable harm existed because "[f]ailing to enjoin the instant proceedings against Sergeant Cioffi ... would allow defendants to compel additional testimony on the very topics at issue in this pending litigation, but outside the bounds of the judicial process and on defendants' terms." *Id.* at 491. The similarity to the instant case is striking; here too, Plaintiff is facing an administrative trial at which he will in all likelihood be questioned about matters that relate to "the very topics at issue in this pending litigation," and his testimony in response to those questions will be given "outside the bounds of the judicial process and on defendants' terms." *Id.*

Defendants have contended that *Mullins* is inapposite because "since discovery is still pending in the instant case, there is no guaranty that defendants will obtain information they would otherwise not be entitled to." Defendants' Sur–Reply ("Def. Sur.") at 2. While discovery is ongoing in the instant action, any future questioning of Plaintiff in the context of discovery will occur subject to the parameters and protections offered by the Federal Rules of Civil Procedure and the authority of this Court. In contrast, any questioning that Plaintiff is subject to in the course of the Hearing will occur not only "outside the bounds of the judicial process," but also under the auspices of an entity that is not only a party to the instant action, but also stands to sustain significant damage if Plaintiff succeeds in proving his claims, all of which are premised upon the alleged existence of "rampant NYPD corruption," Second Amended Compl. ¶ 2.

Defendants additionally contend that there is no need to enjoin the Hearing because, in addition to the assurance that "it is unlikely that any constitutional violations will ensue," Def. Sur. at 3, at any rate Plaintiff could always seek redress with the state courts via an Article 78 proceeding. *Id.* However, the fact that Plaintiff has avenues to appeal the outcome of the Hearing does not change the fact that during the course of the Hearing he may be asked to testify regarding issues relevant to the instant action in a proceeding that is "outside the bounds of the judicial process and on defendants' terms," and, as noted above, any findings made by trier(s) of fact presiding over the Hearing may have a preclusive effect upon this Court, not to mention any state court determination which Plaintiff might subsequently appeal as a result of any constitutional violations in the context of the Hearing, whether or not "unlikely" to occur.

As to the likelihood of success on the merits, Plaintiff has contended that "the detailed allegations in the
200 Second *200 Amended Complaint and the dramatic recordings of the unlawful and unjustified assault and abduction of Officer Schoolcraft from his home on October 31, 2009 demonstrate that there is a likelihood of success on the merits and serious questions going to the merits of this action," Plaintiff's Reply Memorandum in Support of Motion for a Stay ("Pl. Rep.") at 5, and Defendants appear to concede this point in their surreply, choosing instead to only argue that Plaintiff has failed to satisfy the "irreparable harm" prong of the injunction analysis, *see* Def. Sur. at 2–3. [4]

[4] Moreover, Defendants' initial argument on this point—that plaintiff has not yet proven his claims, as they "will have to be decided by the Court on a motion for summary judgment or eventually at a jury trial," Def. Opp. at 3—is entirely unavailing, as "[a] preliminary determination of likelihood of success on the merits ... is ordinarily tentative, pending a trial or motion for summary judgment." *Goodheart Clothing Co. v. Laura Goodman Enters.,* 962 F.2d 268, 274 (2d Cir.1992).

## D. Enjoining the Hearing Will Not Impede Judicial Economy Or *Significantly Prejudice Defendants*

Finally, Defendants argue that the Court should nonetheless decline to enjoin the Hearing because doing so would "impede judicial economy and significantly prejudice defendants." Def. Opp. at 6. With respect to the issue of judicial economy, an injunction of the departmental proceeding would actually serve that interest, as it will prevent the necessity of additional litigation as to the question of whether or not the outcome of the departmental proceeding has a preclusive effect upon the instant action. With respect to the issue of prejudice, while Defendants contend that an injunction will prevent them from "resolving the disciplinary issues with plaintiff in an efficient and prompt manner." This position is countered by Defendants' decision to wait over three years after charging Plaintiff to initiate the proceedings, which "belie[s] their attempt to characterize the need for [the Hearing] as time sensitive or otherwise warranted while this action is ongoing." *Mullins,* 554 F.Supp.2d at 492–93.

## *Conclusion*

As set forth above, if the Hearing were to be conducted, there is a possibility that findings will be made that would have a preclusive effect upon the instant action, and therefore interfere with the Court's ability to fully adjudicate the issues before it. In addition, *Younger* abstention is inapplicable here, and Plaintiff has demonstrated that a preliminary injunction is warranted.[5]

[5] Though not raised by Defendants in their briefing, it is worth noting that, to the extent the Anti–Injunction Act, 28 U.S.C. § 2283, is applicable to an administrative proceeding of the type at issue here, the Court would nonetheless be free to enjoin the Hearing since "a federal court properly acts 'in aid of its jurisdiction' where enjoining state proceedings is 'necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.' " *Hemmerick v. Chrysler Corp.,* 769 F.Supp. 525, 531 (S.D.N.Y.1991) ( *quoting Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Engineers,* 398 U.S. 281, 295, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970)).

Accordingly, upon the conclusions set forth above, Plaintiff's motion for a preliminary injunction is granted.

The City of New York and the NYPD and their agents, servants, employees, and any parties acting on their behalf are preliminary enjoined from pursuing all further administrative proceedings against Plaintiff Adrian Schoolcraft, pending the resolution of this action or a determination by the City that its departmental
201 proceeding*201 will not have a preclusive effect on the issues raised in this action.

It is so ordered.

Supreme Court, Appellate Division, First Department, New York.

# Drotar v. 60 Sweet Thing, Inc.

106 A.D.3d 426 (N.Y. App. Div. 2013) · 964 N.Y.S.2d 150 · 2013 N.Y. Slip Op. 3180
Decided May 2, 2013

2013-05-2

Kelly K. DROTAR, Plaintiff–Respondent, v. 60 SWEET THING, INC., doing business as Redemption Cocktail Lounge and Café, Defendant–Respondent–Appellant, Vic's Hole in One, LLC, et al., Defendants–Appellants–Respondents.

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellants-respondents. Nathaniel B. Smith, New York, for respondent-appellant.

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MAZZARELLI

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Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellants-respondents. Nathaniel B. Smith, New York, for respondent-appellant.
Rubenstein & Rynecki, Brooklyn (Jessica B. Blake of counsel), for respondent.

**MAZZARELLI, J.P., ANDRIAS, SAXE, MANZANET–DANIELS, GISCHE, JJ.**

426 *426 Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 19, 2012, which denied defendants Vic's Hole in One, LLC and Vic's Lucky Number Nine, LLC's (Vic's) motion for summary judgment dismissing the complaint and all cross claims as against them, and on their cross claim for contractual indemnification against 60 Sweet Thing, Inc., denied their motion to strike defendant 60 Sweet Thing, Inc.'s (60 Sweet) pleadings as a sanction for spoliation, and denied 60 Sweet's cross motion for summary judgment dismissing the complaint as against it, unanimously modified, on the law, to grant the Vic's defendants' motion for summary judgment dismissing the complaint and all cross claims against them, and on their cross claim for
152 contractual indemnification, and otherwise affirmed, *152 without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff seeks damages for injuries sustained on December 16, 2008, when she tripped and fell down a two-step, interior staircase, at premises owned by Vic's and leased to 60 Sweet, which operated the premises under the name of Redemption Cocktail Lounge and Café.

The Vic's defendants established entitlement to dismissal of the complaint. As out-of-possession landlords, with a limited right to reenter, they could only be liable for negligence "based on a significant structural or design defect that is contrary to a specific statutory safety provision" ( *Johnson v. Urena Serv. Ctr.,* 227 A.D.2d 325,
427 326, 642 N.Y.S.2d 897 [1st Dept. 1996], *lv. denied* *427 88 N.Y.2d 814, 651 N.Y.S.2d 16, 673 N.E.2d 1243 [1996] ). The only condition alleged on appeal to serve as a predicate for Vic's potential liability involves the

riser heights of the steps. Even if the alleged Building Code provision, which concerns uniformity, were applicable and had been violated, the same would not constitute a significant structural or design defect and could not serve as a basis for liability against Vic's ( *see Kittay v. Moskowitz,* 95 A.D.3d 451, 944 N.Y.S.2d 497 [1st Dept. 2012], *lv. denied*20 N.Y.3d 859, 2013 WL 518556 [2013];*Babich v. R.G.T. Rest. Corp.,* 75 A.D.3d 439, 906 N.Y.S.2d 528 [1st Dept. 2010] ).

In contrast, 60 Sweet did not meet its burden of establishing that the alleged condition of the stairs was an open and obvious one. Plaintiff testified that she fell on the stairs because she did not see them, that the stripes covering the vertical portions of the steps were not visible from the direction she was walking at the time and that it was darker than depicted in photographs of the scene. Plaintiff and her expert further described the steps as appearing to blend into each other. Under these circumstances, it cannot be said, as a matter of law, that the condition was open and obvious and not inherently dangerous ( *see Centeno v. Regine's Originals,* 5 A.D.3d 210, 773 N.Y.S.2d 62 [1st Dept. 2004] ).

Notwithstanding that the Vic's defendants are free from liability, they have not established entitlement to summary judgment on their cross claim for contractual indemnification for costs and expenses against 60 Sweet. Under the terms of the lease, such recovery is dependant upon 60 Sweet's actions causing and/or contributing to the accident, which has not yet been established.

Supreme Court, Appellate Division, First Department, New York.

# Cadlerock Joint Venture, L.P. v. Bersson

958 N.Y.S.2d 340 (N.Y. App. Div. 2013) · 102 A.D.3d 466 · 2013 N.Y. Slip Op. 128
Decided Jan 10, 2013

2013-01-10

CADLEROCK JOINT VENTURE, L.P., Plaintiff–Appellant–Respondent, v. David S. BERSSON, et al., Defendants. Elaine Thompson, Proposed Intervenor–Plaintiff, Marc Benhuri, et al., Proposed Intervenors–Plaintiffs–Appellants, v. Mel Cooper, Proposed Defendant, Imperial Capital, LLC, Proposed Intervenor–Defendant–Respondent.

Vlock & Associates, P.C., New York (Stephen Vlock of counsel), for appellant-respondent. Law Offices of Nathaniel B. Smith, New York (Nathaniel B. Smith of counsel), for appellants.

FRIEDMAN

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Vlock & Associates, P.C., New York (Stephen Vlock of counsel), for appellant-respondent. Law Offices of Nathaniel B. Smith, New York (Nathaniel B. Smith of counsel), for appellants.
**FRIEDMAN, J.P., SWEENY, ACOSTA, ABDUS–SALAAM, MANZANET–DANIELS, JJ.**

467 *467 Order, Supreme Court, New York County (Barbara Kapnick, J.), entered June 15, 2011, which, to the extent appealed from as limited by the briefs, granted defendant David Cooper and intervenor Imperial's cross motion to stay a sheriff's sale of a condominium belonging to defendant-judgment debtor Mel Cooper, and denied intervenors-judgment creditors Benhuri, Kroitoro and Epstein's motion to have a receiver appointed to conduct the sale, unanimously reversed, on the law, without costs, the stay vacated, and the sale directed to proceed under the auspices of a receivership, pursuant to the parties' stipulation.

Plaintiff and intervenors-appellants are correct that their judgments, entered in May 2007, have priority over the purported conveyance of the debtor's condominium via a deed dated and recorded in October 2007 (CPLR 5203). Moreover, the notation on the October 2007 deed that is “confirmatory” of a deed supposedly executed in April 2006 is insufficient to create or evidence a conveyance of real property at that early time (Real Property Law §§ 243, 291). The IAS court erred in staying the sale pending the outcome of a fraudulent conveyance action brought by a subsequent judgment debtor. Because the judgments of appellants were entered prior to October 2007, it does not matter whether the conveyance in October 2007 was bona fide; it is invalid as to them. Finally, Plaintiff waived any right to a sale of the property by the sheriff when it entered into a valid stipulation with the other creditors that provided for a sale by designated co-receivers.

Supreme Court, Appellate Division, First Department, New York.

# Omansky v. Penning

101 A.D.3d 514 (N.Y. App. Div. 2012) · 955 N.Y.S.2d 596 · 2012 N.Y. Slip Op. 8657
Decided Dec 13, 2012

2012-12-13

Lawrence A. OMANSKY, Plaintiff–Appellant, v. Tjebbo PENNING, Defendant, 160 Chambers Street Owners, Inc., Defendant–Respondent.

Lawrence A. Omansky, New York, appellant pro se. Law Office of Nathaniel B. Smith, New York (Nathaniel B. Smith of counsel), for respondent.

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TOM

Lawrence A. Omansky, New York, appellant pro se. Law Office of Nathaniel B. Smith, New York (Nathaniel B. Smith of counsel), for respondent.

**TOM, J.P., SWEENY, MOSKOWITZ, RENWICK, CLARK, JJ.**

514 *514 Order, Supreme Court, New York County (Paul G. Feinman, J.), entered on or about April 25, 2011, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff asserts that defendants defamed him by stating, in front of a potential subtenant, that plaintiff had been evicted and had no right to sublet the property, which was owned by defendants and had been leased to plaintiff. The documentary evidence established, however, that, prior to the alleged statements being made, plaintiff had assigned his rights in the leasehold to Nicolena's B and B II, Inc., a corporate entity run by
515 plaintiff. The documentary evidence further showed that *515 Nicolena's had assigned its rights in the leasehold to an unrelated third-party. Thus, it is that third-party, and not plaintiff, who owns the leasehold, and plaintiff lacked capacity to bring a suit arising out of the same ( *see Old Clinton Corp. v. 502 Old Country Rd.,* 5 A.D.3d 363, 364, 773 N.Y.S.2d 410 [2d Dept. 2004] ). Plaintiff could also not be defamed by a statement when the net effect of that statement was, in fact, true ( *see Konrad v. Brown,* 91 A.D.3d 545, 937 N.Y.S.2d 190 [1st Dept. 2012],*lv. denied*19 N.Y.3d 804, 2012 WL 1948019 [2012] ).

We have considered plaintiff's remaining contentions and find them unavailing.

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No. 10 CV 8076(RPP)
United States District Court, S.D. New York.

# Tech. in P'ship, Inc. v. Rudin

894 F. Supp. 2d 274 (S.D.N.Y. 2012)
Decided Aug 30, 2012

No. 10 CV 8076(RPP).

2012-08-30

TECHNOLOGY IN PARTNERSHIP, INC., Plaintiff, v. Edward M. RUDIN, Alyse Rudin, Gloria Rudin, Alyfunkids Inc. d/b/a My Gym Children's Fitness, My Gym Westfield Inc. d/b/a My Gym Children's Fitness Center, My Gym Glen Rock, Inc., Rudin Appraisals, LLC, Alan Zverin, Zverin & Fischer, LLP and Eisman, Zucker, Klein & Ruttenberg, LLP, Defendants.

Jarrett Michael Behar, Sinnreich Kosakoff & Messina LLP, Central Islip, NY, for Plaintiff. Nathaniel B. Smith, Law Office of Nathaniel B. Smith, New York, NY, Jennifer Wu, Landman Corsi Ballaine & Ford PC, New York, NY, Sophia Ree, Landman Corsi Ballaine & Ford PC, New York, NY, John H. Eickemeyer, Vedder Price P.C. (N.Y.), New York, NY, for Defendants.

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ROBERT P. PATTERSON

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Jarrett Michael Behar, Sinnreich Kosakoff & Messina LLP, Central Islip, NY, for Plaintiff. Nathaniel B. Smith, Law Office of Nathaniel B. Smith, New York, NY, Jennifer Wu, Landman Corsi Ballaine & Ford PC, New York, NY, Sophia Ree, Landman Corsi Ballaine & Ford PC, New York, NY, John H. Eickemeyer, Vedder Price P.C. (N.Y.), New York, NY, for Defendants.

## OPINION & ORDER

**ROBERT P. PATTERSON, JR., District Judge.**

## I. Procedural History

276 On October 22, 2010, Plaintiff Technology in Partnership, Inc. ("TIP"), a corporation*276 organized to provide computer consulting services, including installation and support to businesses, commenced this action by filing a complaint (the "Complaint") alleging that Defendant Edward M. Rudin ("Rudin") operated for over 12 years an enterprise engaged in the common goal of diverting and stealing funds from TIP in violation of the Civil Racketeering Involved Corruption Act ("RICO"), 18 U.S.C. § 1962, and various state laws. (Compl. ¶ 5.) The Complaint states that TIP was jointly created and capitalized by Rudin and Robert Baker ("Baker"). ( *Id.* ¶¶ 28–29.)

On January 26, 2011, Defendants Rudin, Alyse Rudin, Gloria Rudin, Alyfunkids Inc. d/b/a My Gym Children's Fitness, My Gym Westfield Inc. d/b/a My Gym Children's Fitness Center, My Gym Glen Rock, Inc., and Rudin Appraisals, LLC (collectively, the "Rudin Defendants"), who had not yet filed an Answer to the Complaint,

filed a motion to dismiss the Complaint based entirely on statute of limitations grounds. Defendants Alan Zverin, Zverin & Fischer, LLP, and Eisman, Zucker Klein and Ruttenberg, LLP (collectively, the "Accountant Defendants"), who had also not yet filed an Answer, moved separately to dismiss the Complaint for failure to state a claim upon which relief may be granted, pursuant to Fed.R.Civ.P. 12(b)(6). On October 4, 2011, the Court granted the Accountant Defendants' motion in its entirety but denied the Rudin Defendants' motion in its entirety on the grounds that the Rudin Defendants had not established that Mr. Baker, who served as president and majority stockholder of TIP, knew or should have known of Defendants' alleged fraudulent actions prior to the date he asserted control of TIP in May 2010. *Tech. in P'ship, Inc. v. Rudin,* No. 10 CV 8076, 2011 WL 4575237 (S.D.N.Y. Oct. 4, 2011).

The Court's October 4, 2011 Order denying the Rudin Defendants' motion also Ordered the deposition of Robert Baker on the specific issue of "what date he, as director, President, and majority shareholder of TIP knew or should have known of the actions complained of in the civil RICO causes of action." *Id.* Baker was subsequently deposed on November 3, 2011. On December 16, 2011, the Court endorsed Defendants' letter request for a discovery Order compelling production of:

1. All documents that were in the files Mr. Baker identified at his deposition that were in his home and pertained to the plaintiff, including without limitation, any financial records, tax forms, employment agreements, and limited liability company agreements, FEMA application submitted by Mr. Baker on behalf of the plaintiff, and any other agreements or other documents pertaining to the plaintiff; and

2. All other documents in Mr. Baker's possession or control at any time prior to May 2010 pertaining to the plaintiff, including any such documents in the possession of his accountant or lawyer identified in this deposition.

( *See* Order dated Dec. 16, 2011, Ex. B, ECF No. 43.)

On January 13, 2012, Defendants filed an Answer to the Complaint. On February 8, 2012, approximately 16 months after this action was commenced, Defendants filed a motion to stay the proceedings and compel arbitration. On March 19, 2012, Plaintiff filed opposition papers and cross-moved for Rule 37 sanctions against Defendants, alleging violations of the Court's discovery Orders. On April 23, 2012, Defendants filed a memorandum of law in reply to its motion to compel arbitration and in opposition to Plaintiff's cross-motion for sanctions. On May 7, 2012, Plaintiff filed its reply papers on the motion for 277 *277 sanctions. On June 13, 2012, the Court held oral argument on both motions.

For the following reasons, Defendants' motion to compel arbitration is denied. The Court assumes familiarity with the underlying facts of this case and will recite only the facts pertinent to the motions pending before the Court.

## II. Motion to Compel Arbitration

### A. *Relevant Facts*

Plaintiff TIP is a closely-held corporation that was formed to provide computer consulting services. (Defs.' Mem. of Law in Supp. of Mot. to Compel Arbitration ("Defs.' Mem.") at 2; Compl. ¶ 28.) TIP was formed on October 3, 1997 as a New Jersey corporation with Robert Baker and Edward Rudin as its sole directors. Upon the formation of TIP, a Shareholder Agreement was entered into between TIP, Baker, and Rudin. (Defs.' Mem. at 2.) Additionally, Rudin entered into an Employment Agreement with TIP. ( *Id.* at 2–3.) Both TIP's Shareholder Agreement and Rudin's Employment Agreement contain the same arbitration clause:

Any controversy or claim arising out of or relating to this Agreement or the breach thereof, shall be settled by arbitration in the County of Mercer, State of New Jersey in accordance with the rules then applicable to the American Arbitration Association, and judgment upon any award rendered may be entered in any court of competent jurisdiction.
( *Id.* at 3.)

The Shareholder Agreement that was produced to the Court by the Rudin Defendants is not signed by either Baker or Rudin. (Smith Decl., Exs. 3–4.) Rudin's Employment Agreement is signed by Rudin, and Baker's initials appear on only two pages of the document, reflecting assent to certain handwritten modifications. (Smith Decl., Ex. 5.) Although neither agreement was fully executed, both were treated by Baker and Rudin as correctly reflecting their business arrangements. (Defs.' Mem. at 3–4.) Both parties agree that Rudin was in possession of both the Shareholder Agreement and the Employment Agreement before this action was commenced. (Pl.'s Mem. of Law: (1) in Opp'n to the Rudin Defs.' Mot. to Compel Arbitration; and (2) in Supp. of Pl.'s Mot. for Sanctions Pursuant to Fed.R.Civ.P. 37 ("Pl.'s Mem.") at 9; Tr. of Jun. 13, 2012 Oral Arg. ("Tr. 6/13/12") at 13:3–10 ("It was used at a deposition of Mr. Baker that took place before the plaintiff produced any discovery").) **B.** ***Legal Standard***

The Federal Arbitration Act (the "Act") requires courts to stay any action where a written arbitration agreement provides for arbitration of the dispute. 9 U.S.C. § 2. Section 2 of the Act provides:

[A] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
*Id.* The Act is an expression of a strong federal policy favoring arbitration as an alternative means of dispute resolution. *JLM Indus., Inc. v. Stolt–Nielsen SA,* 387 F.3d 163, 171 (2d Cir.2004) (quoting *Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.,* 246 F.3d 219, 226 (2d Cir.2001)). Indeed, waiver of the right to
278 arbitration is "not to be lightly inferred," *278 *Cotton v. Slone,* 4 F.3d 176, 179 (2d Cir.1993) (quoting *Carcich v. Rederi A/B Nordie,* 389 F.2d 692, 696 (2d Cir.1968)), and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *JLM Indus.,* 387 F.3d at 171 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).
**C.** ***Discussion***

Defendants argue that TIP is obligated to arbitrate the claims in the Complaint pursuant to the broad arbitration clause contained within both the TIP Shareholder Agreement and Rudin's Employment Agreement, which mandates that "[a]ny controversy or claim arising out of or relating to this Agreement or the breach thereof, shall be settled by arbitration." (Defs.' Mem. at 1–2.) Defendants further contend that the claims against the Rudin Defendants other than Edward Rudin are so intertwined with the claims against Rudin that those claims should also be subject to arbitration. ( *Id.* at 15.) Plaintiff, however, argues that Defendants waived their right to arbitration by waiting for over fifteen months after the commencement of this litigation to raise the arbitration issue, thereby causing significant prejudice to Plaintiff. (Pl.'s Mem. at 1.)

## *1. Right to Arbitration*

As an initial matter, Plaintiff does not contest the validity or scope of the arbitration clause, nor does it contest that the claims asserted in the Complaint, including the RICO claims, are eligible for arbitration as they apply to Edward Rudin. *See, e.g., Shearson/Am. Express, Inc. v. McMahon,* 482 U.S. 220, 238, 107 S.Ct. 2332, 96

L.Ed.2d 185 (1987) ("[T]here is nothing in the text of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act."); *JLM Indus.,* 387 F.3d at 174 (discussing the arbitrability of RICO claims). Thus, the resolution of Defendants' motion to compel arbitration will turn on whether or not the affirmative defense of arbitration has been waived.

## *2. Waiver*

### a. *Legal Standard for Waiver*

The right to arbitrate is "an affirmative defense that is waived where the party seeking to raise the defense engages in protracted litigation that results in prejudice to the opposing party." *Brookridge Funding Corp. v. Nw. Human Res., Inc.,* 170 Fed.Appx. 170, 171 (2d Cir.2006) (quoting *Cotton,* 4 F.3d at 179 (internal quotation marks omitted)). "Waiver of arbitration is not to be lightly inferred." *La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 626 F.3d 156, 161 (2d Cir.2010) (quoting *PPG Indus., Inc. v. Webster Auto Parts, Inc.,* 128 F.3d 103, 107 (2d Cir.1997)). In determining whether a party has waived its right to arbitration by expressing its intent to litigate the dispute in question, the Court considers three factors: "(1) the time elapsed from when litigation was commenced until the request for arbitration; (2) the amount of litigation to date, including motion practice and discovery; and (3) proof of prejudice." *La. Stadium & Exposition Dist.,* 626 F.3d at 159.

Of these three factors, prejudice is paramount and is required for a finding of waiver due to participation in litigation. *Id.* Prejudice "can be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration, or it can be found when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur
279 unnecessary delay or expense."*279 *Kramer v. Hammond,* 943 F.2d 176, 179 (2d Cir.1991). "Such prejudice has been found where 'a party seeking to compel arbitration engages in discovery procedures not available in arbitration, makes motions going to the merits of an adversary's claims, or delays invoking arbitration rights while the adversary incurs unnecessary delay or expense.' " *Brookridge Funding Corp.,* 170 Fed.Appx. at 171 (quoting *Cotton,* 4 F.3d at 179). There is no "rigid formula" or "bright-line rule" for identifying when a party has waived its right to arbitration; rather, the above factors must be applied to the specific context of each particular case. *La. Stadium & Exposition Dist.,* 626 F.3d at 159.

### b. *TIP Was Prejudiced by Defendants' Litigation and Delay*

Defendants delayed for over fifteen months from the date the Complaint was filed before filing the instant motion to compel arbitration. At the outset of this litigation, Defendants filed a motion to dismiss on statute of limitations grounds, without raising the issue that arbitration might be available in this case. Instead, Defendants first raised the issue of arbitration in their Answer, which was filed two months after Baker's deposition and some fifteen months after the commencement of this action. Defendants justify this delay by arguing that they could not establish a clear right to arbitration until after Baker's deposition, at which Baker acknowledged that Rudin's Employment Agreement correctly reflected their business arrangements. (Defs.' Reply Mem. of Law in Supp. of Mot. to Compel Arbitration and in Opp'n to the Cross–Mot. ("Defs.' Reply") at 4, 6 ("It was only during the course of the Baker deposition that the Rudin Defendants were able to establish that the document was in fact an authentic agreement.").) This argument, however, is without merit.

Edward Rudin, as a shareholder, vice-president, and secretary of TIP, had access to and knowledge of TIP's business documents and was on notice of the arbitration clause before Baker's deposition. Indeed, because Baker's deposition predated Defendants' discovery requests, it is clear that Defendants were in possession of both the Shareholder Agreement and Rudin's Employment Agreement containing the arbitration clause prior to

November 3, 2011 at the very least. However, it was not until three months after Baker's deposition, two months after the Court's December 16, 2011 Order granting Defendants' request for document production, and two discovery conferences before the Court that Defendants filed their motion to compel. As Plaintiff correctly notes, Defendants could have moved to compel arbitration prior to forcing TIP to defend two motions to dismiss, or, at the very least, notified the court of the existence of the arbitration clause prior to their request for further discovery. *See, e.g., Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.,* 67 F.3d 20, 26 (2d Cir.1995) (raising affirmative defenses without asserting right to compel arbitration is a significant factor in waiver); *Forrest v. Unifund Fin. Grp., Inc.,* No. 04–CV–5151 (LTS), 2007 WL 766297, at *6 (S.D.N.Y. Mar. 13, 2007) (denying motion to compel arbitration made eighteen months after the action was commenced where "[d]efendants had the opportunity to raise the arbitration issue in response to the initial complaint but elected to proceed with litigation, in an attempt to have the case dismissed on the merits in court").

### c. *Discovery Prejudice*

Pursuing discovery not otherwise always available in arbitration while on notice of the availability of
280 arbitration is proof of prejudice. *See* *280 *Zwitserse Maatschappij van Levensverzekering en Lijfrente v. ABN Int'l Capital Mkts. Corp.,* 996 F.2d 1478, 1480 (2d Cir.1993) (per curiam) (waiver found where party litigated for over a year and engaged in discovery not available in arbitration). Here, Defendants have availed themselves of significant discovery under the Federal Rules of Civil Procedure that may not be allowed in arbitration. *See Martin v. SCI Mgmt. L.P.,* 296 F.Supp.2d 462, 468 (S.D.N.Y.2003); *Ciago v. Ameriquest Mortg. Co.,* 295 F.Supp.2d 324, 333 (S.D.N.Y.2003).

Following the November 3, 2011 deposition of Baker, on December 16, 2011 the Court Ordered TIP to produce a significant number of documents, pursuant to Defendants' discovery requests. ( *See* Order dated Dec. 16, 2011, Ex. B, ECF No. 43.) Plaintiff has produced approximately 4,000 pages of documents and sixteen gigabytes of electronically stored information as a result of the Court's Order. (Pl.'s Mem. at 4–5.) Furthermore, as discussed *infra,* Plaintiff states that this case may involve substantial spoliation of evidence issues, which, Plaintiff argues, may require significant non-party discovery—discovery that an arbitrator may or may not choose to provide to Plaintiff. *See Martin,* 296 F.Supp.2d at 468;*Ciago,* 295 F.Supp.2d at 333. TIP argues that without access to this non-party discovery, it will be unable to present its claims properly.

Specifically, TIP maintains that a significant amount of documents, including the financial records of TIP from 1997 to 2004, are still outstanding, despite the fact that the Court ordered them produced on January 6, 2012. ( *See* Endorsed Letter dated Jan. 10, 2012, ECF No. 46; Tr. 6/13/12 at 17.) Thus, TIP argues, if these documents are no longer available, significant nonparty depositions will have to be taken from, *inter alia,* the former Accountant Defendants and from the corporate entity of the My Gym franchises, to which TIP alleges the stolen funds were funneled. (Tr. 6/13/12 at 17.)

Defendants argue that the Second Circuit in *Guyden v. Aetna, Inc.,* 544 F.3d 376 (2d Cir.2008), was "not willing to entertain the possibility that an arbitrator is going to act in a completely arbitrary and unreasonable manner in denying a party reasonable discovery." (Tr. 6/13/12 at 26:1–6.) However, Defendants' citation to *Guyden* is inapposite. Unlike the instant arbitration agreement, the arbitration agreement at issue in *Guyden* gave the arbitrator the power to order additional discovery upon a showing by the plaintiff that such discovery was necessary to enable her to present her claim. Plaintiff Guyden had both a statutory *and* a contractual basis for further discovery should it have proven necessary to her claim. *Guyden,* 544 F.3d at 386–87. By contrast, here, if the case were to go to arbitration, TIP would find itself at the mercy of the arbitrator's discretion.[1]

1 The arbitration clause contained within the Shareholder Agreement and Rudin's Employment Agreement expressly incorporated the Commercial Rules of the American Arbitration Association, which include the following:

L–4. Management of Proceedings ... (c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate ... (d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) *may* order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter." (emphasis added).

### *3. Conclusion*

281 Defendants' have conducted significant litigation before this court. Defendants *281 have filed a motion to dismiss, participated in court-ordered conferences involving hotly contested discovery issues, engaged in significant pretrial discovery that may be unavailable in an arbitral forum, and forced TIP to expend considerable resources over an almost sixteen-month period, all before ever raising the arbitration issue. Accordingly, Defendants' Motion to Compel Arbitration is denied. *See Cotton,* 4 F.3d at 179–80 (finding that active litigation of the dispute in federal court, undertaking of discovery, filing of substantive motions, and the resultant expense and delay was prejudice sufficient to compel a finding of waiver).

## III. Motion for Sanctions

**A. *Relevant Facts***

It is undisputed that Rudin and Baker formed TIP in 1997. At that time, the company operated out of rented office space, ( *see* Rudin Decl. ¶ 6), and stored all of its data on a single server (the "First TIP Server"), which functioned as the " 'brains' of the company." (Watkis Decl. ¶ 5.) Since its inception, TIP used the software program Quick Books to maintain its accounting records. (Transcript of Feb. 16, 2012 Conference ("Tr. 2/16/12") at 7:20–24.)

From 2006 onward, TIP employed Roy W. Watkis II ("Watkis") as an information technology ("IT") consultant. ( *Id.* ¶ 3.) Watkis was responsible for, among other things, "assist[ing] TIP with its own IT needs." ( *Id.*) In 2007 or 2008, TIP encountered a problem with the First TIP Server. ( *Id.* ¶ 4.) As a result, Watkis "built a new server for TIP and migrated all of the dat[a] off of the old server to a new server" ( *Id.*) According to Watkis, this new server (the "Second TIP Server") was "a large computer measuring approximately 2 1/2 feet tall by 19 inches wide." (Watkis Reply Decl. ¶ 8.) Once the Second TIP Server was operational, "Rudin moved the new server to his home in North Brunswick, New Jersey, and he operated TIP from his residence thereafter." (Watkis Decl. ¶ 4; *see also* Rudin Decl. ¶ 6.)

While Watkis built the Second TIP Server to hold TIP's data, Watkis also arranged for his company, Notlin Technologies ("Notlin"), to "provide[ ] remote hosting of TIP's e-mail accounts on Notlin's server (the "E-mail Server"). This e-mail hosting was separate and apart from the [Second TIP] Server, which contained all of TIP's other files and information." (Watkis Reply Decl. ¶ 3.) The parties agree that from this point in 2007 or 2008 onward, TIP's financial data was stored on the Second TIP Server, which was within Rudin's personal control and located at his home, whereas all of TIP's e-mails—and any documents attached to them, including financial documents that might also be stored on the Second TIP Server—were stored separately on the E-mail Server, which was under Notlin's control.

The parties disagree substantially about what happened to the Second TIP Server from this point forward and who had access to which files and at what time. According to Rudin, in early 2009 the Second TIP Server "would not turn on," so he enlisted the help of a computer technician, Scott Hlavacek ("Hlavacek"), to fix the machine. (Rudin Reply Decl. ¶ 2; Hlavacek Decl. ¶¶ 3–4; Tr. 6/13/12 at 46:4–10.) Hlavacek had been employed by TIP from 1999–2002 on a full-time basis as a computer technician. (Hlavacek Decl. ¶ 2.) In that capacity, he "was responsible for managing and maintaining all of TIP's corporate computer equipment, including desktops and servers. Thereafter [he] worked from about 2003–2004 as a computer technician for
282 TIP on a consulting basis." ( *Id.* ¶ 3.) "As a favor to Mr. Rudin," whom *282 Hlavacek "had known for years," Hlavacek "attempted to repair" the Second TIP Server. ( *Id.*) "In order to save the data from the server's hard drive, [Hlavacek] removed the server's hard drive and re-installed it into" a different machine, "a desk-top computer, which then was set up and thereafter used as" the new TIP Server (the "Third TIP Server"). ( *Id.* ¶ 4; Tr. 6/13/12 at 44:11–8, 71:11–23.) Rudin contends that this desktop computer "is the only TIP [S]erver that existed in May 2010." (Rudin Reply Decl. ¶ 3.)

Rudin claims that in "May of 2010, Mr. Baker froze me out of the business without notice and without my consent or knowledge took over the operations of the business." (Rudin Decl. ¶ 5.) "In an effort to protect [himself] from Mr. Baker ... [Rudin] cut off access to the [Third] TIP [S]erver" located in his home. ( *Id.* ¶ 6; *see also* Baker Decl. ¶ 3.) However, in July of 2010, in what Rudin asserts was "a good faith effort to resolve this issue," he "permitted Mr. Baker to obtain remote access to the [Third] TIP [S]erver after making a copy of the server's contents." ( *Id.* ¶¶ 7, 8.) Rudin asserts that "after opening up access to the server, Mr. Baker's computer assistants changed the password or access codes for the server," and that for "about 10 months, Mr. Baker had remote access to the [Third] TIP [S]erver." ( *Id.* ¶ 7.) When it became clear to Rudin that the parties were "not going to be able to resolve the matter, [he] unplugged the [Third TIP S]erver and stored it at [his] house." ( *Id.*)

Rudin states that "in July of 2010, after I gave Mr. Baker remote access to the server, his counsel wrote my attorney an e-mail stating 'my client and an independent accounting firm have reviewed the 'quick books,' payroll and other records of [TIP] that were maintained by Eddie Rudin.' " ( *Id.* ¶ 8.) According to Rudin, that same e-mail claimed that Rudin had improperly paid his mother $130 per month out of TIP's funds for many years and "attached to the e-mail a print-out from the TIP Quick Books records" as proof. ( *Id.*) Subsequently, Plaintiff filed this action.

Having denied Defendant Rudin's motion to dismiss and Ordered Baker to be deposed on the issue of the date he discovered the fraud, *see Tech. P'ship, Inc.,* 2011 WL 4575237, the Court held a conference with the parties on January 6, 2012. Thereafter, the Court Ordered:

1. Defendants to file an Answer to TIP's Complaint and produce all relevant documents (including complete financial records) by January 13, 2012;

2. All parties to serve Rule 26(a) disclosures by January 20, 2012; and

3. Defendants to produce Edward Rudin for deposition at a date to be agreed upon by counsel on or before February 10, 2012.
(Endorsed Letter dated Jan. 10, 2012, ECF No. 46.)

At the follow-up status conference held on February 16, 2012, plaintiff asserted that "we've been unable to get the majority of the discovery that we had discussed at the last conference. We had discussed the books and records of [TIP] would be turned over...." (Tr. 2/16/12 at 2:9–12.) Plaintiff's attorney, Mr. Jarrett Behar, Esq.

("Behar") represented that "While I have received thousands of pages of documents from the Rudin defendants, it's largely either redundant of the thousands of pages that we had previously produced on behalf of plaintiff and, for the most part, does not extend prior to 2005." ( *Id.* at 2:15–19.) Behar further explained that

283 "I haven't received the Quick Books, I don't have payables journals, I don't *283 have receivables journals, balance sheets, profit loss statements. I don't have—I almost don't have anything to give to a forensic accountant to even get an analysis performed, which will enable me to depose Mr. Rudin as to the extent of the scheme

[...]

I don't have any financial documents from this company since 1997 to 2004, nothing. Everything that was produced ... none of that goes past 2005."
( *Id.* at 2:19–24, 8:5–17.)

Defendant Rudin's counsel, Mr. Nathaniel Smith, Esq. ("Smith") responded by asserting that "I have turned over almost everything," ( *id.* at 3:15–16), but that Smith did not have the right program to open the Quick Books files, which were stored on a hard drive in his office. ( *Id.* at 4:17–25.) The parties agreed that defendants would turn over the TIP Server hard drive to plaintiff with the stipulation that plaintiff would not use any attorney-client privileged material contained on it. ( *Id.* at 5:15–25.) Smith further stated that "I can explain Mr. Behar's mystification about why there aren't all these documents that he believes should exist ... in the regular course, as things became aged, they were dumped long before this lawsuit ever came about." ( *Id.* at 8:22–23, 9:9–11.)

The parties disagree about whether or not Smith fulfilled his promise to turn over the TIP Server hard drive. On February 23, 2012, the Rudin Defendants provided TIP with a desktop computer that the Rudin Defendants represented to be the TIP Server. (Pl.'s Mem. at 6; Rudin Decl. ¶ 9.) TIP hired Watkis to review the computer, (Pl.'s Mem. at 6), and he concluded that Rudin's representation that this is the TIP Server "is simply untrue." (Watkis Reply Decl. ¶ 6.) Reiterating that he had personal knowledge of the TIP Server because he built the Second TIP Server in 2007 or 2008, Watkis explained that "[i]n addition to the fact that the computer provided by Mr. Rudin had no real data prior to 2006, the computer that I was provided looked nothing like, and indeed was much smaller than, the actual Server." ( *Id.* ¶ 7; *see also id.* ¶¶ 8–10; Pl.'s Mem. at 6; Tr. 6/13/12 at 41:1–9.)

On March 19, 2012, Plaintiff filed the motion for sanctions presently before the Court. Plaintiff alleges that

The Rudin Defendants have ignored the Court's ... orders to provide TIP with TIP's books and records dating back to TIP's inception in 1997. While they have produced thousands of largely irrelevant documents ... almost none of those documents are dated prior to 2005. While they were ordered and, indeed consented to, producing [sic] TIP's server, they have failed to do so, instead producing a desktop computer that contains no file related to TIP prior to 2006.... [They] have failed to produce any meaningful documents or records from ... the critical period between 1997 and 2004.
(Pl.'s Mem. at 1–2, 5.) Plaintiff points out that at the February 16, 2012 conference, "counsel for the Rudin Defendants specifically represented to the Court that [TIP's books and records], going back to TIP's inception, were contained on TIP's [S]erver, which would be promptly produced." ( *Id.* at 15.) Instead, Plaintiff asserts that "Defendants produced a substitute desktop computer that had no relevant files older than 2006." ( *Id.*)

Citing the Rudin Defendants' alleged "repeated failure to comply with the Court's discovery orders" and "stonewalling" tactics, plaintiff argues that "sanctions pursuant to Fed.R.Civ.P. 37 ... should be granted." ( *Id.* at 3, 5.)

On April 17, 2012, Defendants produced a disk that contained a copy of the QuickBooks file that Plaintiff
284 requested. (Tr. *284 6/13/12 at 62:10–13.) Rudin also states that he sent his attorney "a copy of the Quick Books file from my back-up file and I understand that that file [was also] produced" at that time. (Rudin Decl. ¶ 10.)

In the Rudin Defendants' opposition papers, dated April 23, 2012, Rudin contends that the desktop computer produced to Plaintiff was in fact the TIP Server, specifically the Third TIP Server. (Defs.' Reply at 12; *see also* Rudin Reply Decl. ¶ 3; Hlavacek Decl. ¶ 4.) He further explains that as part of the discovery process in this case, he brought to his counsel's office all of the TIP records in his possession, which consisted of "15 large boxes of TIP documents as well as the actual [Third] TIP [S]erver that was still stored at [his] house." (Rudin Decl. ¶ 9.) According to Rudin, "[a]s of that time, the server had all the data required to run the business on a day-to-day basis and I do not have any recollection or knowledge of any gaps or missing TIP data." (Rudin Reply Decl. ¶ 4.)

Rudin also argues that plaintiff's motion for sanctions was made in bad faith because "the evidence proves that TIP already *had* access to the server and that [it] *has* had in its possession for years the 'Quick Book' records that it now pretends that it needs to be produced by the Rudin Defendants." (Defs.' Reply Mem. at 12) (emphasis in original.) As discussed *supra,* Rudin maintains that he provided Baker with remote access to the Third TIP Server for 10 months after the initiation of this action, and that in that time period "Baker's computer assistants changed the password or access codes for the server." (Rudin Decl. ¶ 7; *see also* discussion *supra* at p. 282.) Rudin asserts that "I have not had access to the TIP [S]erver since 2010, when I turned over access to it remotely to Mr. Baker and the password was changed" and that "if the records [Plaintiff] seek[s] are no longer on the server, then it is because Mr. Baker removed the data from the server when he had access to it in 2010." ( *Id.*)

In its reply, dated May 7, 2012, Plaintiff contends that the Rudin Defendants' statement that Baker had access to the TIP Server in May 2010 is "completely baseless." (Reply Mem. of Law in Further Supp. of Pl.'s Mot. for Sanctions Pursuant to Fed.R.Civ.P. 37 ("Pl.'s Reply Mem.") at 2.) Indeed, Baker asserts that when he seized control of TIP from Rudin in May 2010, "the only TIP documents that I was able to gain access to were those on TIP's remote e-mail server hosted by Notlin Technologies," not the financial documents stored on the TIP Server. (Baker Decl. ¶ 5.) Subsequently, he reviewed "limited documentation that was provided by defendant Edward Rudin in an attempt to settle the dispute in June 2010." ( *Id.*) In addition, Baker explained that "the limited Quickbooks [and] any other accounting records that I obtained at that time were either attached to e-mails and located on the remote e-mail server, or were directly provided. I never obtained access to the TIP [S]erver located at defendant Edward Rudin's house." ( *Id.* ¶ 7.)

Baker further alleges that "after Mr. Baker uncovered his fraudulent scheme in May 2010," (Pl.'s Reply Mem. at 2), "upon information and belief [Rudin] ... began actively deleting hundreds of files from the TIP [S]erver, including those containing information related to defendant Edward Rudin's operation of and involvement with the fraudulent enterprise, and important information necessary to operate TIP's business." (Baker Decl. ¶¶ 8–9; *see also* Compl. ¶ 104.) Plaintiff asserts that "these seriously [sic] spoliation accusations cannot be properly
285 investigated without production of the actual server." (Pl.'s *285 Reply Mem. at 2; *see also* Tr. 6/13/12 at 69:14–70:4.)

Ultimately, Plaintiff contends that sanctions are appropriate because the Rudin Defendants' counsel specifically stated on the record at the February 16, 2012 conference that the TIP Server would be produced and, according to Plaintiff, months later the Rudin Defendants have still not followed through on this promise. Indeed, Plaintiff asserts that "the Rudin Defendants knew that the computer they were producing was not the TIP [S]erver" when they turned over the desktop computer and its hard drive after the February 16, 2012 conference. (Pl.'s Reply Mem. at 3.) Therefore, Plaintiff asserts that not only have "the Rudin defendants failed to voluntarily produce the TIP [S]erver and comply with the Court's orders, but [have] also misrepresented to the Court that they would make this production." ( *Id.* at 4–5.)

At the June 13, 2012 oral argument on the motion to compel arbitration and the cross-motion for sanctions, the Rudin Defendants argued that "the suggestion that Mr. Baker and TIP don't have any information [between 1997 and 2004] is just completely false" because Plaintiff's Complaint "details dates, checks, times, moneys," and "has spreadsheets with dates and everything." (Tr. 6/13/12 at 34:14, 36:9.) Indeed, Defendant Rudin's counsel noted that the Complaint specifically details allegedly fraudulent checks issued from 1998 to 2002, which counsel contended undermined Plaintiff's claim that it did not have access to any information from 1997 to 2004. ( *Id.* at 53:14–24.) In addition, the Rudin Defendants state that after Baker removed Rudin from TIP, Baker and his associates "took over control of the bank accounts. They took over control of the customers. They took over control of the business, of the software, or everything. And they have access to everything." ( *Id.* at 35:10–14, 49:14–50:13.) Finally, the Rudin Defendants assert that Baker admitted on page 133 of his deposition that he accessed Rudin's e-mails "from the TIP Server," and that after taking possession of "a server" in May 2010, Baker said he "had all the information." ( *Id.* at 35:24–36:6, 54:3–25, 65:10–13.)

TIP's counsel clarified that "Mr. Baker ... [only] had access to TIP's e-mail server. The e-mail server and the physical computer server are two different things .... That's all the information that we have from the complaint, derived from information we were able to get off the e-mail server in May of 2010. We've never had access to the physical server ...." ( *Id.* at 39:11–25.) In response to Defendant Rudin's representation that Mr. Hlavacek had migrated the TIP Server and all of its files from the Second TIP Server that Mr. Watkis built in 2007 or 2008 to a Third TIP Server, housed in a desktop computer, TIP's counsel asserted that the computer represented by defendants as the TIP Server "doesn't have the data it should. That's the important point. And that's never addressed." ( *Id.* at 40:21–24.)

A week after the oral argument, Rudin explained in a sworn statement attached to a letter to the Court filed on June 20, 2012 how he addressed the Court's request that he "provide any information [he] might have as to why the TIP [S]erver's hard drive produced to TIP's counsel does not contain any data for the period from 1998 through 2005." (Rudin Reply Decl. ¶ 4.) Rudin states that on June 19, 2012, he went to his "counsel's office with Mr. Hlavacek for the purpose of trying to obtain information about the contents of the hard drive." (Rudin Reply Decl. ¶ 5; *see also* Hlavacek Decl. ¶ 5.) Once there, Hlavacek, according to his own sworn statement,
286 also attached to the June 20, 2012 letter, "attempted to access the hard drive in a *286 desktop computer identified ... by Mr. Rudin as the TIP [S]erver," however, the "computer wo [uld] not 'boot up,' " so Hlavacek "removed the hard drive and attempted to access it through a laptop." (Hlavacek Decl. ¶ 5.) Unfortunately, the TIP Server's hard drive "would not open through the laptop connection." ( *Id.*) Hlavacek stated that he "believe[s] that the circuit board for the hard drive is at fault" and recommended that "the hard drive should be sent to [a] data recovery company so that the contents can be retrieved." ( *Id.*) Fortunately, the Rudin Defendants note that "Rudin made a copy of the hard drive before Mr. Baker forced him out of TIP in May 2010. It is from this copy that [Smith] sent plaintiff's counsel a copy of the Quick Books file after receiving the cross-motion for sanctions." (Defs.' Jun. 20, 2012 Let. at 1.)

In response, Plaintiff filed a letter with the Court on June 25, 2012 taking issue with the Rudin Defendants' suggestion that "the computer they provided was somehow broken while in TIP's possession...." (Pl.'s Jun. 25, 2012 Let. at 1.) Plaintiff points out that the computer was returned to the Rudin Defendants on March 28, 2012, but that the Rudin Defendants did not identify the computer as inoperable until their June 20, 2012 letter. ( *Id.*) Plaintiff contends that "with the computer ostensibly inoperable, verification" of Rudin's claim that "he has no knowledge of why" the computer lacks data from prior to 2006 "becomes impossible." ( *Id.*) Plaintiff characterizes Rudin's claim as "nothing more than pure sophistry designed to avoid having to produce any meaningful discovery from the main period in which TIP alleges that the defendants looted the company." ( *Id.* at 2.) **B. *Legal Standard***

Fed.R.Civ.P. 37 provides, in relevant part, that when a party fails to obey an order to provide or permit discovery, the Court where the action is pending may issue further "just orders" that may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against a disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed.R.Civ.P. 37(b)(2)(A). Moreover, "[i]nstead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed.R.Civ.P. 37(b)(2)(C).

The Court's discretion in selecting an appropriate sanction should be guided by a number of factors including:

(1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser
287 sanctions; (3) the prejudice to the other party; (4) the duration of the period of noncompliance; *287 and (5) whether the non-compliant party had been warned of the consequences of non-compliance.

*Richardson v. N.Y.C. Health and Hosps. Corp.,* No. 05–CV–6278 (KMK)(DF), 2007 WL 2597639, at *6 (S.D.N.Y. Aug. 31, 2007) (internal citations omitted). The court has wide discretion in imposing sanctions under Rule 37. *Residential Funding Corp. v. DeGeorge Fin. Corp.,* 306 F.3d 99, 107 (2d Cir.2002). However, sanctions imposed by a district court pursuant to Rule 37(b)(2) must be "just" and "must relate to the particular claim to which the discovery order was addressed." *Daval Steel Prods. v. M/V Fakredine,* 951 F.2d 1357, 1366 (2d Cir.1991). Courts in this Circuit typically impose Rule 37 sanctions only when there has been a clear failure to produce materials in the offending party's possession or control, *see, e.g., Aliki Foods, LLC v. Otter Valley Foods, Inc.,* 726 F.Supp.2d 159 (D.Conn.2010), or where the moving party has demonstrated that spoliation of evidence has occurred, *see, e.g., Centrifugal Force, Inc. v. Softnet Comm., Inc.,* 783 F.Supp.2d 736 (S.D.N.Y.2011).

Here, Plaintiff, the moving party, has not met its burden to show that the Rudin Defendants have failed to comply with this Court's January 6, 2012 discovery Order to "produce all relevant documents (including complete financial records)" in their possession and control. Although Plaintiff contends that the Rudin Defendants have failed to comply with the Order because the desktop computer produced and represented to be the TIP Server was not the same TIP Server built by Watkis in 2007 or 2008, Hlavacek's and Rudin's sworn statements explain that the machine Watkis built, the Second TIP Server, broke down, requiring Hlavacek to transfer the data to a desktop computer, and that this computer, which was in use as the Third TIP Server at the time Baker seized control of TIP, has been produced to Plaintiff. (Rudin Reply Decl. ¶¶ 3–4; Hlavacek Decl. ¶ 4; *see also* Defs.' Reply Mem. at 12.) Although Watkis concluded that the computer produced is not the Second TIP Server, his determination was based on the physical differences between the computer produced and the one he built in 2007 or 2008, as well as the lack of data older than 2006 on the machine. (Watkis Reply Decl. ¶ 6.) The physical differences between the machines are explained by Hlavacek's actions. While Plaintiff may wish to further probe this issue at trial, at this point in the proceedings, the Court is satisfied with the Rudin Defendants' representation that Rudin produced the only TIP Server in his possession, and thus the Court finds that the Rudin Defendants have complied with the Court's January 6, 2012 discovery Order in that respect.

Plaintiff further contends that the Rudin Defendants' discovery production is not "complete" because the desktop computer produced lacks any records for the period from 1997 to 2004. However, the Rudin Defendants have represented that they have produced all of the records within their possession and control. Indeed, in his sworn statement Rudin declared that at the time he brought the Third TIP Server to his counsel's office, "the server had all the data required to run the business on a day-to-day basis and I do not have any recollection or knowledge of any gaps or missing TIP data." (Rudin Reply Decl. ¶ 4.) In addition, although the computer identified by the Rudin Defendants as the Third TIP Server now appears to be inoperable, the Rudin Defendants represent that Rudin made a copy of the hard drive before exiting TIP in May of 2010, and that the Quick Books file from that copy has already been provided to Plaintiff. (Defs.' Jun. 20 Let. at 1.) While
288 Plaintiff may wish to have the hard drive sent *288 to a data recovery technician, further probe at trial what happened to the allegedly missing data, or file additional motions on this issue,[2] at this point in the proceedings the Court accepts the Rubin Defendants' representation that they have produced all of the records within their possession or control.

[2] As this time, Plaintiff has not made a motion for spoliation. However, Plaintiff has indicated that it intends to do so if the Rubin Defendants maintain, as they have, that the Rudin Defendants possess no additional relevant records because any records from the period from 1997 to 2004 are now gone. ( *See* Tr. 2/16/12 at 8:24–9:11; Tr. 6/13/12 at 69:23–70:4).

Accordingly, for the reasons stated above, the Court declines to impose sanctions pursuant to Rule 37 at this time.

## IV. Conclusion

For the reasons set forth above, the Rubin Defendants' motion to compel arbitration (ECF No. 48) is hereby denied, and Plaintiff's cross-motion for sanctions (ECF No. 55) is also denied.

IT IS SO ORDERED.

No. 10-cv-9037 (CS)
UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

# 101 McMurray, LLC v. Porter

Decided Mar 23, 2012

No. 10-cv-9037 (CS)

03-23-2012

101 MCMURRAY, LLC, Plaintiff, v. MARTIN PORTER, CRAIG WALLACE, WALLACE & WALLACE, PROOF OF FUNDS, LLC, DANE GEROUS BRIGADIER, and ROBERT EDWARD MAYES, III, Defendants.

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Cathy Seibel

## OPINION AND ORDER

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2 *2

## Seibel, J.

Before the Court are the motions of Defendants Craig Wallace and Wallace & Wallace (collectively, the "Wallace Defendants"), (Doc. 33), Martin Porter, (Doc. 37), and Proof of Funds ("POF"), Dane Gerous Brigadier, and Robert Edward Mayes, III (collectively, the "POF Defendants"), (Doc. 43). Porter and the POF Defendants seek dismissal of Plaintiff's Second Amended Complaint ("SAC"), (Doc. 29), under Federal Rules of Civil Procedure 12(b)(2) for lack of personal jurisdiction and 12(b)(6) for failure to state a claim. The Wallace Defendants join Plaintiff in opposing the motions to dismiss for lack of jurisdiction, but also move to dismiss two claims against them for failure to state a claim. For the following reasons, Porter's and the POF Defendants' motions are GRANTED IN PART and DENIED IN PART, and the Wallace Defendants' motion is GRANTED.

## I. BACKGROUND

The facts (but not the conclusions) in the Amended Complaint are assumed to be true for the purposes of this Opinion. Plaintiff is a limited liability company organized under the laws of Nevada with its principal place of business in California. (SAC ¶ 1.) Porter, a citizen of Florida, Brigadier, a citizen of Ohio, and Mayes, a citizen of Tennessee, each informed Plaintiff that, as principals of POF, a limited liability company organized under the laws of and having a principal place of business in Pennsylvania, they could obtain a $16 million standby letter of credit (the "SLC") for Plaintiff from UBS AG Zurich ("UBS"). *(Id.* ¶¶ 2, 5-7, 11.) At all relevant times, Brigadier, Mayes, and Porter each represented that he worked for POF as a Managing Member, Chief Financial Officer and a Managing Member, and Director of Finance, respectively. (SAC ¶¶ 12-14.) Each of these Defendants, acting on behalf of POF, made representations to Plaintiff regarding the SLC in various telephone
3 conversations and e-mails, and specifically in a written *3 document entitled "Agreement for Obtaining a Standby Letter of Credit" that Porter sent by e-mail to Plaintiff on or about December 14, 2007 (the "SLC Agreement"), (SAC Ex. A). (SAC ¶ 11.) Prior to entering into the SLC Agreement, Plaintiff also received brochures allegedly prepared by Brigadier, Mayes, and Porter, on behalf of POF, that contained additional representations regarding POF's ability to acquire a standby letter of credit. *(See* SAC ¶¶ 15-17.)

Porter and the POF Defendants allegedly selected Craig Wallace, a citizen of New York, and his law firm, Wallace & Wallace, a partnership organized under the laws of and having a principal place of business in New York, to act as the Escrow Agent for the transaction. (SAC ¶ 26.) Information about the law firm and Wallace's former employment at the Kings County District Attorney's Office was displayed prominently on POF's website under the "Escrow Attorney" link. *(Id.* ¶ 27; *see* Declaration of Harry H. Wise, III ("Wise Decl."), (Doc. 48), Ex. B.)[1] Under an escrow agreement, to which Plaintiff, Porter as "Director of Finance," and Wallace & Wallace were signatories (the "Escrow Agreement"), *(see* SAC Ex. A, Annex E), the parties agreed that Plaintiff would wire-transfer $680,000 to the Wallace Defendants' Interest on Lawyer Account ("IOLA"), and that, upon the SLC being "placed on DTC/Euroclear or . . . received by [Plaintiff] and the Escrow Agent along with coordinates and authentication," the Wallace Defendants would disburse $440,000 to Porter and $240,000
4 to POF as an "arrangement *4 fee," *(see id.* ¶ 3.2.1; SAC Ex. A, Annex B). POF was a third party beneficiary under the Escrow Agreement. (SAC Ex. A, Annex E ¶ 10.1.)

1 When deciding a motion to dismiss, ordinarily the court's "review is limited to the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." *McCarthy v. Dun & Bradstreet Corp.,* 482 F.3d 184, 191 (2d Cir. 2007); *accord Faulkner v. Beer,* 463 F.3d 130, 134 (2d Cir. 2006). But the court can also consider documents "integral" to the complaint—that is, documents "either in plaintiff['s] possession or of which plaintiff[] had knowledge and relied on in bringing suit," as well as documents concerning "matters of which judicial notice may be taken." *Brass v. Am. Film Techs., Inc.,* 987 F.2d 142, 150 (2d Cir. 1993). Each of the documents filed as exhibits to the Wise Decl.— screenshots of POF's website, correspondence between Plaintiff and certain of the Defendants, and a letter that Plaintiff's counsel received from UBS concerning the SLC—are documents that Plaintiff quotes in its SAC or relied on in bringing this lawsuit. Accordingly, I may consider each of these documents to determine the instant motions to dismiss. *See Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (2d Cir. 2002).

In reliance on the abovementioned representations, Plaintiff entered into the SLC Agreement and wire-transferred $680,000 to the Wallace Defendants' IOLA account. (SAC ¶¶ 21, 29.) Defendants delivered the SLC to Plaintiff, (id. ¶ 24; *see* SAC Ex. B), and, in turn, the Wallace Defendants disbursed the funds to Porter and POF, (*see* SAC ¶ 32). In the months after Plaintiff entered into the SLC Agreement, Brigadier and Mayes made additional representations to Plaintiff regarding steps that were being taken to ensure the availability of the SLC funds. (See *id.* ¶ 19.) But a genuine $16 million standby letter of credit was never placed on DTC/Euroclear or received by Plaintiff or the Wallace Defendants along with coordinates and authentication. *(See id.* ¶¶ 30-31.) Rather—as Plaintiff subsequently learned from employees at UBS—the SLC it received from Porter was a fake that bore forged UBS signatures. (*Id.* ¶¶ 20, 24; *see* SAC Ex. B; Wise Decl. Ex. G.) Upon learning that the SLC was fraudulent, Plaintiff demanded the return of its $680,000, but Defendants failed to give Plaintiff its money back. (SAC ¶ 34.)

Plaintiff commenced this action by filing a Complaint on December 3, 2010, (Doc. 1), and subsequently amended it twice, (Docs. 3, 29). Plaintiff brings claims against all Defendants for violation of the Racketeer Influenced & Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), fraud, conversion, and unjust enrichment, and also asserts claims solely against the Wallace Defendants for breach of the Escrow Agreement and gross negligence. Porter and the POF Defendants now move to dismiss the SAC under Rule 12(b)(2) for lack of personal jurisdiction, and all Defendants move to dismiss various claims under Rule 12(b)(6). *5

## II. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555 (alteration in original) (citations and internal quotation marks omitted). Although Federal Rule of Civil Procedure 8 "marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, . . . it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal,* 129 S. Ct. at 1950.

In considering whether a complaint states a claim upon which relief can be granted, the Court may "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," and then determine whether the remaining well-pleaded factual allegations, accepted as true, "plausibly

give rise to an entitlement to relief." *Id.* Deciding whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (second alteration in original) (quoting Fed. R. Civ. P. 8(a)(2)). *6

## III. DISCUSSION

### A. Personal Jurisdiction

At the motion to dismiss stage, the plaintiff must only make a *prima facie* showing by its pleadings and affidavits that the court has jurisdiction over each of the defendants. *See CutCo Indus., Inc. v. Naughton,* 806 F.2d 361, 364-65 (2d Cir. 1986) (at trial, plaintiff must demonstrate personal jurisdiction by preponderance of the evidence). A federal court sitting in diversity looks to the law of the state in which it sits to ascertain whether it may exercise personal jurisdiction over a foreign defendant. *See Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 305 F.3d 120, 124 (2d Cir. 2002). In such cases, the court must determine if the forum's law would confer jurisdiction through its long-arm statute, and then decide if the exercise of such jurisdiction is permissible under the Due Process Clause of the Fourteenth Amendment. *Id.*

Plaintiff contends that the Court has jurisdiction over Porter and the POF Defendants (1) under either of two subsections of New York's long-arm statute, N.Y. C.P.L.R. ("CPLR") 302(a)(1) or (a)(2); (2) because Defendants—through Porter as POF's "Director of Finance"— consented to "submit to the exclusive jurisdiction of the Courts of New York" in connection with "any dispute relating to th[e] Escrow Agreement"; or (3) based on the nationwide jurisdiction afforded to plaintiffs under the RICO statute. (P's Mem. 5-11.)[2] Porter and the POF Defendants make various arguments regarding why the Court lacks personal jurisdiction over them. For example, they argue that they neither committed any acts nor were ever present in New York, *7 (*see* Porter's Mem. 7; POF Ds' Mem. 7-8),[3] Plaintiff has failed to show that Porter and the POF Defendants had sufficient control over the Wallace Defendants to deem them their agents under CPLR 302(a)(1), (*see* Porter's Mem. 9-10; Porter's Reply Mem. 2-3; POF Ds' Reply Mem. 3-5),[4] and wiring money into New York State is insufficient, by itself, to confer personal jurisdiction under CPLR 302(a)(1), (*see* Porter's Mem. 8-9; POF Ds' Mem. 10-12). The POF Defendants also claim that the Wallace Defendants cannot be considered their agents under CPLR 302(a)(1) because they did not choose the Wallace Defendants to handle, collect, or disburse the money, as demonstrated by the fact that they are not parties to the Escrow Agreement. (See POF Ds' Reply Mem. 4-5.) The Wallace Defendants oppose their co-Defendants' motions to dismiss for lack of personal jurisdiction. (See Wallace Ds' Opp'n Mem.)[5] They join Plaintiff's arguments that the Court has specific jurisdiction over their co-Defendants, and further argue that the Court has general jurisdiction over them because the Defendants all worked together over a course of approximately twenty transactions, which demonstrates that the other Defendants were engaged in a continuous and systematic course of activity in New York. *(Id.* 3-5, 7-8.)

2 "P's Mem." refers to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Second Amended Complaint. (Doc. 49.)

3 "Porter's Mem." refers to Porter's Memorandum of Law in Support of Motion to Dismiss. (Doc. 38.) "POF Ds' Mem." refers to the Memorandum of Law of Proof of Funds, LLC, Dane Gerous Brigadier and Robert Edward Mayes, III, in Support of Motion to Dismiss Plaintiff's Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(2) and Fed. R. Civ. P. 12(b)(6). (Doc. 57.)

4 "Porter's Reply Mem." refers to Porter's Reply Memorandum of Law in Support of Motion to Dismiss. (Doc. 40). "POF Ds' Reply Mem." refers to the Reply Memorandum of Law of Co-Defendants Proof of Funds, LLC, Dane Gerous Brigadier and Robert Edward Mayes, III, in Response to Plaintiff's Opposition to and Wallace Defendants' Partial Opposition to Co-Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint. (Doc. 58.)

5 "Wallace Ds' Opp'n Mem." refers to the Memorandum of Law in Support of the Wallace Defendants' Partial Opposition to Co-Defendants' Motion to Dismiss. (Doc. 41.)

I find that jurisdiction exists, at the very least, under CPLR 302(a)(1). CPLR 302(a)(1) "gives New York personal jurisdiction over a nondomiciliary if two conditions are met: first, the nondomiciliary must 'transact
8 business' [in person or through an agent] within the state; second, *8 the claim against the nondomiciliary must arise out of that business activity." *CutCo,* 806 F.2d at 365; *see Kreutter v. McFadden Oil Corp.,* 71 N.Y.2d 460, 467 (1988) (Section 302(a)(1) is a "single act statute" pursuant to which "proof of one transaction in New York is sufficient to invoke jurisdiction") (internal quotation marks omitted). "A nondomiciliary 'transacts business' under CPLR 302(a)(1) when he 'purposefully avails [himself] of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws." *CutCo,* 806 F.2d at 365 (alterations in original) (quoting *McKee Elec. Co. v. Rauland-Borg Corp.,* 20 N.Y.2d 377, 382 (1967)). Further, a "claim 'arises out of a defendant's transaction of business in New York when there exists a substantial nexus between the business transacted and the cause of action sued upon." *Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp.,* 98 F.3d 25, 31 (2d Cir. 1996) (internal quotation marks omitted).

I first consider the question of whether, as Plaintiff claims, Porter and the POF Defendants transacted business in New York through the Wallace Defendants acting as their co-Defendants' agents. (See P's Mem. 6-8.) In determining whether an agency relationship exists for the purposes of CPLR 302, courts "have focused on the realities of the relationship in question rather than the formalities of agency law." *CutCo,* 806 F.2d at 366. "Whether a representative of the defendant qualifies as an agent for jurisdictional purposes does not turn on legalistic distinctions between being an agent or independent contractor," and "no showing of a formal relationship between the defendant and the agent is required." *Robert Diaz Assocs. Enters., Inc. v. Elete, Inc.,* No. 03-CV-7758, 2004 WL 1087468, at *5 (S.D.N.Y. May 14, 2004) (internal quotation marks omitted). Rather, for the Wallace Defendants to be considered their co-Defendants' agents under CPLR 302(a)(1), their actions must have been done "for the benefit of, and with the knowledge and consent of" Porter and the POF
9 Defendants, and Porter and the *9 POF Defendants must have exercised at least "some control" over the Wallace Defendants. *See CutCo,* at 366 (internal quotation marks omitted). "[A] sufficient amount of control may involve the ability of the principal to influence such acts or decisions by virtue of the parties' respective roles." *Cavu Releasing, LLC v. Fries,* 419 F. Supp. 2d 388, 392 (S.D.N.Y. 2005) (internal quotation marks omitted).

Plaintiff has plausibly alleged that the Wallace Defendants acted for the benefit of both Porter and the POF Defendants. Plaintiff alleges that Porter and the POF Defendants specifically selected the New York-based Wallace Defendants to act as the Escrow Agent, and advertised their relationship with these Defendants on POF's website. (See SAC ¶¶ 26-28.) Pursuant to the Escrow Agreement, the Wallace Defendants were to, and ultimately did, deliver Plaintiff's funds to Porter and the POF Defendants, and then take a share of such disbursements for Escrow Agent fees and expenses. (See SAC ¶¶ 29, 32; SAC Ex. A, Annex E ¶ 3.2; SAC Ex. A, Annex B.) The Escrow Agreement demonstrates that the Wallace Defendants acted with the knowledge and consent of, at the very least, Porter, who was a signatory to the agreement and plausibly acted on behalf of the POF Defendants. (See SAC Ex. A, Annex E.) Moreover, the Escrow Agent's fees were paid out of the funds that the Wallace Defendants wired to POF, suggesting a relationship between the parties. (See SAC Ex. A,

Annex B.) I also find a substantial nexus between the transaction of business in New York under the Escrow Agreement—in which the parties agreed to submit to the exclusive jurisdiction of New York courts—and Plaintiff's various claims against the Defendants. Indeed, without the Wallace Defendants' involvement in the SLC transaction, Defendants may not have been able to obtain Plaintiff's money because, as Plaintiff plausibly alleges, POF added information regarding the Wallace Defendants to its website "to give false comfort to
10 potential victims of their fraud that the contemplated transactions were *10 legitimate, and that funds delivered to defendants to be held in escrow would be protected." (SAC ¶ 28.) Although at this stage it is unclear what level of control Porter and the POF Defendants had over the Wallace Defendants, drawing all reasonable inferences in the light most favorable to Plaintiff, I find that Plaintiff has plausibly alleged that Porter and the POF Defendants transacted business through the Wallace Defendants in New York sufficient to confer personal jurisdiction pursuant to CPLR 302(a)(1).

Next, I must consider whether asserting personal jurisdiction over Porter and the POF Defendants would comport with due process. The due process analysis contains two parts: "the 'minimum contacts' inquiry and the 'reasonableness' inquiry." *Licci v. Lebanese Canadian Bank, SAL,* No. 10-CV-1306, 2012 WL 688809, at *5 (2d Cir. Mar. 5, 2012) (quoting *Chloé v. Queen Bee of Beverly Hills, LLC,* 616 F.3d 158, 164 (2d Cir. 2010)); *see Calder v. Jones,* 465 U.S. 783, 788 (1984) (A non-resident defendant must have "certain minimum contacts [with the forum] . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.") (second alteration in original) (internal quotation marks omitted). "Minimum contacts exist where the defendant 'purposefully availed itself of the privilege of doing business in the forum state and could 'reasonably anticipate being haled into court there.'" *Pearson Educ., Inc. v. Shi,* 525 F. Supp. 2d 551, 557 (S.D.N.Y. 2007) (quoting *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474-75 (1985)). To determine whether asserting jurisdiction is reasonable under the circumstances—*i.e.,* comports with traditional notions of fair play and substantial justice—a court considers five factors:

> (1) the burden that the exercise of jurisdiction will impose on the defendant;
> (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies.

11 *11 *Chloé,* 616 F.3d at 164-65 (citing *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 113-14 (1987)).

For the reasons already stated, Plaintiff has plausibly alleged that by specifically choosing the New York-based Wallace Defendants as their agents and entering into the Escrow Agreement in which they agreed to submit to the exclusive jurisdiction of New York courts, Porter and the POF Defendants "purposefully avail[ed] [themselves] of the privilege of conducting activities within the forum State," *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980) (internal quotation marks omitted), which satisfies the minimum contacts test. As for the reasonableness factors, none suggest that it would offend due process for this Court to exercise personal jurisdiction over Porter or the POF Defendants. The POF Defendants argue that maintenance of this suit in New York violates their due process rights because each of the POF Defendants is a citizen of a different state other than New York, and pursuant to a Finder's Fee Agreement, Plaintiff agreed to submit to jurisdiction of all disputes related to the Finder's Fee Agreement in Tennessee. (See POF Ds' Reply Mem. 8-9.) But, as far as the Court can tell, the only burden on Porter or the POF Defendants would be the general inconvenience of litigating in New York. Given that the parties are dispersed across the country, it does not appear that litigating this case in New York would be any more of a hardship than if it had been brought in either Florida or Tennessee—the other jurisdictions that Defendants raise as possible fora—as almost all of the parties would

still have to travel to litigate the action in either of those venues. Further, a New York court has an interest in adjudicating claims involving a New York lawyer and his New York law firm. The reasonableness factors thus do not preclude the exercise of personal jurisdiction over Porter and the POF Defendants. *12

Because Plaintiff has made a *prima facie* showing that this Court's exercise of personal jurisdiction is appropriate under CPLR 302(a)(1) and consistent with due process requirements, Porter and the POF Defendants' motions under Rule 12(b)(2) are denied. I note, however, that while Plaintiff's averments of personal jurisdiction are sufficient at this stage, it must ultimately prove personal jurisdiction by a preponderance of the evidence should the case proceed to trial. *See CutCo,* 806 F.2d at 366. Should the evidence as developed in discovery show, for example, that the POF Defendants had nothing to do with the selection, advertisement, or use of the Wallace Defendants as Escrow Agent, a summary judgment motion could be made.

**B. RICO**

The civil RICO statute makes it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). Each of the Defendants argues—and the Court agrees—that Plaintiff's Section 1962(c) RICO claim fails as a matter of law because Plaintiff neither alleges an enterprise nor a pattern of racketeering activity. (See Porter's Mem. 11-12; Porter's Reply Mem. 4; POF Ds' Mem. 14-19; POF Ds' Reply Mem. 9-10; Wallace Ds' Mem. 7-11; Wallace Ds' Reply Mem. 3-5.)[6]

6 "Wallace Ds' Mem." refers to the Memorandum of Law in Support of the Wallace Defendants' Motion to Dismiss the Second Amended Complaint. (Doc. 35.) "Wallace Ds' Reply Mem." refers to the Reply Memorandum of Law in Further Support of the Wallace Defendants' Motion to Dismiss. (Doc. 36.)

**i. Enterprise**

A RICO "enterprise" is defined to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Where a complaint alleges an association-in- *13 fact enterprise, courts in this Circuit look to the "hierarchy, organization, and activities" of the association to determine whether "its members functioned as a unit." *First Capital Asset Mgmt. v. Satinwood, Inc.,* 385 F.3d 159, 174-75 (2d Cir. 2004) (internal quotation marks omitted); *see United States v. Turkette,* 452 U.S. 576, 583 (1981) (enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. . . . The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved . . . .")

Here, Plaintiff has not pleaded specific factual allegations to satisfy the substantive element that Defendants were involved in an "enterprise." Rather, Plaintiff's SAC contains mere legal conclusions, such as

> Defendants are an association-in-fact "enterprise" as that term is defined in 18 U.S.C. § 1961(4), that engaged in, and the activities of which affected, interstate commerce. They have been associated through time, joined in purpose, and organized in a manner amenable to hierarchical and consensual decision-making with each member fulfilling a specific and necessary role to carry out and facilitate its purpose, which was, upon information and belief, earning money fraudulently by delivering fake bank documents to its victims.

(SAC ¶ 48). The only allegations that even remotely suggest the existence of an enterprise are that "each defendant shared in profiting from the fraudulently-obtained funds in amounts presently unknown to plaintiff" and "all defendants conspired to obtain plaintiff's funds," (id. ¶ 23), but these assertions are also mere legal conclusions without factual support to demonstrate the existence of an "ongoing organization." Plaintiff has failed to provide any information from which the Court can fairly conclude that the members functioned as a
14 unit, including facts *14 regarding the hierarchy, organization, and activities of the alleged association-in-fact enterprise.[7]Thus, I do not find plausible that the alleged constituent entities formed an enterprise. *See Satinwood,* 385 F.3d at 173, 175; *see also Nasik Breeding & Research Farm Ltd. v. Merck & Co.,* 165 F. Supp. 2d 514, 539 (S.D.N.Y. 2001) (dismissing RICO claim where plaintiff merely listed members of alleged enterprise and alleged that they were "combined in an association-in-fact"; plaintiff "failed to present specific details of any hierarchy, organization, or unity among the various alleged conspirators," and "conclusory naming of a string of entities [did] not adequately allege an enterprise") (internal quotation marks omitted); *First Nationwide Bank v. Gelt Funding, Corp.,* 820 F. Supp. 89, 97-98 (S.D.N.Y. 1993) (dismissing RICO claim where plaintiff alleged that "at various times as early as 1985, and possibly earlier . . . defendants were associated in fact for the common purpose, among others, of defrauding [plaintiff] through the loan transactions described in this complaint and other means" and that "[t]his association in fact was an 'enterprise,'" and stating that "[c]onclusory allegations that disparate parties were associated in fact . . . are insufficient to sustain a RICO claim, absent allegations as to how the members were associated together in an 'enterprise'") (internal quotation marks omitted), *aff'd,* 27 F.3d 763 (2d Cir. 1994).

> 7 That the Wallace Defendants may have been Porter and the POF Defendants' agent for jurisdictional purposes does not itself mean that they together formed a continuing unit or enterprise.

Further, Plaintiff fails to allege an enterprise that is separate and distinct from the fraudulent SLC scheme in which Defendants allegedly engaged, and "[t]he non-existence of a separate enterprise is fatal to Plaintiff['s] RICO claim." *Kottler v. Deutsche Bank AG,* 607 F. Supp. 2d 447, 458-59 (S.D.N.Y. 2009) (dismissing RICO claim in fraudulent tax shelter case because plaintiff failed to show how defendants came together for a purpose
15 other than creating *15 the fraudulent tax shelters, and thus they "did not exist as an association in fact separate and apart from the alleged RICO activity").

**ii. Pattern of Racketeering Activity**

A "pattern of racketeering activity" requires a plaintiff to plead at least two predicate acts of racketeering within ten years. *See* 18 U.S.C. § 1961(5). A "pattern" is established for RICO purposes where the predicate acts "themselves amount to, or . . . otherwise constitute a threat of, *continuing* racketeering activity." *H.J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. 229, 240 (1989) (emphasis in original). The Supreme Court has explained that predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy the pattern requirement. *See id.* at 241-42. Rather, "a plaintiff in a RICO action must allege either an open-ended pattern of racketeering activity (i.e., past criminal conduct coupled with a threat of future criminal conduct) or a closed-ended pattern of racketeering activity (i.e., past criminal conduct extending over a substantial period of time)." *Satinwood,* 385 F.3d at 181 (internal quotation marks omitted); *see id.* (courts have held that two years is minimum duration for closed-ended continuity, but "mere fact that predicate acts span two years is insufficient, without more, to support a finding of a closed-ended pattern"); *see also Evercrete Corp. v. H-Cap Ltd.,* 429 F. Supp. 2d 612, 624-25 (S.D.N.Y. 2006) ("Courts have uniformly and consistently held that schemes involving a single, narrow purpose and one or few participants directed towards a single victim do not satisfy the RICO requirement of a closed or open pattern of continuity.") (internal quotation marks omitted).

The predicate acts that Plaintiff alleges are acts of wire fraud under 18 U.S.C. § 1343, (*see* SAC ¶¶ 46, 51), which is an enumerated "racketeering activity" under 18 U.S.C. § 1961(1). The wire fraud statute requires a
16 plaintiff to show the existence of a scheme to defraud, *16 defendants' knowing or intentional participation in the scheme, and the use of an interstate wire in furtherance of the scheme. *S.Q.K.F.C., Inc. v. Bell Atl. TriCon Leasing Corp.,* 84 F.3d 629, 633 (2d Cir. 1996). Further, for a civil RICO claim such as this one, where the alleged predicate acts are frauds, a plaintiff must plead these acts with particularity under Federal Rule of Civil Procedure 9(b). *Moore v. PaineWebber, Inc.,* 189 F.3d 165, 173 (2d Cir. 1999); *see Plount v. Am. Home Assurance Co.,* 668 F. Supp. 204, 206 (S.D.N.Y. 1987) ("[A]ll of the concerns that dictate that fraud be pleaded with particularity exist with even greater urgency in civil RICO actions.") "[T]he complaint [must] specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff[] contend[s] the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements," as well as "allege facts that give rise to a strong inference of fraudulent intent." *Moore,* 189 F.3d at 173 (internal quotation marks omitted); *see Cont'l Kraft Corp. v. Euro-Asia Dev. Grp., Inc.,* No. 97-CV-0619, 1997 WL 642350, at *5 (E.D.N.Y. Sept. 8, 1997) ("A claim of . . . wire fraud must specify the content, date, and place of any alleged misrepresentations and the identity of the persons making them. . . . [t]he cases are legion that a RICO complaint cannot be predicated on innocuous business communications, absent some factual basis for inferring the sender's intent to defraud the recipient via a scheme to defraud.") (third alteration in original) (internal quotation marks omitted).

Although the SAC sets forth specific statements that Plaintiff contends were fraudulent, and provides facts that give rise to an inference of fraudulent intent, the SAC is deficient for its failure to plead either an open- or closed-ended "pattern of racketeering activity." *See Ray Larsen Assocs., Inc. v. Nikko Am., Inc.,* No. 89-CV-2809, 1996 WL 442799, at *7-8 (S.D.N.Y. Aug. 6, 1996) (finding no open- or closed-ended pattern where there
17 was no threat of criminal *17 activity into future and alleged scheme lasted only seventeen months). Plaintiff does not allege any threats of future criminal conduct by the Defendants for an open-ended pattern, *cf. DeFalco v. Bernas,* 244 F.3d 286, 324 (2d Cir. 2001) (escalating nature of demands by defendants demonstrated that they had "no intention of stopping once they met some immediate goal . . . [and] would have continued extorting the plaintiffs into the future"), or conduct that lasted at least two years to form a closed-ended pattern, *see Spool v. World Child Int'l Adoption Agency,* 520 F.3d 178, 184 (2d Cir. 2008) (sixteen-month period insufficient for closed-ended continuity, especially where plaintiff did not allege separate schemes or large number of participants or victims).

Because Plaintiff fails to adequately plead the enterprise and pattern-of-racketeering-activity prongs of a civil RICO claim, the motions to dismiss this claim are granted.[8]

[8] Although the SAC does not expressly allege a RICO conspiracy claim under 18 U.S.C. § 1962(d), (but *see* P's Mem. 17 (arguing that it adequately states a claim for RICO conspiracy)), Defendants further argue in their instant motions that such claim should be dismissed, (*see* POF Ds' Mem. 19-20; POF Ds' Reply Mem. 10; Wallace Ds' Mem. 11-12; Wallace Ds' Reply Mem. 5-6). Even if Plaintiff had pleaded a RICO conspiracy claim, it would be dismissed. Section 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d). Thus, "a plaintiff must prove the existence of an agreement to violate RICO's substantive provisions" to establish a RICO conspiracy. *Cofacrèdit, S.A. v. Windsor Plumbing Supply Co.,* 187 F.3d 229, 244 (2d Cir. 1999) (internal quotation marks omitted). For the same reasons that Plaintiff "did not adequately allege a substantive violation of RICO," its conspiracy claim is "properly dismissed." *Satinwood,* 385 F.3d at 182.

**C. Fraud**

**i. Claim**

Porter and the POF Defendants argue that Plaintiff's fraud claim fails because (1) the fraud is not pleaded with particularity and (2) Plaintiff attempts to recast a breach of contract claim as a fraud claim. (See Porter's Mem. 10-11; POF Ds' Mem. 20-22.) The POF Defendants also claim that they cannot be held liable for allegedly inducing Plaintiff to enter into the SLC Agreement because the representations that Plaintiff attributes to these
18 Defendants were *18 made months after Plaintiff entered into the SLC Agreement and wired funds under it and, further, they were not parties to the SLC Agreement. (See POF Ds' Mem. 22; POF Ds' Reply Mem. 9.) The Wallace Defendants state that Plaintiff fails to plead fraud against them with particularity under Rule 9(b) because Plaintiff does not set forth any representations or statements that the Wallace Defendants made in connection with the alleged fraud. *(See* Wallace Ds' Mem. 14-17; Wallace Ds' Reply Mem 8-9.)

To plead fraud under New York law,[9] a plaintiff must plead "(1) a representation of material fact, (2) which was untrue, (3) which was known to be untrue or made with reckless disregard for the truth, (4) which was offered to deceive another or induce him to act, and (5) which that other party relied on to its injury." *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.,* 404 F.3d 566, 580 (2d Cir. 2005); *accord Eurycleia Partners,* 12 N.Y.3d at 559. Further, as discussed above, claims of fraud are subject to the heightened pleading requirement of Rule 9(b),
19 *see Aetna Cas.,* 404 F.3d at 582, which requires a party to state with particularity the *19 circumstances constituting the fraud, including (1) specifying statements that the plaintiff contends were fraudulent, (2) identifying the speaker, (3) stating where and when the statements were made, and (4) explaining why the statements were fraudulent, *Shields v. Citytrust Bancorp, Inc.,* 25 F.3d 1124, 1127-28 (2d Cir. 1994). Although intent may be averred generally under Rule 9(b), *see* Fed. R. Civ. P. 9(b), the plaintiff must allege "specific facts from which a reasonable trier of fact could directly or indirectly infer that the promisor intended not to honor his obligations at the time the promise was made," *Drexel Burnham Lambert Inc. v. Saxony Heights Realty Assocs.,* 777 F. Supp. 228, 235 (S.D.N.Y. 1991). "The requisite 'strong inference' of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Lerner v. Fleet Bank, N.A.,* 459 F.3d 273, 290-91 (2d Cir. 2006) (internal quotation marks omitted).

9 None of parties address which state's law applies to Plaintiff's tort claims. The SLC Agreement states that that agreement "shall be construed and governed by the Laws of Dade County, Florida." (SLC Agreement ¶ 5.13). The Escrow Agreement provides that it "will be governed by and construed pursuant to the laws of New York." (Escrow Agreement ¶ 11.1.) The POF Defendants note, in connection with their personal jurisdiction argument, that Plaintiff and the POF Defendants entered into a Finder's Fee Agreement in which these parties "expressly consented to jurisdiction, choice of law and performance of obligations in the State of Tennessee, not New York." (See POF Ds' Reply Mem. 2-3.) Because Plaintiff is not alleging any claims in connection with the alleged Finder's Fee Agreement, Tennessee law is inapplicable to Plaintiff's state law claims. I must thus decide whether to apply Florida or New York law to Plaintiff's fraud, conversion, and unjust enrichment claims.

"A federal district court applies the choiceoflaw rules of the State in which it sits." Grund v. Del. Charter Guarantee & Trust Co, 788 F. Supp. 2d 226, 243 (S.D.N.Y. 2011) (citing Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 494 (1941)). "'The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved.'" Md. Cas. Co. v. Cont'l Cas. Co., 332 F.3d 145, 151 (2d Cir. 2003) (quoting In re Allstate Ins. Co., 81 N.Y.2d 219, 223 (1993)). If no conflict exists, a court applies the laws of the forum state in which the action is heard. Wall v. CSX Transp., Inc., 471 F.3d 410, 42223 (2d Cir. 2006); accord Excess Ins. Co. v. Factory Mut. Ins. Co., 769 N.Y.S.2d 487, 489 (1st Dep't 2003). Because I find that no conflict exists between New York and Florida law regarding Plaintiff's claims of fraud, compare Eurycleia Partners, LP v. Seward & Kissel,

LLP, 12 N.Y.3d 553, 559 (2009), with Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc., 842 So. 2d 204, 209 (Fla. Dist. Ct. App. 2003), conversion, compare Colavito v. N.Y. Organ Donor Network, 8 N.Y.3d 43, 4950 (2006), with Edwards v. Landsman, 51 So. 3d 1208, 1213 (Fla. Dist. Ct. App. 2011), or unjust enrichment, compare Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182 (2011), with Golden v. Woodward, 15 So. 3d 664, 670 (Fla. Dist. Ct. App. 2009), I will analyze Plaintiff's state law claims under New York law.

Plaintiff plausibly alleges that each of Porter, Brigadier, and Mayes represented that he worked for POF and could obtain a $16 million standard letter of credit from USB for Plaintiff. (SAC ¶ 11.) After Plaintiff read a brochure allegedly prepared by Brigadier, Mayes, and Porter, claiming that POF could obtain "cash backed callable, lienable, transferable and assignable instruments from AS rated institutions which can be used as default collateral," (id. ¶ 15), Porter delivered the SLC Agreement by e-mail on or about December 14, 2007, which Porter signed as "Director of Finance," purportedly on behalf of POF, (id. ¶ 11; *see* SAC Ex. A). In reliance on the above representations, Plaintiff signed the SLC Agreement and wired $680,000 to the Wallace Defendants' IOLA account in exchange for the fake SLC. (See SAC ¶¶ 21, 24.) Plaintiff also plausibly alleges that the POF Defendants continued to perpetrate the fraud in follow-up communications in which they stated,
20 for example, "[t]he block has been requested for *20 your $16m instrument . . . . We will send you . . . the correspondence (I.e. [sic] Euroclear Screen Shot Confirming Block) once this task has been completed," and "[a]s soon as Ricardo finishes the Bank to Bank procedures you are ready to go." (*Id*. ¶ 19; Wise Decl. Exs. D, E.) Further, over a year after entering into the SLC Agreement, Brigadier wrote a letter to Plaintiff on POF letterhead to advise it that the SLC was due to expire and that "when you [Plaintiff] are prepared to use the Letter of Credit in an authorized transaction, we [POF] will then authorize the reissuance of the letter of credit at a reduced price of one hundred thousand €100,000.00 Euros." (SAC ¶ 19; Wise Decl. Ex. F.) These facts are sufficient for Plaintiff to aver the circumstances of the fraud with particularity under Rule 9(b).

Plaintiff also pleads facts giving rise to a strong inference of fraud. Plaintiff alleges that Porter and the POF Defendants' motive was to "profit[] from the fraudulently-obtained funds," (SAC ¶ 23), and states that they had the opportunity to carry out the alleged fraud by making "representations . . . with knowledge of their falsity or with reckless disregard for their truth, and . . . with the intention that the plaintiff rely on them," (id. ¶ 21). Further, the alleged repeated false representations, including those that the POF Defendants made months after the SLC Agreement had been signed, plausibly lulled Plaintiff into not discovering the fraud and constitute circumstantial evidence of conscious misbehavior and recklessness. Thus the facts in the SAC plausibly demonstrate that Porter and the POF Defendants made false representations to Plaintiff that induced it to act to its detriment. Because Plaintiff adequately pleads the four elements of a fraudulent inducement claim, as well
21 as the requisite mental state, with *21 particularity, the allegations against Porter and the POF Defendants in the SAC are sufficient to withstand dismissal.[10]

10 Contrary to Porter's assertion, Plaintiff does not merely recast a breach of contract claim in the language of fraud. (See Porter's Mem. 10.) Indeed, Plaintiff does not seek to bring breach of contract and fraud claims premised on the same set of facts, and, in any event, had Plaintiff brought a breach of contract claim, its fraud claim would survive the instant motions. Although "[i]t is black letter law in New York that a claim for common law fraud will not lie if the claim is duplicative of a claim for breach of contract," *Clifton v. Vista Computer Servs., LLC,* No. 01-CV-10206, 2002 WL 1585550, at *2 (S.D.N.Y. July 16, 2002); *see Richbell Info. Servs., Inc. v. Jupiter Partners, L.P.,* 765 N.Y.S.2d 575, 589 (1st Dep't 2003), "a claim based on fraudulent inducement of a contract is separate and distinct from a breach of contract claim under New York law," *Merrill Lynch & Co. v. Allegheny Energy, Inc.,* 500 F.3d 171, 184 (2d Cir. 2007) (misrepresentation of present fact gives rise to fraud claim separate from breach of contract claim); *see also Stewart v. Jackson & Nash,* 976 F.2d 86, 89 (2d Cir. 1992) (defendant's declaration that it had secured large environmental law client and was in process of establishing environmental law department were misrepresentations of fact giving rise to

separable fraud claim); *Hargrave v. Oki Nursery, Inc.,* 636 F.2d 897, 899 (2d Cir. 1980) (allegations that defendant knowingly misrepresented the health of wine grape vines, the subject of plaintiff's purchase, stated a claim for fraud); *DIRECTV Latin Am., LLC v. Park 610, LLC,* 691 F. Supp. 2d 405, 437 (S.D.N.Y. 2010) (misrepresentations regarding defendant's business structure and shares in a defendant's member corporation gave rise to fraud claim). Here, Plaintiff plausibly alleges that Porter and the POF Defendants misrepresented the present fact that POF—the company these Defendants allegedly represented—had a business relationship with UBS "that would allow them to obtain a standby letter of credit" for $16 million. (SAC ¶ 21.) Thus, Plaintiff has plausibly alleged that it was fraudulently induced to enter into the SLC Agreement. *See RKB Enters. Inc. v. Ernst & Young,* 582 N.Y.S.2d 814, 816 (3d Dep't 1992) ("A party fraudulently induced to enter into a contract may join a cause of action for fraud with one for breach of the same contract.").

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Plaintiff does not, however, make any specific allegations against the Wallace Defendants to plausibly demonstrate that they made any misrepresentations of fact or were aware of or knowingly involved in the alleged fraud. Rather, the only allegations regarding the Wallace Defendants show that that they "agreed to act" as the Escrow Agent, (SAC ¶ 25), and that they paid out the funds to the other Defendants under the Escrow Agreement, *(see id.* ¶ 32). For all one can tell from the SAC, the Wallace Defendants appear to have unknowingly received the fraudulent SLC, which looked genuine, and according to their duties under the Escrow Agreement, which "[we]re purely ministerial in nature," (SAC Ex. A, Annex E ¶ 4.1.3), disbursed the funds in accordance with the terms of the payment instructions annexed to the SLC Agreement, *(see* SAC Ex. A, Annex E; SAC Ex. A, Annex B). Nothing in the Escrow Agreement required the Wallace Defendants to call UBS to confirm the SLC's validity or to investigate the authenticity of a document that appeared in all respects
22 to be genuine. Taking the *22 facts in the light most favorable to Plaintiff, Plaintiff has not pleaded facts suggesting that the Wallace Defendants knew of the fraud; indeed, the facts as alleged are completely consistent with the Wallace Defendants having been fooled as Plaintiff was. *See Iqbal,* 129 S. Ct. at 1949 ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.") (internal quotation marks omitted). Because Plaintiff fails to set forth any facts that plausibly show that the Wallace Defendants made any misrepresentations of fact or were in on the alleged fraud, it has not nudged its claim against them across the line from conceivable to plausible, *see Twombly,* 550 U.S. at 570, and thus the fraud claim is dismissed as to these Defendants.

**ii. Request for Punitive Damages**

The POF Defendants and Wallace Defendants also argue that Plaintiff's claim for punitive damages in connection with the fraud cause of action should be dismissed because punitive damages are only awarded in "singularly rare cases," and this is not such a case. *(See* Wallace Ds' Mem. 16; POF Ds' Mem. 24-25.) Having dismissed the fraud claim as to the Wallace Defendants, I address this motion only with respect to the POF Defendants.

For punitive damages to be awarded in a tort action, "[t]here must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton." *Fortnow v. Hughes Hubbard & Reed, LLP,* No. 125924/02, 2005 WL 3506955, at *4 (N.Y. Sup. Ct. 2005) (internal quotation marks omitted); *accord Goldberg v. UBS AG,* 660 F. Supp. 2d 410, 428 (E.D.N.Y. 2009). The conduct alleged must be "intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence . . . [and] must be supported by clear, unequivocal and convincing evidence." *Fortnow,* 2005 WL
23 *23 3506955, at *4 (internal quotation marks omitted). Further, "a private party seeking to recover punitive damages must not

only demonstrate egregious tortious conduct by which he was aggrieved and which is actionable as an independent tort, but also that such conduct was part of a pattern of similar conduct directed at the public generally." *Id.*; *accord N.Y. Univ. v. Cont'l Ins. Co.,* 87 N.Y.2d 308, 316 (1995).

Although Plaintiff has not addressed this aspect of Defendants' motions, and I could thus regard the claim as abandoned, *see Adams v. N.Y. State Educ. Dep't,* 752 F. Supp. 2d 420, 452 n.32 (S.D.N.Y. 2010) (collecting cases), I decline to do so. For the reasons set forth above regarding the fraud claim, I cannot say at this stage that it is implausible that the Porter and the POF Defendants acted with fraudulent or evil motive in setting up the SLC transaction or sending the fake SLC to Plaintiff. Further, Plaintiff alleges that the POF Defendants advertised their services, apparently widely, through brochures and a website, (*see* SAC ¶¶ 15, 16, 27), and that there are potentially other victims of similar conduct by these Defendants, (*see id.* ¶¶ 26, 28). Should the facts as developed in discovery show that Plaintiff cannot prove this claim by clear, unequivocal, and convincing evidence, the matter may be revisited on summary judgment. For now, the POF Defendants' motion regarding Plaintiff's punitive damages claim is denied.

**D. Conversion**

Next, Porter and the POF Defendants argue that Plaintiff's conversion claim fails because Plaintiff does not to allege which Defendants were responsible for the alleged conversion or that Defendants exercised dominion over Plaintiff's funds to the exclusion of Plaintiff's rights. (See Porter's Mem. 12-13; POF Ds' Mem. 23-24.)

To state a claim for conversion under New York law, a plaintiff must allege "(1) legal ownership or an
24 immediate superior right of possession to a specific identifiable thing and (2) *24 that the defendant exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of the plaintiff's rights." *Ancile Inv. Co. v. Archer Daniels Midland Co.,* 784 F. Supp. 2d 296, 312 (S.D.N.Y. 2011) (internal quotation marks omitted); *accord Colavito,* 8 N.Y.3d at 49-50 ("A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession."). Further, a conversion can occur even in situations "where possession of property is initially lawful, . . . when there is a refusal to return the property upon demand." *Salatino v. Salatino,* 881 N.Y.S.2d 721, 723 (3d Dep't 2009). Where money is the subject property of a conversion claim, the "money 'must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner.'" *Robert Smalls Inc. v. Hamilton,* No. 09-CV-7171, 2010 WL 3238955, at *8 (S.D.N.Y. July 19, 2010) (quoting *Key Bank of N.Y. v. Grossi,* 642 N.Y.S.2d 403, 405 (3d Dep't 1996)).

Plaintiff plausibly alleges that it wired $680,000 to the Wallace Defendants, which was subsequently disbursed to the Defendants in accordance with the payment instructions annexed to the SLC Agreement, (SAC ¶¶ 22, 29; *see* SAC Ex. A, Annex B), and that, although Plaintiff made a demand for the return of its funds, Defendants refused to return the money, (SAC ¶ 34). Even if the Wallace Defendants initially possessed the money lawfully pursuant to the Escrow Agreement, the later possession by Porter and the POF Defendants was plausibly unlawful given that they allegedly obtained release of the money by sending the fraudulent SLC, accepted payment under the SLC Agreement, and then refused to deliver the funds back to Plaintiff upon demand.
25 Accordingly, the allegations in the SAC plausibly plead a claim for conversion under *25 New York law against Porter and the POF Defendants, and their motions to dismiss this claim are denied.

**E. Unjust Enrichment**

Plaintiff brings its third cause of action against all the Defendants for unjust enrichment, and seeks for the Court to "impose a constructive trust on the funds of plaintiff so obtained [by fraud] by defendants." (See SAC ¶¶ 41-44.) Porter argues that Plaintiff's unjust enrichment claim fails for the same reason as its conversion claim —namely, that Plaintiff does not allege which Defendants were unjustly enriched—and because the claim is really one for breach of contract. (See Porter's Mem. 13-14.) The POF Defendants argue that Plaintiff has failed to establish why a constructive trust should be imposed because Plaintiff does not allege what promise the POF Defendants made to Plaintiff, how they were unjustly enriched, or the requisite confidential or fiduciary relationship. *(See* POF Ds' Mem. 22-23.)

**i. Claim**

A cognizable unjust enrichment claim requires a showing "1) that the defendant benefitted; 2) at the plaintiff's expense; and 3) that 'equity and good conscience' require restitution." *Kaye v. Grossman,* 202 F.3d 611, 616 (2d Cir. 2000); *accord Mandarin Trading,* 16 N.Y.3d at 182. "The 'essence' of such a claim 'is that one party has received money or a benefit at the expense of another.'" *Kaye,* 202 F.3d at 616 (quoting *City of Syracuse v. R.A.C. Holding, Inc.,* 685 N.Y.S.2d 381, 382 (4th Dep't 1999)). "Enrichment alone will not suffice to invoke the remedial powers of a court of equity. Critical is that under the circumstances and as between the two parties to the transaction the enrichment be unjust." *1133 Taconic, LLC v. Lartrym Servs., Inc.,* 925 N.Y.S.2d 840 (2d Dep't 2011) (internal quotation marks omitted). *26

Here, Plaintiff has plausibly alleged that Porter and the POF Defendants made false representations to Plaintiff regarding the SLC to fraudulently obtain $440,000 and $240,000, respectively, and thus they were unjustly enriched when they sent the fake SLC in return. Accordingly, Porter and the POF Defendants' motions to dismiss Plaintiff's unjust enrichment claim are denied.

**ii. Constructive Trust**

A constructive trust is a "fraud-rectifying remedy," *Bankers Sec. Life Ins. Soc. v. Shakerdge,* 49 N.Y.2d 939, 940 (1980) (internal quotation marks omitted), the purpose of which is to prevent unjust enrichment, *Simonds v. Simonds,* 45 N.Y.2d 233, 242 (1978). "Under New York law, the equitable remedy of a constructive trust is appropriate when there is clear and convincing evidence of (1) a confidential or fiduciary relationship; (2) an express or implied promise; (3) a transfer in reliance on such a promise; and (4) unjust enrichment." *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.,* 380 F.3d 624, 646 (2d Cir. 2004); *accord Depena v. Shocker,* 922 N.Y.S.2d 119, 120-21 (2d Dep't 2011). Although the Second Circuit has held that a constructive trust is "a flexible device" that cannot be "bound by an unyielding formula," *Golden Budha Corp. v. Canadian Land Co. of Am., N.V.,* 931 F.2d 196, 202 (2d Cir. 1991) (internal quotation marks omitted), and that the lack of a confidential or fiduciary relationship does not "automatically defeat[] [a] claim of constructive trust . . . when [use of such device is] otherwise required by equity," *Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag, Controle et Revision S.A.),* 961 F.2d 341, 353 (2d Cir. 1992), courts have found that the failure to plead a confidential or fiduciary relationship can be fatal to a claim for a constructive trust, *see, e.g., Atateks Foreign Trade Ltd. v. Dente,* 798 F. Supp. 2d 506, 507 (S.D.N.Y. 2011) (dismissing claim for constructive trust *27 where plaintiff failed to allege a confidential or fiduciary relationship with defendant); *Pons v. People's Republic of China,* 666 F. Supp. 2d 406, 415 (S.D.N.Y. 2009) (same); *DLJ Mortg. Capital, Inc. v. Kontogiannis,* No. 08-CV-4607, 2009 WL 1652253, at *4 (E.D.N.Y. June 4, 2009) (same); *Faulkner v. Arista Records LLC,* 602 F. Supp. 2d 470, 484 (S.D.N.Y. 2009) (dismissing claim for constructive trust where plaintiff alleged fiduciary relationship, but court concluded that no such relationship existed).

Plaintiff does not plead—and the facts as alleged in the SAC do not suggest—that the SLC transaction was anything more than a garden-variety arm's-length transaction. *See Diversified Carting, Inc. v. City of N.Y.,* No. 04-CV-9507, 2006 WL 147584, at *10 (S.D.N.Y. Jan. 20, 2006) ("Purely commercial transactions do not give rise to a fiduciary relationship.") (internal quotation marks omitted). Plaintiff's failure to set forth facts from which the Court can infer that any of the Defendants stood in a confidential or fiduciary capacity with respect to Plaintiff "is fatal to its claim for a constructive trust," *Atateks,* 798 F. Supp. 2d at 507; *compare In re Koreag,* 961 F.2d at 353-54 (finding absence of fiduciary relationship did not defeat claim for constructive trust where equity "otherwise required" such finding based on defendant's status as liquidator for insolvent estate, which rendered it in "fiduciary status vis-a-vis creditors of the insolvency estate"), *with Atateks,* 798 F. Supp. 2d at 507 (determining that "there [we]re no similar considerations [as those found in *In re Koreag]* that warrant[ed] dispensing with the requirement of a confidential or fiduciary relationship between the parties"). The claim for a constructive trust is therefore dismissed.

## IV. LEAVE TO AMEND

Leave to amend a complaint should be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). It is
28 within the sound discretion of the district court to grant or deny leave to amend. *28 *McCarthy v. Dun & Bradstreet Corp.,* 482 F.3d 184, 200 (2d Cir. 2007). "Leave to amend, though liberally granted, may properly be denied for: 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.'" *Ruotolo v. City of N.Y.*, 514 F.3d 184, 191 (2d Cir. 2008) (quoting *Foman v. Davis,* 371 U.S. 178, 182 (1962)). Amendment is futile when the claim as amended cannot "withstand a motion to dismiss pursuant to Rule 12(b)(6)," and "[i]n deciding whether an amendment is futile, the court uses the same standard as those governing the adequacy of a filed pleading." *MacEntee v. IBM,* 783 F. Supp. 2d 434, 446 (S.D.N.Y. 2011) (internal quotation marks omitted). Where the problem with a claim "is substantive . . . better pleading will not cure it," and "[r]epleading would thus be futile." *Cuoco v. Moritsugu,* 222 F.3d 99, 112 (2d Cir. 2000).

At a pre-motion conference held on March 28, 2011, Defendants apprised Plaintiff of the grounds upon which they intended to (and ultimately did) base their motions to dismiss, and I gave Plaintiff a second chance to amend its pleadings after I flagged additional defects that Plaintiff needed to cure. I further stated that I would not give Plaintiff leave to amend again on any defects to which the Defendants or I alerted it at the conference. Plaintiff's failure to fix some deficiencies in its previous pleadings alone is sufficient ground to deny leave to amend *sua sponte. See In re Eaton Vance Mut. Funds Fee Litig.,* 380 F. Supp. 2d 222, 242 (S.D.N.Y. 2005) (denying leave to amend because "the plaintiffs have had two opportunities to cure the defects in their complaints, including a procedure through which the plaintiffs were provided notice of defects in the Consolidated Amended Complaint by the defendants and given a chance to amend their Consolidated Amended
29 Complaint," and "plaintiffs have not submitted a proposed amended *29 complaint that would cure these pleading defects"), *aff'd sub nom. Bellikoff v. Eaton Vance Corp.,* 481 F.3d 110, 118 (2d Cir. 2007) ("plaintiffs were not entitled to an advisory opinion from the Court informing them of the deficiencies in the complaint and then an opportunity to cure those deficiencies") (internal quotation marks omitted); *see also Ruotolo,* 514 F.3d at 191 (affirming denial of leave to amend "given the previous opportunities to amend"). Further, Plaintiff has not requested leave to file a Third Amended Complaint or otherwise suggested that it is in possession of facts that could cure the pleading deficiencies in its RICO or constructive trust claims or the fraud claim against the Wallace Defendants. Accordingly, I decline to grant Plaintiff leave to amend *sua sponte* with respect to the dismissed claims. *See, e.g., Gallop v. Cheney,* 642 F.3d 364, 369 (2d Cir. 2011) (no error in failing to grant leave to amend where it was not sought); *Walton v. Morgan Stanley & Co.,* 623 F.2d 796, 799 n.7 (2d Cir. 1980)

("[A]ppellants never sought leave to amend their complaint either in the district court or as an alternative form of relief in this court after [appellee] raised the issue of the sufficiency of appellants' complaint. Accordingly, we see no reason to grant such leave sua sponte."). *30

## V. CONCLUSION

For the foregoing reasons, the motions of Porter and the POF Defendants are GRANTED as to the RICO and constructive trust claims, and DENIED as to the fraud, conversion, unjust enrichment, and punitive damages claims. The Wallace Defendants' motion is GRANTED as to the RICO and fraud claims. The Clerk of Court is respectfully directed to terminate the pending motions. (Docs. 33, 37, 43.) The parties are to appear for a status conference on **April 23, 2012** at **4:30 p.m.**

## SO ORDERED.

DATED: White Plains, New York

March 23, 2012

_____

Cathy Seibel, U.S.D.J.

No. 08 Civ. 6893(VM)
United States District Court, S.D. New York.

# Kregler v. City of New York

821 F. Supp. 2d 651 (S.D.N.Y. 2011)
Decided Oct 26, 2011

No. 08 Civ. 6893(VM).

2011-10-26

William KREGLER, Plaintiff, v. CITY OF NEW YORK et al., Defendants.

Nathaniel B. Smith, Law Office of Nathaniel B. Smith, New York, NY, for Plaintiff. Christopher Aaron Seacord, New York City Law Department, New York, NY, for Defendants.

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VICTOR MARRERO

653 *653 Nathaniel B. Smith, Law Office of Nathaniel B. Smith, New York, NY, for Plaintiff. Christopher Aaron Seacord, New York City Law Department, New York, NY, for Defendants.

## *DECISION AND ORDER*

## VICTOR MARRERO, District Judge.

Plaintiff William Kregler ("Kregler") brought this action pursuant to 42 U.S.C. § 1983 ("§ 1983") against the City of New York ("City") and individual defendants ("Individual Defendants") Louis Garcia ("Garcia"), Rose Gill Hearn ("Hearn"), Keith Schwam ("Schwam"), Darren Keenaghan ("Keenaghan"), Brian Grogan ("Grogan"), and Jayme Naberezny ("Naberezny"). At all relevant times, the Individual Defendants were employees of the City's Fire Department ("FDNY") or Department of Investigation ("DOI"). On August 13, 2010, the City and Garcia answered the Second Amended Complaint.[1] That same day, Hearn, Schwam, Keenaghan, and Grogan moved pursuant to Rules 12(b)(1), (4) and (6) of the Federal Rules of Civil Procedure ("Federal Rules") to dismiss the Second Amended Complaint for failure to state a claim. In addition, Naberezny moved to dismiss the Seconded Amended Complaint as time barred. Because the parties' briefs referred to materials outside the pleadings, the Court, by Decision and Order dated March 9, 2011 (the "Order"), converted Individual Defendants' motion to a motion for summary judgment (the "Motion") pursuant to Rule 12(d) of the Federal Rules and directed the parties to submit supplemental briefing and any relevant, additional evidence. For the reasons stated below, the Court now GRANTS the Motion.

[1] Although entitled "First Verified Amended Complaint," the operative pleading, dated July 9, 2010 (Docket No. 39), is actually the second amended complaint filed by Kregler. Accordingly, for the sake of accuracy, it will be referred to as the "Second Amended Complaint" or "Compl."

## I. *BACKGROUND* [2]

2 The Court derives the factual summary from (1) the recitation of the pertinent pleadings and other matters of record set forth in the Order, *see Kregler v. City of New York,* 770 F.Supp.2d 602 (S.D.N.Y.2011); (2) the Second Amended Complaint; (3) Local Civil Rule 56.1 Statement of Undisputed Facts in Support of Defendants Naberezny, Gill Hearn, Schwam, and Grogan's Converted Motion for Summary Judgment, dated May 20, 2011; and (4) Local Civil Rule 56.1 Opposition Statement of Disputed Facts in Opposition to Motion for Summary Judgment, dated June 27, 2011. Except where specifically referenced, no further citation to these sources will be made.

654 In April of 2004, one month following his retirement from his position as a Fire *654 Marshal with the FDNY after being employed there for 20 years, Kregler filed a preliminary application and questionnaire for appointment by the City's Mayor as a City Marshal. Candidates for appointment as City Marshals are subject to an investigation by DOI of their personal and financial background and must complete a DOI-administered training program. In January of 2005, Kregler was interviewed by representatives of the Mayor's Committee on City Marshals and was later notified by Schwam, an Assistant Commissioner at DOI, that DOI would commence its personal and financial review of Kregler's background. Kregler met in April of 2005 with Keenaghan, a DOI investigator, to discuss Kregler's preliminary application. Kregler then made minor modifications to the application, signed the revised form, and provided authorizations for release of his personal information.

On May 25, 2005, Kregler, in his capacity as President of the Fire Marshals Benevolent Association, publicly endorsed the candidacy of Robert Morgenthau ("Morgenthau") for re-election as District Attorney for New York County. At that time, all other law enforcement associations in the City, including two unions of firefighters, supported Morgenthau's opponent, Leslie Crocker Snyder ("Snyder"). An article that appeared in a June 2005 edition of *The Chief,* a local newspaper, reported on Kregler's endorsement of Morgenthau. Grogan, an FDNY Supervising Fire Marshal, posted a copy of that article in a public area within one of the FDNY offices. Kregler alleges that Grogan then "berated" him for the endorsement, stating: "who the f___ do you think you are. Louie [Garcia] makes the endorsement." (Compl. ¶ 29.) At the time of that incident, Garcia was the Chief Fire Marshal of the FDNY's Bureau of Fire Investigation. Both Garcia and Grogan supported Snyder's political campaign against Morgenthau.

On July 7, 2005, Kregler was interviewed by staff of the Mayor's Office in connection with his City Marshal application and the following day was told by Schwam that the next step in the process would be the completion of the DOI background check. To that end, Kregler met a second time with Keenaghan to update and re-file his application. In September of 2005, Schwam invited Kregler and four other candidates to begin the DOI training classes, which Kregler successfully completed. In November of 2005, Kregler satisfied the last requirement for appointment by demonstrating his ability to obtain a bond. In March of 2006, Kregler was informed by letter from Schwam that he would not be appointed as a City Marshal.

Kregler filed this action in August of 2008, raising a claim of First Amendment retaliation under § 1983. Kregler contends that the explanation proffered to him for the denial of his application—Kregler's failure to disclose details of a Command Discipline he had received in 1999 during his employment by the FDNY—was merely a pretext for defendants' unlawful retaliation for his endorsement of Morgenthau.

On December 2, 2008, defendants moved to dismiss the first amended complaint, dated November 14, 2008 ("First Amended Complaint"), asserting that Kregler failed to state a claim upon which relief could be granted. By Decision and Order dated March 16, 2009, 608 F.Supp.2d 465 (S.D.N.Y.2009), the Court deferred ruling on
655 the motion to dismiss pending the outcome of a preliminary hearing pursuant to *655 Rule 12(i) of the Federal Rules ("Rule 12(i) Hearing"). The Court conducted the Rule 12(i) Hearing on July 16, 2009 and heard the parties' further oral arguments on July 18, 2009. On August 14, 2009, by Decision and Order, the Court

dismissed the First Amended Complaint in its entirety. Kregler appealed and, on May 3, 2010, the United States Court of Appeals for the Second Circuit issued a summary order ("Summary Order") vacating the order of dismissal and remanding the case to this Court for further proceedings. *See Kregler v. City of New York,* 375 Fed.Appx. 143, 144 (2d Cir.2010).

On July 9, 2010, Kregler filed his Second Amended Complaint in which, among other things, he added Naberezny, the Inspector General for the DOI, as a defendant. Also Kregler now alleges that Garcia was "personally and socially acquainted" with Naberezny (Compl. ¶ 40) and that the two "agreed to cause Kregler's application for appointment as a City Marshal to be rejected by DOI in retaliation for Kregler's support of Morgenthau." (Compl. ¶ 43.) The Individual Defendants again moved to dismiss, and the Court converted the motion to a motion for summary judgment.

## II. *LEGAL STANDARD*

In connection with a Rule 56 motion, "[s]ummary judgment is proper if, viewing all the facts of the record in a light most favorable to the non-moving party, no genuine issue of material fact remains for adjudication." *Samuels v. Mockry,* 77 F.3d 34, 35 (2d Cir.1996) ( *citing Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The role of a court in ruling on such a motion "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. U.S. Fire Ins. Co.,* 804 F.2d 9, 11 (2d Cir.1986).

The moving party bears the burden of proving that no genuine issue of material fact exists, or that due to the paucity of evidence presented by the non-movant, no rational jury could find in favor of the non-moving party. *See Gallo v. Prudential Residential Servs., L.P.,* 22 F.3d 1219, 1223 (2d Cir.1994). The opposing party cannot defeat summary judgment by relying on the allegations in the complaint, conclusory statements, or mere assertions that affidavits supporting the motion are not credible. *See Gottlieb v. Cnty. of Orange,* 84 F.3d 511, 518 (2d Cir.1996).

To succeed on his First Amendment retaliation claim under § 1983, Kregler must show that: (1) he engaged in constitutionally protected speech; (2) he suffered an adverse employment action; and (3) a causal connection exists between the speech and the adverse employment action "so that it can be said that the speech was a motivating factor in the determination." *Washington v. Cnty. of Rockland,* 373 F.3d 310, 320 (2d Cir.2004).

It is well settled in the Second Circuit that "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994) (internal quotation marks omitted). Personal involvement, however, is not limited to direct participation in the deprivation of rights at issue. Kregler may show the personal involvement of the Individual Defendants in several ways, such as by establishing that each defendant: (1) directly participated in the infraction; (2) failed to remedy the wrong after learning of the violation; (3) created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue; (4) was grossly
656 negligent in *656 managing subordinates who caused the unlawful condition or event; or (5) exhibited "gross negligence" or "deliberate indifference" to the constitutional rights of Kregler by having actual or constructive notice of the unconstitutional practices and failing to act. *See Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995); *see also Wright,* 21 F.3d at 501.

## III. *DISCUSSION*

### A. *CLAIMS AGAINST HEARN*

In his First Amended Complaint, "to amplify his allegations against Hearn" and avoid motion practice (Pl. Mem. 8), Kregler advanced the theory that the personal relationship between Hearn and Garcia provided the impetus by which the two of them allegedly agreed to reject Kregler's application for City Marshal in retaliation for supporting Morgenthau. However, after hearing testimony at the Rule 12(i) Hearing, Kregler's counsel stated on the record:

[s]o what I have here is a situation where I think I've named the wrong defendant. And, in fact, I would like to make an application to the Court to substitute in Naberezny for Gill Hearn because it looks to me like the discussion, the understanding about Kregler not becoming a sheriff that was had, was had between Naberezny and Garcia and not between Garcia and Gill Hearn. (Hr'g Tr. 26:18–26:24, July 28, 2009.)

Subsequently, Kregler substituted Naberezny's name for Hearn's in the Second Amended Complaint. He now maintains that it was Naberezny who had the relationship with Garcia and that it was Naberezny who colluded with Garcia to cause the denial of Kregler's appointment.[3] Despite the evidence adduced at the Rule 12(i) Hearing and the statements of Kregler's counsel, Kregler continues to pursue a claim against Hearn as Commissioner of the DOI, who "was responsible for training, investigation, and oversight of City Marshals." (Compl. ¶ 6.) Hearn argues that the claims against her must be dismissed because Kregler's counsel admitted on the record that there is no factual basis for alleging Hearn was aware of any retaliatory action taken against Kregler.

[3] The Second Amended Complaint states that "Naberezny and Garcia are personally and socially acquainted" (Compl. ¶ 40) and they "agreed to cause Kregler's application for appointment as a City Marshal to be rejected by DOI in retaliation for Kregler's support of Morgenthau." (Compl. ¶ 41.)

"[A]bsent egregious circumstances, a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in his professional capacity binds his client as a judicial admission." *Haywood v. Bureau of Immigration,* 372 Fed.Appx. 122, 124 (2d Cir.2010). "[H]owever, to bind the client by such statements, they must constitute 'a clear and unambiguous admission of fact.' " *Stowe v. Nat'l R.R. Passenger Corp. ("Amtrak"),* No. 08 Civ. 4767, 793 F.Supp.2d 549, 554, 2011 WL 2516939, at *2 (E.D.N.Y. June 23, 2011) ( *quoting United States v. McKeon,* 738 F.2d 26, 30 (2d Cir.1984)). Only statements of facts as opposed to legal arguments made to a court are considered judicial admissions. *N.Y. State Nat'l Org. for Women v. Terry,* 159 F.3d 86, 97 n. 7 (2d Cir.1998).

A review of the record suggests that Kregler's counsel made a clear and unequivocal statement to substitute Hearn for Naberezny as a defendant. Even if the Court were to construe counsel's statements as "legal conclusions" as Kregler suggests (Pl. Mem. 10.), Kregler admits that naming Hearn as a defendant based solely on her alleged relationship with Garcia was an error. Therefore, to defeat the motion for summary judgment, it
657 is incumbent*657 upon Kregler to offer another theory of liability supported by evidence that establishes Hearn's personal involvement. Kregler presents only conclusory statements that Hearn was deliberately indifferent to facts showing that his rights were being violated and that she terminated his application based on unsubstantiated information provided by Naberezny; Kregler offers no evidence supported by the record to advance such contentions. *See Niagara Mohawk Power Corp. v. Jones Chem., Inc.,* 315 F.3d 171, 175 (2d Cir.2003) ("Conclusory allegations, conjecture, and speculation ... are insufficient to create a genuine issue of fact.").

Kregler argues that it is premature for the Court to decide the issue of Hearn's liability without providing him an opportunity to take complete discovery. The Court disagrees. Not only did Kregler have an opportunity to elicit testimony from Hearn at the Rule 12(i) Hearing regarding her personal involvement, but the Court

explicitly stated in its Order that to decide the issue at hand it was necessary for the parties to submit additional material that they believed pertinent to the motion for summary judgment. ( *See* Order at 9.) Although the Court considers Kregler's arguments regarding Hearn's liability to be mere conjecture (i.e., that Hearn was deliberately indifferent and that she terminated Kregler's application based on weak grounds), even if evidence existed to support that conclusion, Kregler's claim against Hearn still fails as a matter of law. *See Whitfield v. Imperatrice,* No. 09 Civ. 3395, 2010 WL 6032636, at *12 (E.D.N.Y. Sept. 17, 2010) (finding no personal involvement for individual defendants where defendant provided "no evidence that these individuals were aware of his complaints to the Office of Court Administration" and thus individual defendants "could not possibly have been 'prompted' or motivated to act in retaliation for plaintiff's complaints"). Here, Kregler has not demonstrated that Hearn had any actual or constructive knowledge of any intent to retaliate against Kregler because of his endorsement of Morgenthau—a necessary element to establish Hearn's personal involvement. Accordingly, upon review of the record and the parties' submissions, the Court finds that Kregler has not established any genuine issue of material fact suggesting that Hearn was personally involved in the alleged constitutional violation. The claims against Hearn are therefore dismissed. **B. *CLAIMS AGAINST SCHWAM AND KEENAGHAN***

Kregler alleges in his Second Amended Complaint that Schwam and Keenaghan were aware that the explanation proffered to Kregler for the denial of his application was false, but "deliberately decided to look the other way." (Compl. ¶ 49.) In their motion to dismiss, Schwam and Keenaghan argue that the claims against them must be dismissed because they lacked the authority to cure the alleged constitutional violation. Kregler, on the other hand, contends that the Second Circuit has already rejected Schwam's and Keenaghan's arguments relating to their lack of personal involvement or authority to remedy the constitutional violation in the Summary Order. Thus, he asserts that under the "law of the case" doctrine, the Court must reject those arguments here.

"The 'law of the case' doctrine is a rule of practice followed by New York courts that dictates that 'a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation.' " *Westerbeke Corp. v. Daihatsu Motor Co.,* 304 F.3d 200, 218 (2d Cir.2002) (citations omitted). In its Summary Order, the Second Circuit stated: "We have considered all of defendants' contentions
658 in *658 support of the Rule 12(b)(6) dismissal and have found them to be without merit." *Kregler,* 375 Fed.Appx. at 144. The Second Circuit, however, did not specify in its ruling what arguments were raised in support of defendants' previous motion to dismiss. Accordingly, the Court converted Schwam's and Keenaghan's second motion to dismiss to a motion for summary judgment to allow the parties an opportunity to provide additional briefing and materials regarding the issues raised and considered on appeal to assist the Court in determining whether the "law of the case" doctrine applies.

After review of the parties' submissions and the appellate record, the Court finds that the "law of the case" doctrine does not control here because the Second Amended Complaint alleges materially different and more detailed claims than the Amended Complaint, which was the subject of the Summary Order. *See Bellezza v. Holland,* No. 09 Civ. 8434, 2011 WL 2848141, at *3 (S.D.N.Y. July 12, 2011) (finding that "law of the case" doctrine is inapplicable where subsequent complaint is materially different and more detailed than original complaint reviewed by appellate court). For example, the Second Amended Complaint alleges that "Garcia and Naberezny agreed to cause Kregler's application for appointment as City Marshal to be rejected by DOI in retaliation for Kregler's support of Morgenthau" (Compl. ¶ 43), whereas the First Amended Complaint does not contain any specific allegations as to who was responsible for making the decision to terminate Kregler's application. In the First Amended Complaint, Kregler advanced the theory that Schwam and Keenaghan

directly participated in the alleged violation of his constitutional rights, but in the Second Amended Complaint he asserts that they were deliberately indifferent. Specifically, Kregler alleges that Schwam and Keenaghan knew that the City's stated reason for rejecting his application was false, but "deliberately decided to look the other way." (Compl. ¶ 49.) The First Amended Complaint did not advance a theory of deliberate difference and thus the Second Circuit could not have rejected that mode of liability regarding Schwam and Keenaghan.

Since the "law of the case" doctrine is inapplicable here, the Court will proceed to determine whether Kregler's claims against Schwam and Keenaghan fail as a matter of law.[4] Schwam and Keenaghan contend that, under a theory of deliberate indifference, an individual who lacks the authority to remedy or "take action with respect to any constitutional violation" cannot be found to be personally involved. *Koulkina v. City of New York,* 559 F.Supp.2d 300, 317 (S.D.N.Y.2008); *see also Keesh v. Goord,* No. 04 Civ. 271A, 2007 WL 2903682, at *6 (W.D.N.Y. Oct. 1, 2007) (finding no personal involvement where defendant who oversaw prisoner grievances signed determination made by committee on plaintiff's grievance but did not have voting power regarding decision); *Brody v. McMahon,* 684 F.Supp. 354, 355 (N.D.N.Y.1988). Kregler argues that the issue of whether Schwam and Keenaghan are subordinates is based on factual contentions that cannot be decided until he has an opportunity to develop a full record. However, in the Second Amend Complaint, Kregler concedes that both Schwam and Keenaghan were subordinates of Hearn. ( *See* Compl. ¶¶ 7–8.) Because it is undisputed that Schwam and Keenaghan were subordinates and thus lacked the authority to prevent the alleged constitutional violation*659 caused by their supervisor, Kregler's claim of deliberate indifference fails as a matter of law.[5]

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[4] Schwam was the Director of the Marshal's Bureau of the DOI, directly reporting to Hearn. Keenaghan was an investor in the Background Unit of the Marshal's Bureau, directly reporting to Schwam.

[5] Once again Kregler argues that even if Schwam and Keenaghan are subordinates, as law enforcement officers, they have a duty to intervene. Further, Kregler contends that as City employees, Schwam and Keenaghan have an affirmative duty to intervene to prevent an illegality under the Mayor's Executive Order 16. In the Order, the Court already considered and rejected such arguments. ( *See* Order at 13 n. 4.)

Kregler maintains that deliberate indifference is not the only theory of liability that he advances against Schwam and Keenaghan. Rather, he argues that Schwam and Keenaghan were "primary participants in the illegal conduct as aiders and abettors of that conduct." (Pl. Mem. 15.) Kregler, however, offers no evidence in support of such a theory other than his conclusory statements. The only reference the Court can find in the record relating to "aiding and abetting" is Kregler's allegation in the Second Amended Complaint stating that "while acting under color of law, the individual defendants, and those whose were acting at their direction ... aided, abetted and participated in the violation by the other individual defendants of Kregler's rights, because he expressed his opinions with regard to matters of public concern." (Compl. ¶ 80.) Yet there is no specific identification of which individual defendants aided and abetted in the purported constitutional violation against Kregler. This is not enough to defeat a motion to dismiss, let alone a motion for summary judgment. *See Niagara Mohawk Power Corp.,* 315 F.3d at 175.

Furthermore, Kregler's allegation that Schwam and Keenaghan misused their authority to cause the rejection of his application is wholly inconsistent with his allegation that Garcia and Naberezny were the individuals who colluded to cause the rejection of his application. ( *Compare* Compl. ¶ 43 (allegations regarding Garcia and Naberezny) *with* Compl. ¶ 71 (allegations regarding Schwam and Keenaghan).) Kregler offers no explanation to reconcile these two separate and conflicting allegations. He cannot have it both ways. *See Shabazz v. Pico,* 994 F.Supp. 460, 470 (S.D.N.Y.1998) ("[W]hen the facts alleged are so contradictory that doubt is cast upon their plausibility, [the court may] pierce the veil of the complaint's factual allegations, dispose of some

improbable allegations, and dismiss the claim." (internal quotation marks omitted)). Kregler's entire theory of liability as against Naberezny rests on the argument that she and Garcia had a personal relationship and together they agreed to cause the termination of Kregler's application by providing false information to Hearn. That is irreconcilable with the allegation that Schwam and Keenaghan were the parties who caused the rejection because of Kregler's endorsement of Morgenthau. Accordingly, because no genuine issue of material fact exists as to the personal involvement of Schwam and Keenaghan, they are dismissed from this action. **C. *CLAIMS AGAINST GROGAN***

In the Second Amended Complaint, Kregler alleges that Grogan was upset about Kregler's endorsement of Morgenthau and that he and Garcia "agreed to take steps to prevent Kregler's appointment in retaliation for Kregler's endorsement." (Compl. ¶¶ 29, 39.) Grogan argues that the claims against him must be dismissed because of his lack of personal involvement, namely his inability to remedy the alleged constitutional violation.

As with Schwam and Keenaghan, Kregler maintains that the "law of the case" doctrine bars dismissal of his
660 claims as against Grogan. The Court finds that *660 doctrine inapplicable to the case at hand. "The law of the case doctrine prevents relitigation of an issue decided at an earlier point in an action only if the 'court was ever squarely presented with the question.' " *Ancile Inv. Co. v. Archer Daniels Midland Co.,* No. 08 Civ. 9492, 2011 WL 3516128, at *1 (S.D.N.Y. Aug. 3, 2011) ( *citing Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber,* 407 F.3d 34, 44 (2d Cir.2005)). Because the Second Circuit was never squarely presented with the question as to whether Grogan lacked the authority to take action to remedy the wrong, the doctrine is not controlling. Therefore, Grogan is not precluded from advancing that argument here.

At the Rule 12(i) Hearing, Kregler testified that he had no evidence to suggest that Grogan was a decision maker with respect to his application for City Marshal or that Grogan had any conversation with personnel at DOI concerning the application. ( *See* Hr'g Tr. 84:11–85:6, July 16, 2009.) Even if Grogan were aware of the purported constitutional violation, Kregler fails to explain how Grogan, an employee of the FDNY, can be held personally liable for a final decision made solely by the DOI commissioner. Accordingly, because Kregler has not established any genuine issues of material fact as to Grogan's personal involvement in the alleged constitutional violation committed against him, the claims against Grogan are dismissed. **D. *CLAIMS AGAINST NABEREZNY***

In her motion to dismiss, Naberezny argues that the claims against her are time barred. "[T]he timeliness of a discrimination claim is measured from the date the claimant receives notice of the allegedly discriminatory decision, not from the date the decision takes effect." *O'Malley v. GTE Serv. Corp.,* 758 F.2d 818, 820 (2d Cir.1985); *see also Pearl v. City of Long Beach,* 296 F.3d 76, 80 (2d Cir.2002). It is undisputed that the decision to terminate Kregler's application for the position of City Marshal occurred on or about November 14, 2005, and that he was informed of that decision on March 10, 2006. Accordingly, since the applicable statute of limitations for a § 1983 is three years, *see Owens v. Okure,* 488 U.S. 235, 251, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989), the limitation period for Kregler's claims expired as of March 10, 2009.

Although Kregler concedes that Naberezny was added as a defendant outside the three-year statute of limitation, he asserts that the claims against her are timely because they "relate back" to the claims in the original complaint. In order for a complaint that adds a new defendant to relate back to the original complaint for limitations purposes, the following requirements must be satisfied: (1) both complaints must arise out of the same conduct, transaction, or occurrence; (2) the additional defendant must have been omitted from the original complaint by mistake; and (3) the additional defendant must not be prejudiced by the delay. Fed.R.Civ.P. 15(c)

(1). Rule 15(c) of the Federal Rules also requires that the new defendant have actual or constructive knowledge that she would have been named but for the plaintiff's mistake. *See Tsering v. Wong,* No. 08 Civ. 5633, 2008 WL 4525471, at *6 (S.D.N.Y. Oct. 3, 2008).

The notice required must be such that a reasonably prudent person ought to have been able to anticipate or should have expected that the character of the originally pleaded claim might be altered or that other aspects of
661 the conduct, transaction or occurrence set forth in the original pleading might be called into question.*661 *Id.* ( *citing Pemrick v. Stracher,* No. 92 Civ. 959, 2005 WL 2921621, at *7 (E.D.N.Y. Nov. 4, 2005)).

In assessing Naberezny's motion to dismiss, the Court found that the record before it was not developed as to whether Naberezny had been prejudiced by the delay in naming her as a defendant. ( *See* Order at 18.) Accordingly, the Court directed the parties to engage in discovery limited to the issues of whether (1) Naberezny had actual or constructive knowledge of this action within the time period of the applicable statute of limitations and (2) she could have reasonably expected that she might be named as a defendant. At her deposition, Naberezny testified that she was not aware of the original complaint or the First Amended Complaint filed in this action. In response, Kregler relies on *Abdell v. City of New York* for the proposition that because Naberezny is represented by the Corporation Counsel of the City of New York ("Corporation Counsel"), the same attorney representing the other defendants, their knowledge of the lawsuit within the applicable statute of limitations is imputed to Naberezny. 759 F.Supp.2d 450, 455 (S.D.N.Y.2010).

Kregler's argument fails for several reasons. Primarily, it is based on dicta. In *Abdell,* the Court found that the defendant had actual knowledge of the action within the limitations period and therefore it was unnecessary to impute the knowledge of counsel to the new defendant. *See id.* As previously stated, Kregler makes no showing that Naberezny was aware of the lawsuit until she was named in the Second Amended Complaint, which was after the expiration of the statute of limitations.

In *Berry v. Village of Millbrook,* however, the Court applied the constructive notice doctrine and held that the claims against the new defendant related back to the initial complaint. No. 09 Civ. 4234, 2010 WL 3932289, at *5 (S.D.N.Y. Sept. 29, 2010). The court reasoned that, because the defendant had been clearly identified in the initial complaint, the attorney knew or should have known that the additional defendant would be added to the existing lawsuit. *Id.* Unlike *Berry,* Naberezny's name did not appear in either the initial complaint or the First Amended Complaint. It was not until his filing of the Second Amended Complaint on July 9, 2010, more than three years after the alleged violation occurred, that Kregler named Naberezny as a defendant. Nonetheless, at the Rule 12(i) Hearing, upon learning that Naberezny was the individual who had the personal relationship with Garcia not Hearn, Kregler's counsel requested the Court to "substitute in Naberezny for Gill Hearn." (Hr'g Tr. 26:20–21, July 28, 2009.) Even assuming that Corporation Counsel should have been aware at this juncture of the lawsuit that Naberezny would be added as a defendant, Kregler's counsel did not make this application until July 28, 2009—more than four months after the statute of limitations had run. Accordingly, because no genuine issue of material fact exists to suggest that Naberezny had actual or constructive knowledge of this action within the time period of the applicable statute of limitations, the claims against Naberezny are dismissed as a matter of law.

## IV. *ORDER*

For the reasons discussed above, it is hereby

**ORDERED** that the motion (Docket No. 56) of defendants Jayme Naberezny, Rose Gill Hearn, Keith Schwam, Darren Keenaghan and Brian Grogan is GRANTED; and it is further

**ORDERED** that plaintiff William Kregler and remaining defendants City of New York and Louis Garcia shall
662 confer and prepare a proposed Case Management *662 Plan in the form provided on the Court's website, to be submitted to the Court at an initial conference on this action scheduled for December 2, 2011 at 10:45 a.m.

The Clerk of Court is directed to terminate any pending motions.

SO ORDERED.

# Tech. in P'ship, Inc. v. Rudin

Decided Oct 3, 2011

10 Civ. 8076 (RPP)

10-03-2011

TECHNOLOGY IN PARTNERSHIP, INC., Plaintiff, v. RUDIN, et al., Defendants.

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Robert P. Patterson

## OPINION AND ORDER

ROBERT P. PATTERSON, JR., U.S.D.J.

Plaintiff Technology in Partnership ("TIP" or "Plaintiff") filed a complaint on October 22, 2010, alleging that defendants created an enterprise with a common goal to divert and steal funds from TIP. See (Compl. ¶ 1.) Specifically, Plaintiff alleges a fraudulent scheme taking place over the nearly thirteen year period between October 1997 and May 2010 in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 ("RICO") and other state law claims.

On January 26, 2011, defendants Alan Zverin ("Zverin"), Zverin & Fischer, LLP ("Z&F"), and Eisman, Zucker, Klein & Ruttenberg, LLP ("EZKR") (collectively, "Accountant Defendants") moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss all claims against them. Defendants Edward Rudin ("Rudin"), Alyse Rudin, Gloria Rudin, Alyfunkids, Inc. d/b/a/ My Gym Children's Fitness Center ("Alyfunkids"), My Gym Westfield, Inc. d/b/a My
2 Gym Children's Fitness Center ("My Gym Westfield"), My Gym Glen Rock, Inc. ("My Gym Glen *2 Rock"), and Rudin Appraisals, LLP ("Rudin Appraisals") (collectively, "Rudin Defendants") moved separately to dismiss Plaintiff's Complaint in its entirety on statute of limitations grounds, or in the alternative, to hold a hearing with limited discovery pursuant to Fed. R. Civ. P. 12(i).

For the reasons stated below, Accountant Defendants' motion to dismiss is granted and Rudin Defendants' motion to dismiss and motion for preliminary hearing are denied.

## I. BACKGROUND

Plaintiff is a closely-held corporation formed to provide computer consulting services, including installation and support to businesses. (Compl. ¶ 28.) On October 3, 1997, Robert Baker ("Baker") and Rudin incorporated TIP in New Jersey, and during the period of the claims, its principal place of business was in New York. (Id. ¶¶ 34, 14-15.) Baker and Rudin were the sole shareholders and officers of TIP: Baker became President of TIP and received 60% of TIP's stock, and Rudin became Vice-President or Secretary of TIP and received 40% of TIP's stock. (Id. ¶¶ 30-32.) Rudin has an accounting background, and was responsible for TIP's day-to-day operations and TIP's financial filings. (Id. ¶¶ 32, 35.) Plaintiff's counsel acknowledged at oral argument that between October 1997 and May 2010, Baker received and reviewed Schedule K-1 statements annually, but did not otherwise perform his duties as a director and officer of TIP until May 2010, when he approached Rudin

and asked for further documentation - which he was denied - after which Baker locked Rudin out of the company and gained access to financial documents and records that were on the company's file server. (Tr. at 26-27.) Based on these financial documents and records, Baker, who brings this action on behalf of TIP, "first discerned *3 the existence of the Enterprise and its scheme to divert and steal funds from TIP . . . ." (Compl. ¶ 43.) The Complaint cites to no other sources for the allegations made therein.

Accountant Defendants were appointed by Rudin as accountants for TIP. Rudin first engaged Z&F as TIP's accountants. (Id. ¶ 36.) At Z&F, Robert Fischer, Rudin's brother-in-law, "took direction from Rudin concerning TIP's accounting and tax filings" until his death. (Id. ¶¶ 37-38.) Afterwards, Zverin and his new firm EZKR were responsible for TIP's accounting and tax filings. (Id. ¶ 38.) Plaintiff contends that Baker never received TIP's corporate tax returns or other financial documents, other than the yearly Schedule K-1 statements, which only contained TIP's reported profit or loss. (Id. ¶¶ 39, 44, 81.) Plaintiff also alleges Rudin and Accountant Defendants engaged in a pattern and practice of conduct of filing false information with the Internal Revenue Service (IRS), and paid Rudin excessive compensation. (Id. ¶ 38.) Specifically, Plaintiff contends that from 1999 to 2009 Accountant Defendants prepared TIP's federal and state tax returns, which "contained fraudulent and false information," "at the direction of defendant Edward Rudin, and without independent verification of the underlying data." (Id. ¶¶ 57-58.) The Complaint suggests that Accountant Defendants "paid Mr. Rudin excessive compensation in an effort to funnel money out of TIP." (Id. ¶ 38.) There is no supporting allegation demonstrating Accountant Defendants were employed by TIP with the authority to cause payments to be made by TIP. Similarly, the Complaint alleges that the fraudulent efforts of the Rudin Defendants and Accountant Defendants "were successful in preventing Mr. Baker from learning of the Enterprise from TIP's incorporation in October 1997 through in or about May 2010," but does not allege what actions each group of defendants took *4 in this regard. (Id. ¶ 42.) Plaintiff also alleges "a professional relationship" between the Rudin Defendants and Accountant Defendants. (Id. ¶ 60.)

Plaintiff alleges the Rudin Defendants engaged in various conduct to carry out the fraudulent scheme. (Id. ¶ 3.) Plaintiff alleges Rudin received excessive and unwarranted salary and bonus payments between 2001 and 2009, and diverted TIP funds through a series of cash withdrawals from the Operating Account and cash deposits into the Payroll Account between July 2007 and November 2008. (Id. ¶ 41.) Plaintiff contends that the cash deposits were actually TIP's client payments; checks originally made payable to TIP were cashed against a TIP account, which Rudin later used to make a deposit into the Payroll Account. (Id. ¶¶ 66-70.) Plaintiff also alleges Rudin diverted and stole TIP funds by sending checks to defendants Alyse Rudin and Gloria Rudin, Rudin's wife and mother, respectively. (Id. ¶¶ 71-76.) Defendants Alyfunkids, My Gym Westfield, and My Gym Glen Rock (collectively, "My Gym Defendants") and Rudin Appraisals are owned and operated by Rudin. (Id. ¶ 2.) Plaintiff alleges Rudin used TIP's offices, equipment, systems and personnel to run My Gym Defendants and Rudin Appraisals, (id. ¶¶ 88-89,) and diverted and stole TIP funds to fund and operate My Gym Defendants and Rudin Appraisals, (id. ¶ 82). Other than Gloria Rudin, who lives in Del Ray Beach, Florida, all of the Rudin Defendants either live in or have their principal place of business at 19 Princess Drive, North Brunswick, New Jersey. (Id. ¶¶ 19-27.)

On October 22, 2010, Plaintiff filed a Complaint claiming: (1) civil RICO violation against all defendants; (2) civil RICO conspiracy against all defendants; (3) breach of fiduciary duty against Rudin; (4) malpractice against Accountant Defendants; (5) breach of fiduciary duty *5 against Accountant Defendants; (6) aiding and abetting breach of fiduciary duty against Alyse Rudin, Gloria Rudin, My Gym Defendants, and Rudin Appraisals; (7) fraud against Rudin; (8) fraudulent concealment against Rudin and Accountant Defendants; (9) constructive trust against Rudin Defendants; (10) conversion against Rudin Defendants; (11) unjust enrichment

against Rudin Defendants; and (12) accounting against Rudin, Accountant Defendants, My Gym Defendants, and Rudin Appraisals. Accountant Defendants and Rudin Defendants filed separate Rule 12(b)(6) motions to dismiss on January 26, 2011. Rudin Defendants also filed a motion for a preliminary hearing on January 26, 2011. Plaintiff filed a memorandum in opposition to the motions on March 28, 2011. ("Pl.'s Opp. Mem.") On April 29, 2011, Accountant Defendants and Rudin Defendants filed reply memorandum in support of their motions to dismiss. Oral argument was held on September 20, 2011.

## II. DISCUSSION

A. Legal Standard

On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must accept "all well-pleaded allegations in the complaint as true, drawing all reasonable inferences in the plaintiff's favor." Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC, 595 F.3d 86, 91 (2d Cir. 2010). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Applying this plausibility standard, a complaint must do more than offer "'naked
6 assertions devoid of further factual enhancement,' and a court is not 'bound to accept as *6 true a legal conclusion couched as a factual allegation.'" Iqbal, 129 S. Ct. at 1949-50 (quoting Twombly, 550 U.S. at 555, 557). See Vargas v. Choice Health Leasing, No. 09 Civ. 8264 (DLC), 2011 U.S. Dist. LEXIS 49310, at *5-6 (S.D.N.Y. May 9, 2011) (applying Iqbal and Twombly plausibility standard to civil RICO claim).

A motion to dismiss an action on statute of limitations grounds is treated as a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Gharty v. St. John's Queens Hospital, 869 F.2d 160, 162 (2d Cir. 1989). B. Accountant Defendants

Accountant Defendants move to dismiss under Fed. R. Civ. P. 12(b)(6) on the grounds that the Complaint fails to state a claim. They contend that (1) the Complaint fails to allege facts that satisfy the requirements for the civil RICO claims, (2) the Court should decline to exercise supplemental jurisdiction over the state law claims once the civil RICO claims are dismissed, and (3) the Complaint contains conclusory allegations or otherwise fails to satisfy the elements of the state law claims. Plaintiff contends that the pleading standard was met for the claims in question. Specifically, Plaintiff argues that Accountant Defendants' work as accountants for TIP and the Rudin Defendants is prima facie evidence of participation in the enterprise, malpractice, and breach of fiduciary duty. (Pl.'s Opp. Mem. at 19.)

1. *Civil RICO (18 U.S.C. § 1962)*

To establish a private civil cause of action under RICO, a plaintiff must properly set forth: "(1) a violation of . . . [section] 1962; (2) an injury to business or property; and (3) that the injury was caused by the violation." De
7 Falco v. Bernas, 244 F.3d 286, 305 (2d Cir. 2001); First *7 Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 767 (2d Cir. 1994). To state a claim under section 1962(d) based on a conspiracy to violate section 1962(c), a plaintiff must allege a substantive RICO violation. See Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1064 (2d Cir. N.Y. 1996), vacated on other grounds, 525 U.S. 128 (1998); SKS Constructors, Inc. v. Drinkwine, 458 F. Supp. 2d 68, 80 (E.D.N.Y. 2006); Medinol Ltd. v. Boston Sci. Corp., 346 F. Supp. 2d 575, 613 (S.D.N.Y. 2004). A substantive RICO violation is pled properly by a factual showing of "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity" for each individual defendant. De Falcos, 244 F.3d at 306. To meet the standard in Iqbal, these allegations must establish the existence of the enterprise not by pleading conclusions of fact, but by pleading factual allegations plausibly leading to these conclusions. Here, as stated in

paragraph 43 of the Complaint: "In or about May 2010, however, Mr. Baker obtained access to TIP's financial documents and records, and first discerned the existence of the Enterprise and its scheme to divert and steal funds from TIP." No other source of information relating to the events of the prior thirteen years is cited in the Complaint. Accordingly, it must be read in this light.

While RICO liability is not limited to those with primary responsibility for the enterprise's affairs, in order to participate in the *conduct* of such affairs, the defendant must have had some part in *directing* those affairs. Reves v. Ernst & Young, 507 U.S. 170, 179 (1993) (emphasis added). This is met when the defendant participates in the "operation or management of the enterprise itself." Id. at 185-86 (finding no participation by accounting firm where AICPA's professional standards were not in conflict with the firm's alleged activities).
8 The *8 provision of professional services in itself is insufficient to meet RICO's participation requirement because these services do not require taking part in the direction of the enterprise's affairs. Azrielli v. Cohen Law Offices, 21 F.3d 512, 521-22 (2d Cir. 1994) (holding the provision of legal representation during a fraudulent transaction insufficient to show operation or management); Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison, 955 F. Supp. 248, 254 (S.D.N.Y. 1997) (accounting firm's misrepresentations and omissions of material facts in financial statements for the enterprise did not equate to participation in the operation or management of the enterprise); Dep't of Econ. Dev. v. Arthur Andersen & Co. (U.S.A.), 924 F. Supp. 449 (S.D.N.Y. 1996) (accounting firm's concealment of an enterprise's fraudulent activities did not amount to operation or management). In addition, the plaintiff cannot simply allege that certain entities provided services which were helpful to an enterprise; the complaint must allege that those entities exerted "any control" over the enterprise. City of New York v. Smokes-Spirits.com , Inc., 541 F.3d 425, 449 (2d Cir. 2008); Hayden, 955 F. Supp. at 255 (noting even the provision of essential services to an enterprise does not amount to control).

The Complaint alleges that Accountant Defendants filed false information with the IRS and paid Rudin excessive compensation. (Compl. ¶ 38.) It does not allege that any Accountant Defendant was an officer or employee of TIP with authority to draw on its accounts. Plaintiff does allege a professional relationship between Accountant Defendants and the Rudin Defendants. (Id. ¶ 60.) The Complaint also alleges, however, that Accountant Defendants acted "at the direction of defendant Edward Rudin." (Id. ¶ 57.) As alleged, the professional services provided by Accountant Defendants do not demonstrate any control over the enterprise.
9 Indeed, *9 at oral argument, Plaintiff's counsel disclosed that TIP's financial records were maintained on the company's file server using QuickBooks, a line of accounting software for small business owners, from which Rudin deleted some records by remote access. (Tr. at 27.) These disclosures of how Baker "first discerned the existence of the Enterprise and its scheme to divert and steal funds from TIP," (Compl. ¶ 43,) make even less plausible the Complaint's conclusory allegations about Accountant Defendant's "assistance and cooperation" and their participation in the diversion of TIP funds to the Rudin Defendants, (Tr. at 30.)[1]

[1] The only improper payments alleged are funds received by various Rudin Defendants.

As Plaintiff has not and, based on the facts disclosed, cannot satisfy the participation element required for both the civil RICO violation and the civil RICO conspiracy, Counts I and II against Accountant Defendants are dismissed with prejudice. See Vargas, 2011 U.S. Dist. LEXIS 49310, at *8-10 (finding that plaintiff failed to plead with plausibility any predicate acts of racketeering activity, and granting defendant's motion to dismiss and entering judgment for defendant on the federal civil RICO claim); cf. Hayden, 955 F. Supp. at 253-54 (dismissing with prejudice plaintiff's civil RICO claims for failure to allege or present facts "permitting a rational inference" of defendant's participation in the enterprise).

2. *Accounting Malpractice*

A claim for accounting malpractice must show (1) a departure from the accepted standards of practice, and (2) that the departure was the proximate cause of the injury. Housing Works, Inc. v. Turner, 179 F. Supp. 2d 177, 216 (S.D.N.Y. 2001). Plaintiff alleges gross negligence by Accountant Defendants in failing to verify
10 information in TIP's tax returns and *10 failing to provide copies of the tax returns to Baker. (Compl. ¶¶ 57-58.) The unverified information alleged relates to the identity of the corporation's officers and the extent of their ownership interest in the company. (Id. ¶¶ 45-55.) Plaintiff also alleges that this failure to act establishes causation because it was reasonably foreseeable that performance would have prevented the harm - namely the funneling of TIP funds to the Rudin Defendants. (Pl.'s Opp. Mem. at 29.)

As tax preparers, Accountant Defendants were subject to AICPA Professional Standards, which state in pertinent part: "In preparing or signing a return, a member may in good faith rely, without verification, on information furnished by the taxpayer or by third parties." American Institute of Certified Public Accountants, AICPA Professional Standards § TS 300.02 (2011). Reliance on information furnished by Rudin, who was the director and officer responsible for TIP's financial filings, (Compl. ¶ 35,) is not a departure from accepted practice. And, the failure by Accountant Defendants to furnish copies to Baker is also not a departure from accepted practice because Rudin was responsible for TIP's financial filings and he is alleged to have distributed Schedule K-1 statements to Baker annually. (Compl. ¶¶ 35, 39.) Furthermore, the provision of tax return preparation services containing the types of errors alleged in the Complaint is not proximate enough to constitute malpractice. As the Complaint fails to allege facts that plausibly show a departure from standard
11 accounting practices, Count IV is dismissed with prejudice. *11

3. *Breach of Fiduciary Duty*

A claim for breach of fiduciary duty requires: (1) a fiduciary relationship between the parties and (2) a breach of that fiduciary duty. Kottler v. Deutsche Bank AG, 607 F. Supp. 2d 447, 465-66 (S.D.N.Y. 2009). Absent special circumstances, the accountant-client relationship generally does not give rise to a fiduciary duty. Vtech Holdings Ltd. v. PriceWaterhouseCoopers LLP, 348 F. Supp. 2d 255, 268 (S.D.N.Y. 2004) (noting an accountant's commission of active fraud would establish a fiduciary relationship, while a consulting relationship would not);[2] Lavin v. Kaufman, Greenhut, Lebowitz & Forman, 640 N.Y.S.2d 57, 58 (N.Y. App. Div. 1st Dept. 1996) (inferring a fiduciary relationship when accountants regularly advised clients beyond basic advice and the client unquestionably followed such advice). Rather, a relationship is fiduciary in nature based on the services agreed to by the parties and evidenced by influence, control, or responsibility over the client. Vtech Holdings Ltd., 348 F. Supp. 2d at 268. Here, there are no factual allegations showing Accountant Defendants committed any fraud or gave TIP advice beyond basic advice.[3]

2 Alleging a fiduciary relationship based on active fraud requires compliance with Fed. R. Civ. P. 9(b). The Complaint fails to allege with particularity the elements for fraudulent concealment. See infra Part II.B.4.

3 Although the Complaint does allege that Accountant Defendants provided accounting services for TIP, it does not identify the nature of any services other than tax preparation.

Plaintiff argues that a fiduciary relationship arises where the complaint alleges knowledge and concealment of illegal acts, and failure to withdraw in the face of a conflict of interest. See Nate B. & Frances Spingold Found. v. Wallin, Simon, Black and Co., 585 N.Y.S.2d 416, 417 (N.Y. App. Div. 1st Dept. 1992). Here, however, the
12 allegations of knowledge and concealment of illegal acts are allegations regarding Accountant Defendants' *12 provision of tax preparation services to TIP and the Rudin Defendants. Further, the mere preparation of tax

returns containing the type of factual errors alleged in the Complaint, coupled with bald conclusory allegations of knowledge and concealment do not meet the plausibility standard in Iqbal. As there are no factual allegations showing special circumstances giving rise to a fiduciary duty, Count V is dismissed with prejudice.

4. *Fraudulent Concealment*

A claim for fraudulent concealment must show: "(1) failure to discharge a duty to disclose, (2) an intention to defraud, or scienter, (3) reliance, and (4) damages." TVT Records v. Island DefJam Music Group, 412 F.3d 82, 90-91 (2d Cir. 2005). Claims alleging fraudulent omission must be made with particularity. DirecTV Latin Am., LLC v. Park 610, LLC, 691 F. Supp. 2d 405, 436 (S.D.N.Y. 2010); see Fed. R. Civ. P. 9(b). Thus, the complaint must allege with particularity "(1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled the plaintiff; and (4) what the defendant obtained through the fraud." DirecTV Latin Am., 691 F. Supp. 2d at 436. The Complaint does not meet this standard.

Plaintiff argues that a duty to disclose arose because Accountant Defendants possessed superior knowledge of essential facts. See P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V., 754 N.Y.S.2d 245, 252 (N.Y. App. Div. 1st Dept. 2003). However, the Complaint makes clear that Accountant Defendants worked "at the direction of defendant Edward Rudin," who had an accounting background and was responsible for TIP's
13 financial records.[4] (Compl. *13 4, 35.) And the Complaint contains no factual allegations showing that Accountant Defendants provided accounting services to TIP other than tax preparation services, knew of the fraudulent transactions, and failed to disclose them to TIP. The Complaint also lacks factual allegations regarding the facts not disclosed to TIP by Accountant Defendants, on what date, and why that omission is evidence of an intention to defraud or scienter. Count VIII therefore fails to meet the particularity standard and is dismissed with prejudice as against Accountant Defendants.

[4] These records were maintained on TIP's file server using QuickBooks. (Tr. at 27.)

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5. *Accounting*

A party seeking an accounting must meet four requirements: "(1) relations of a mutual and confidential nature; (2) money or property entrusted to the defendant imposing upon him a burden of accounting; (3) that there is no adequate legal remedy; and (4) in some cases, a demand for an accounting and a refusal." Pressman v. Estate of Steinvorth, 860 F. Supp. 171, 179 (S.D.N.Y. 1994) (quoting 300 Broadway Realty Corp. v. Kommit, 235 N.Y.S.2d 205, 206 (N.Y. Sup. Ct. 1962)).

Plaintiff contends that an accounting is necessary to gain a full financial picture of the fraudulent scheme which Accountant Defendants directly participated in. (Pl.'s Opp. Mem. at 33.) Accountant Defendants argue that the Complaint failed to properly allege a mutual and confidential relationship. However, the Complaint alleges Plaintiff maintained a nearly thirteen-year relationship with Accountant Defendants for tax preparation services, (Compl. ¶ 4,) and therefore, it is plausible that a relationship of a mutual and confidential nature emerged during that time. Nonetheless, the Complaint lacks allegations regarding any money or property
14 entrusted to Accountant Defendants. As alleged, TIP's financial records were only kept by *14 Rudin. Plaintiff is now in possession of QuickBook records on TIP's file server, except for documents Rudin deleted in May 2010. (Tr. at 26-27.) Therefore, Count XII is dismissed without prejudice against Accountant Defendants, and upon a factual showing that Accountant Defendants have duplicate copies of TIP's financial books and records, Count XII may be reinstated. B. The Rudin Defendants

The Rudin Defendants moved to dismiss the Complaint, arguing that Plaintiff's claims are time-barred by the applicable statutes of limitations. In the alternative, the Rudin Defendants request a hearing with limited discovery pursuant to Fed. R. Civ. P. 12(i), to settle the issue of whether Baker knew or should have known of the misconduct prior to May 2010. As a matter of law, the Rudin Defendants argue Baker, as a director and majority shareholder of TIP from October 1997 to present, had an affirmative duty to know and understand the corporation's financial status by reviewing the financial documentation regularly during that period and instead did nothing. Plaintiff contends dismissal is inappropriate because the determination of whether the claims are barred by their respective statutes of limitations requires consideration of the facts. Plaintiff also argues that a Fed. R. Civ. P. 12(i) hearing is unavailable on statute of limitations grounds and the issue of Baker's affirmative duty is intertwined with the merits.

1. *Statutes of Limitations*

The statute of limitations period for civil RICO claims begins to run when the plaintiff discovers or should have
15 discovered the injury that underlies the cause of action. Bankers Trust *15 Co. v. Rhoades, 859 F.2d 1096, 1102 (2d Cir. 1988). Under New York law, the running of the statute of limitations for a claim based in fraud is subject to the plaintiff's actual or imputed discovery of the facts constituting the fraud. N.Y. C.P.L.R. § 213(8); see Malone v. Bayerische Hypo-Und Vereins Bank, Nos. 08 Civ. 7277 (PGG) & 09 Civ. 3676 (PGG), 2010 U.S. Dist. LEXIS 9529, at *12 (S.D.N.Y. Feb. 4, 2010) (citing Guilbert v. Gardner, 480 F.3d 140, 147 (2d Cir. 2007)); see also Bouley v. Bouley, 797 N.Y.S.2d 221, 224 (N.Y. App. Div. 4th Dept. 2005) (applying the discovery rule to equitable actions). Thus, the discovery rule is applicable all state law claims.

While it is true that Baker is subject to the fiduciary duties of a director as defined by New Jersey law, In re Luxottica Group S.p.A. Sec. Litig., 293 F. Supp. 2d 224, 237 (E.D.N.Y. 2003), the degree of care Baker owed the corporation in relation to the constructive discovery date of the alleged injuries, is not a pure question of law, but one requiring determination of the facts and circumstances of Baker's activities. N.J. Stat. § 14A:6-14(1)-(2) (directors of corporations must "discharge their duties in good faith and with that degree of diligence, care and skill which ordinarily prudent people would exercise under similar circumstances in like positions" and may in good faith rely on written financial reports "as represented by the officer of the corporation having charge of its books of account"). As the constructive date of discovery cannot be determined at this stage in the proceedings, the statute of limitations periods cannot be determined and the motion is denied without prejudice.
16 *16

2. *Preliminary Rule 12(i) Hearing*

The preliminary hearing under Fed. R. Civ. P. 12(i) requested by the Rudin Defendants authorizes the court to decide threshold issues raised by the defendants. See Beltre v. Lititz Healthcare Staffing Solutions LLC, 757 F. Supp. 2d 373, 376 (S.D.N.Y. 2010). However, the hearing should not concern the merits of the case, or issues closely interwoven with the merits so as to render it unlikely or impractical that the hearing would achieve a productive outcome in light of the stage of the proceedings. Id.

The issue raised by the Rudin Defendants - when Baker should have discovered the alleged misconduct - is not a procedural matter, see United States v. Montreal Trust Co., 358 F.2d 239, 242 (2d Cir. 1966) (reviewing a district court's ruling after a preliminary hearing on personal jurisdiction), and is closely interwoven with the merits of the case. Plaintiff alleges that prior to May 2010 it did not have access to documents where misconduct was evident. Accepting Plaintiff's factual allegations as true, the Court denies the motion for a

preliminary hearing, but orders that a deposition of Baker be conducted within 30 days to determine at what date he, as director, President, and majority shareholder of TIP knew or should have known of the actions complained of in the civil RICO causes of action.

## III. CONCLUSION

Accountant Defendants' January 26, 2011 motion to dismiss is granted. On the federal civil RICO claims and the state law claims, all claims other than Count XII are dismissed with prejudice. Count XII is dismissed as to
17 the Accountant Defendants without prejudice. *17

The Rudin Defendants' January 26, 2011 motion to dismiss on statute of limitations is denied. The Rudin Defendants' motion for preliminary hearing is denied. The Court orders that Baker be deposed within 30 days on the issue of the constructive discovery date.

IT IS SO ORDERED.

Dated: New York, New York

October 3**,** 2011

Robert P. Patterson, Jr.

U.S.D.J.

18 *18

Copies of this Order faxed to:

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Jarrett Michael Behar

Sinnreich Kosakoff & Messina LLP

*Counsel for Defendants:*

Nathaniel B. Smith

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Vedder Price P.C. (NY)

Index No. 7582/05
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF WESTCHESTER

# Analisa Salon Ltd. v. Elide Props., LLC

2011 N.Y. Slip Op. 34125
Decided Jul 22, 2011

Index No. 7582/05 Index No. 19232/05

07-22-2011

ANALISA SALON LTD., d/b/a SUSAN MARLOWE FIGURE SALON, Plaintiff, v. ELIDE PROPERTIES, LLC, JACK SEMINARA, JOHN JAMES ROMEO, CONSTABLE MICHAEL M. SEMINARA and CONSTABLE KENNETH R. HERBERT, Defendants. ANALISA SALON LTD., d/b/a SUSAN MARLOWE FIGURE SALON, Plaintiff, v. CONSTABLE MICHAEL M. SEMINARA and CONSTABLE KENNETH R. HERBERT, Defendants.

The Law Office of Marcia E. Kusnetz, PC Attorneys for Plaintiff 800 Westchester Avenue, Suite 412-S Rye Brook, New York 10573 Wilson, Elser, Moskowitz, Edelman & Dicker LLP Attorneys for Defendants Constable Michael M. Seminara and Constable Kenneth R. Herbert 3 Gannett Drive White Plains, New York 10604 DelBello Donnellan Weingarten Tartaglia Wise & Wiederkehr, LLP Attorneys for Defendants Elide Properties, LLC and Jack Seminara One North Lexington Avenue White Plains, New York 10601 Nathaniel B. Smith, Esq. Attorney for Defendant James John Romeo 111 Broadway-13th Floor New York, New York 10006

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HON. ORAZIO R. BELLANTONI JUSTICE OF THE SUPREME COURT

PRESENT: **SHORT FORM DECISION**

Defendants Elide Properties, LLC (Elide) and Jack Seminara (Seminara) move for an order, pursuant to CPLR 3212, dismissing the first, second, third and fifth causes of action set forth in plaintiff's amended verified
2 complaint or in the alternative, pursuant to *2 CPLR §4102, striking the jury demands made by plaintiff. Defendant John James Romeo (Romeo) also moves for an order pursuant to CPLR 3211(a)(1), CPLR 3211(a)(7) and CPLR 3212(b) and (g) dismissing plaintiff's first and fourth causes of action or in the alternative, pursuant to CPLR §4102, striking the jury demands made by plaintiff.

The following papers were read:

| | |
|---|---|
| Notice of Motion-Affidavit-Affidavit-Exhibits A-Y-Affidavit of Service | 1-29 |
| Notice of Motion-Affirmation-Exhibits 1-5-Affirmation of Service | 30-37 |
| Affirmation in Opposition-Affidavit-Affidavit-Exhibits A-K | 38-51 |
| Affidavits of Service (3) | 52-54 |
| Reolv Affidavit-Affidavit of Service | 55-56 |

Reply Affirmation-Exhibit 6-Affirmation of Service 57-59

Upon the foregoing papers the motions are decided as follows:

## Defendants Elide and Seminara's Motion for Summary Judgment

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v. Pomeroy*, 35 NY2d 361 [1974). The movant must set forth a prima facie showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movant sets forth a prima facie case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman v. City of New York*. 49 NY2d 557 [1980]).

Plaintiff's first cause of action seeks specific performance of lease agreement which provided for plaintiff's right of first refusal. Specific performance is not an available remedy for breach of contract where, as here, there is an adequate remedy at law, i.e. money damages (*see Alpha Auto Brokers v. Continental Ins. Co*., 286 AD2d 309 [2nd Dept 2001]). This Court notes that defendants Elide and Seminara where not parties to the subject lease which plaintiff seeks to enforce. Additionally, there has been a finding by the Appellate Division, Second Department, that plaintiff was entitled to summary judgment on its fourth cause of action which seeks damages for breach of lease against defendant Romeo (*see Analisa Salon, Ltd. v. Elide Properties, LLC*, 46 AD3d 721 [2nd Dept 2007]). Accordingly, defendants have established their prima facie entitlement to summary judgment as to plaintiff's first cause of action.

3 The second and third causes of action are interrelated as plaintiff seeks treble *3 damages for wrongful eviction. Defendants Elide and Seminara cannot be held liable to plaintiff for purported damages caused to plaintiff since plaintiff was evicted pursuant to a lawful warrant of eviction (*see Campbell v. Maslin*, 59 NY2d 722 [1983]). To the extent that defendants Elide and Seminara have established, prima facie, their entitlement to judgment on plaintiff's second cause of action, they have also established their entitlement to judgment as to the third cause of action for treble damages (*see* RPAPL §853). To the extent that the second cause of action could be construed to allege an action for civil conspiracy, summary judgment is appropriate as it is well settled that New York does not recognize civil conspiracy to commit a tort as an independent action (*see Hebrew Inst. for Deaf & Exceptional Children v. Kahana*, 57 AD3d 734 [2nd Dept 2008]).

Plaintiff's fifth cause of action seeks damages for tortious interference with contract. In order to succeed on a cause of action sounding in tortious interference with an existing contract, the plaintiff must establish: (1) the existence of a valid contract between it and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procurement of the third party's breach of the contract without justification; and (4) damages (*see Pink v. Half Moon Co-Op Apartments*, 68 AD3d 739 [2nd Dept 2009]). The affidavit of Seminara is sufficient to establish defendants' prima facie entitlement to summary judgment as to plaintiff's fifth cause of action. Seminara states that he had knowledge of a lease agreement, which contained a right of first refusal between Romeo and plaintiff, and that neither he nor Elide intended to induce Romeo to breach the lease and it was only after plaintiff allegedly failed to exercise the right of first refusal that Elide acquired title to the premises.

nd

In opposition to Elide and Seminara's motion plaintiff alleges that the motion should be denied as the movants are attempting to re-litigate issues and are barred from doing so pursuant to the law of the case doctrine. Law of the case addresses the potentially preclusive effect of judicial determination made in the course of a single litigation before final judgment (*see People v. Evans*, 94 NY2d 499 [2000]). This Court on November 16, 2005, found defendants' cross-motion to be premature but made no determinations as to the issues raised by the within motion. Counsel also states that "Mr. Wiederker argued orally, on appeal, the very defenses he attempts to reargue now." Upon review of the appellate record, the defendants did not have a motion pending before the Appellate Division, Second Department, when reargument was denied, nor would the mere mention of a potential defense to an appellate court be considered law of the case. Plaintiff further alleges that specific performance claim must stand because it has produced evidence that it was ready, willing and able to purchase the property at the price accepted by Elide and Seminara. As stated above, this allegation fails, as the Appellate Division has found an adequate remedy at law available to plaintiff against Romeo in the form of money
4 images (*see Analisa Salon, Ltd. v. Elide Properties, LLC*, 46 AD3d 721 *4 [2nd Dept 2007]). To the extent that the decision of the Appellate Term of the 9th and 10Judicial Districts states that plaintiff was evicted in violation of RPAPL §749(2), failure to give at least 72-hour notice, this finding alone fails to rebut the showing that the moving defendants possessed a valid warrant and that if any damage was caused it was caused by the Marshall's failure to give the requisite notice (*see Funding Assistance Corp. v. Mashreq Bank*, 277 AD2d 127 [1 Dept 2000]). Plaintiff offers no appellate case law which has found that the warrant of eviction was unlawfully issued. The allegations by counsel that defendant Elide took precautions to hide the sale from plaintiff, his statements as to Seminara's actions or inactions, and his allegation that Seminara's general denial or lack of memory creates an issue of fact amounts to nothing more than mere conjecture and speculation which is insufficient to raise an issue of act fact (*see generally Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Fotiatis v. Cambridge Hall Tenants Corp*., 70 AD3d 631 [2 Dept 2010]).

Based upon the foregoing defendants' motion to dismiss is granted in its entirety.

## Defendant Romeo's Motion to Dismiss and for Summary Judgment

Defendant seeks dismissal of the first and fourth causes of action. As stated above specific performance is not an available remedy for breach of contract where, as here, there is an adequate remedy at law, i.e. money damages (*see Alpha Auto Brokers v. Continental Ins. Co*., 286 AD2d 309 [2 Dept 2001]). There has been a finding by the Appellate Division, Second Department that plaintiff was entitled to summary judgment on its fourth cause of action which sought damages for breach of lease against defendant Romeo (*see Analisa Salon, Ltd. v. Elide Properties, LLC*, 46 AD3d 721 [2 Dept 2007]). As such plaintiff's first cause of action is dismissed as to defendant Romeo, however, plaintiff may recover against defendant Romeo under its fourth cause of action for breach of lease pursuant to *Analisa Salon, Ltd. v. Elide Properties, LLC*, 46 AD3d 721 (2 Dept 2007).

Based upon the foregoing defendant Romeo's motion is granted to the extent that the first cause of action is dismissed against him. The branch of Romeo's motion which sought to strike the jury demand is deemed moot as the equitable relief sought against him has been dismissed. A copy of this decision and order is forwarded to
5 the Settlement Conference Part. *5 Dated: July 22, 2011

White Plains, New York

/s/_____

HON. ORAZIO R. BELLANTONI

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Index Number 114241/2009 E
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK: CIVIL TERM: PART 12

# Omansky v. Penning

2011 N.Y. Slip Op. 33949
Decided Apr 22, 2011

Index Number 114241/2009 E Mot. Seq. No. 002

04-22-2011

LAWRENCE A. OMANSKY, Plaintiff, v. TJEBO PENNING, MICHAEL LATEFI and 160 CHAMBERS STREET OWNERS, INC., Defendants.

For the Plaintiff: Lawrence A. Omansky, Esq., pro se For Defendants Latefi & 160 Chambers: Law Office of Nathaniel B. Smith By: Nathaniel B. Smith, Esq. For Defendant Penning: Kagan Lubic Lepper Lewis Gold & Colbert, LLC By: Emil A. Samman, Esq.

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PAUL G. FEINMAN

## DECISION AND ORDER

**For the Plaintiff:**
Lawrence A. Omansky, Esq., *pro se*
**For Defendants Latefi & 160 Chambers:**
Law Office of Nathaniel B. Smith
By: Nathaniel B. Smith, Esq.
**For Defendant Penning:**
Kagan Lubic Lepper Lewis Gold &
Colbert, LLC
By: Emil A. Samman, Esq.

E-filed papers considered in review of this motion to dismiss:

| Papers | Efiling Document No. |
|---|---|
| Notice of Motion, Affirmation, Exhibits | 20-22 |
| Interim Order of November 11, 2010 | 23 |
| Affidavit in Opposition, Exhibits | 24 |
| Reply Affirmation | 26 |
| Amended Verified Complaint | 18 |

PAUL G. FEINMAN, J.:

Defendant 160 Chambers Street Owners, Inc. moves to dismiss the amended complaint on the basis of (1) documentary evidence, (2) the plaintiff's lack of capacity to sue, and (3) the complaint's failure to state a cause of action as a matter of law (CPLR 3211 [a] [1], [3], [7]), and for costs and expenses of the motion pursuant to CPLR 8303-a and 22 NYCRR § 130-1.1. For the reasons set forth below, the documentary evidence establishes a defense warranting dismissal as a matter of law and this branch of the motion is granted. The branch of the motion seeking sanctions and or costs and expenses is denied.

2 According to the amended verified complaint, defendant is a New York State cooperative *2 corporation and the owner and or landlord of the commercial space in the premises known as 160 Chambers Street, New York, New York (Am. Ver. Compl. ¶ 3). Plaintiff was the tenant of the commercial space, pursuant to a written lease (Am. Ver. Compl. ¶ 4). Plaintiff had previously sublet the commercial space to an entity known as Chambers Wine Merchants, Inc., the sublease of which expired on September 30, 2008 (Am. Ver. Compl. ¶ 6). The sublease contained a five-year option to renew, and Wine Merchants indicated it wanted to exercise the five-year option on the condition than an elevator be installed in the premises during that five-year period (Am. Ver. Compl. ¶¶ 6-7). The complaint alleges that upon inquiry by plaintiff, defendant, along with its directors, co-defendants Penning, Latefi, and or Latefi's wife, represented that an elevator would be installed, but that the commercial space needed to be vacated during installation, and that plaintiff would be compensated for the period of time that the commercial space lay vacant (Am. Ver. Compl. ¶ 8). Relying on these representations, plaintiff did not renew Wine Merchants' lease (Am. Ver. Compl. ¶ 9). Defendants did not install an elevator (Am. Ver. Compl. ¶ 10).

At some point, plaintiff sought a new tenant for the commercial space, and on September 2, 2009, a prospective tenant who had already negotiated the terms of the lease, and was examining the space with plaintiff's real estate broker, heard from co-defendant Penning that plaintiff had been evicted and had no right to lease the space (Am. Ver. Compl. ¶¶ 11-13). This statement was, according to the amended complaint, known by Penning to be false at the time he uttered it (Am. Ver. Compl. ¶ 14). Consequently, plaintiff alleges, the prospective tenant became uneasy about executing the lease, and plaintiff offered, as an inducement to sign, an eight-year indemnity clause providing that plaintiff would indemnify this tenant for all legal fees and damages
3 in the event legal action is taken by "Owner against Tenant to attempt to void this *3 lease." (Am. Ver. Compl. ¶¶ 15-16).

The amended verified complaint contains three causes of action. The first sounds in defamation, based on the words of Penning, the agent for defendant 160 Chambers Street Owners, that "Mr. Omansky no longer owns this space, we do, and we are not leasing at this time," and "because Mr. Omansky was evicted, and no longer had a right to lease this space." (Am. Ver. Compl. ¶ 19). It contends that plaintiff's good name and reputation have been damaged, and that he suffered special damages in that he was required to enter into an eight-year indemnity agreement with the subtenant that exposes him to potential significant expenses in excess of $50,000. The second cause of action alleges that because of the defamatory statements, the prospective tenant did not sign the lease as expected on September 3, 2009, but only on September 23, 2009, after further negotiation, with a commencement date of October 1, 2009, resulting in a loss to plaintiff of $10,800.00, representing 27 days of rental income (Am. Ver. Compl. ¶¶ 26-30). The third cause of action alleges tortious interference with contract and the business relationship between plaintiff and his tenant (Am. Ver. Compl. ¶ 33-34).

The essence of defendant's motion to dismiss the amended complaint is that documentary evidence established that he is not a proper plaintiff inasmuch as he had assigned the underlying lease at issue in this case, and therefore he lacks the capacity to bring this suit.[1] It points to a copy of a letter dated April 22, 2010, from the attorneys representing an entity called Commerce Court 160 Chambers Street (Commerce Court), which was intended to provide "formal notice" of the status of the commercial space at issue (Doc. 21-4). The letter recites
4 that in June 1983, an *4 Agreement of Lease was entered into between 160 Chambers Street Owners, Inc., as landlord and Lawrence A. Omansky, as tenant, that in March 2008, Omansky assigned the lease to "Nicolena's B and B II, Inc." (Nicolena B&B) and that in March 2009, Commerce Court succeeded to all rights of Nicolena B & B, in lieu of foreclosure. Attached to this letter notice is a copy of the documents filed in April 2010 with the New York City Department of Finance as to the recording of the transaction, including an Assignment and Assumption of Lease dated August 18, 2009 (Doc. 21-4, pp. 3- 10). This August 18, 2009, assignment shows that on that date, Nicolena B & B, by Omansky as "Sole Shareholder and President," assigned to Commerce Court "the performance of all of the terms, covenants and conditions of the Lease herein . . . as if Assignee had signed the Lease originally as the lessee named therein." (Doc. 21-4, pp. 6, 7).[2]

[1] Co-defendant Penning submits an affirmation by his attorney in support of this motion, but does not move separately for relief (Doc. 22 [Samman Aff.]).

[2] The documents do not show any transaction in March 2009, contrary to the letter indicating that the transaction between Nicolena B & B with Commerce Court occurred then rather than in August 2009.

Defendant argues that based on these documents, plaintiff had assigned the commercial lease "long before" the defamatory statements were made, has as an individual given up his rights to the commercial lease, and cannot show that he personally suffered any special damages so as to establish a claim of defamation (Doc. 21 [Smith Aff. in Supp. ¶ 3]). It also argues that plaintiff, an attorney, should be sanctioned and required to pay the costs of responding to this litigation, because of his initial failure to bring this to the attention of the court (Doc. 21 [Smith Aff. in Supp. ¶ 3]).

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court accepts as true the facts as alleged in the four
5 corners of the complaint. The court must also accord the plaintiff the *5 benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001], citing *Tenuto v Lederle Labs.*, 90 NY2d 606, 609-610 [1997]; *Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). However, when a motion is also premised on CPLR 3211 (a) (1), the court may look at the documentary evidence to determine whether it would, as a matter of law, bar the plaintiff from succeeding.

Here, plaintiff argues that he formed Nicolena B & B as a subchapter S corporation, in order to use the commercial lease as collateral for another loan (Doc. 24 [Omansky Aff. in Opp. ¶ 3]). The March 3, 2008 Assignment and Assumption of Lease shows that he assigned to Nicolena B & B "*all* of Assignor's right, title, and interest as tenant in, to and under the Lease described in . . . the Lease . . ." and that Nicolena B & B, "for itself, its successors and assigns, hereby accepts and assumes *all of the rights, duties and obligations* of the tenant under the Lease" (Doc. 24, p. 13, emphases added). Plaintiff further contends that as "Omansky d/b/a Nicolena's B and B II Inc.," he later assigned the "collateral" but not the "ownership" of the commercial lease, to Commerce Court (Doc. 24 [Omansky Aff. in Opp. ¶ 3]). He suggests that there is no prejudice in allowing him to amend the caption to address this "technicality," and proffers additional documents to show how the commercial lease was the subject of other transactions (Doc. 24 [Omansky Aff. in Opp. ¶ 9]).

The Assignment of Corrective Mortgage, Assignment of Rents and Security Agreement, dated August 18, 2009 concerns the assignment of certain documents and rights by a Bahamian company called Acqua Wellington Asset Management, Ltd. (Acqua Wellington), to another Bahamian company, Coronation International (Doc. 24, pp. 20 *et seq.*). The assignment included *6 the transfer of all rights, title and interest of a "corrective mortgage, assignment of rents and security agreement," also dated August 18, 2009, from Nicolena B & B, in favor of Acqua Wellington. The assignment was "an absolute assignment" (Doc. 24, at p. 21 [Assignment ¶ 3]). In addition, the Forbearance Agreement and Release, also dated August 18, 2009 (Doc. 24, pp. 26 *et seq.*), is drawn up between Coronation International, and three borrowers, one of which is Nicolena B & B, and two guarantors, one of whom is plaintiff Omansky. According to plaintiff, under the terms of the Forbearance Agreement, the "master lease" was placed into escrow with a title company and he was allowed to retain ownership and control of it until February 26, 2010 when, if the loan had not been repaid, the ownership would be transferred to Coronation (Doc. 24 [Omansky Aff. in Opp. ¶ 6]).

There is no reference to Commerce Court in the Forbearance Agreement. Plaintiff explains that in August 2009 when Acqua Wellington assigned its rights, title, and interest in the lease to Coronation, Coronation then formed Commerce Court, to do business under that name (Doc. 24 [Omansky Aff. in Opp. ¶ 5]). Plaintiff offers an affidavit by Richard Wells, described by plaintiff as an "employee" of Acqua Wellington and a Vice President of Commerce Court, in support of this claim (Doc. 24 [Omansky Aff. in Opp.¶¶ 4, 8]). However, this November 23, 2010 affidavit by Wells (Doc. 24 pp. 7-9), although signed by a notary as required for an affidavit, lacks a notary stamp or a written statement indicating the notary's name, commission, state, or date of the expiration of the commission, and thus does not provide sufficient assurances that the document can be understood to function as an affidavit.[3] Moreover, if the notarization is *7 from out of state, it fails to comport with CPLR 2309 (c) which requires an out-of-state affidavit to be accompanied by a certificate of conformity.

[3] Executive Law § 142-a, allows for the public to rely on the presumption of validity of a notarized document, but not "if the defect was apparent on the face of the certificate of the notary public" (Executive Law § 142-a [3]).

Even if the Wells document were to be considered, it does not sufficiently support plaintiff's claim of clear ownership of the lease as of September 2009. The Wells document discusses the agreement to place the lease title in escrow until February 26, 2010, at which point Nicolena B & B's interest would be conveyed to Commerce Court, but also states unequivocally that in March 2008, Nicolena B & B "mortgaged its interest in and to the Lease to Acqua Wellington" (Doc. 24, p. 7-8 [Omanksy Aff. in Opp., Wells Aff. ¶ 3]).[4]

[4] According to Wells, Coronation International is an affiliate of Commerce Court (Doc. 24, p. 8 [Omansky Aff. in Opp., Wells Aff. ¶ 2]).

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Clearly, plaintiff as an individual is not the proper plaintiff, if any, to bring this action. Even if, as argued by plaintiff, Nicolena B & B was the actual owner of the lease in September 2009, plaintiff Omanksy may not pursue the litigation as an individual. However, the documentary evidence appears to show that in September 2009, the lease was owned either by Acqua Wellington or Commerce Court, not by Omansky personally or even by Omanksy's solely owned corporation, Nicolena B & B.

The standard in a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7) is whether the facts stated in the complaint are sufficient to support any cognizable legal theory (*Campaign for Fiscal Equity v State of N. Y.,* 86 NY2d 307, 318 [1995]). Here, the true nature of the motion is that the complaint should be dismissed based on documentary evidence extrinsic to the complaint showing that plaintiff was not the leaseholder, *8 and therefore could not be defamed by a statement to such effect. In sum, the

documentary evidence conclusively establishes that the lease at issue was assigned from plaintiff to an entity other than himself, and the complaint cannot succeed as a matter of law (*see also, Old Clinton Corp. v 502 Old Country Rd. LLC,* 5 AD3d 263, 364 [2d Dept. 2004] [holding that where plaintiff had assigned its lease when it sold the premises, it lacked standing under CPLR 3211 [a] [3] to seek specific performance of a lease provision]). The documentary evidence establishes the truth of the allegedly defamatory statement to the extent it establishes that Omansky individually did not have a right to lease the space. Because the identity of the actual leaseholder is precisely the claim at issue in the purported defamatory statement, it would be entirely improper to allow plaintiff merely to amend the caption to substitute an entirely new plaintiff in response to defendant's motion. The motion to dismiss is therefore granted in its entirety as against all the defendants.

The branch of defendant's motion seeking sanctions and or costs is denied.

ORDERED that the motion to dismiss the complaint based on documentary evidence and capacity to sue pursuant to CPLR 3211(a) (1) and (3), is granted in its entirety; and it is further

ORDERED that the Clerk of Court is directed to enter judgment dismissing the complaint in its entirety, together with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the branch of the motion which seeks sanctions and or costs is denied.

This constitutes the decision and order of the court. Dated: April 22, 2011

New York, New York

_____

J.S.C.

No. 08 Civ. 6893(VM)
United States District Court, S.D. New York.

# Kregler v. City of N.Y.

770 F. Supp. 2d 602 (S.D.N.Y. 2011)
Decided Mar 9, 2011

No. 08 Civ. 6893(VM).

2011-03-9

William KREGLER, Plaintiff,v.CITY OF NEW YORK et al., Defendants.

Nathaniel B. Smith, Law Office of Nathaniel B. Smith, New York, NY, for Plaintiff.Christopher Aaron Seacord, New York City Law Department, New York, NY, for Defendants.

DECISION AND ORDER

604 *604 Nathaniel B. Smith, Law Office of Nathaniel B. Smith, New York, NY, for Plaintiff.Christopher Aaron Seacord, New York City Law Department, New York, NY, for Defendants.

## DECISION AND ORDER

## VICTOR MARRERO, District Judge.

Plaintiff William Kregler ("Kregler") brought this action pursuant to 42 U.S.C. § 1983 ("§ 1983") against the City of New York ("City") and individual defendants ("Individual Defendants") Louis Garcia ("Garcia"), Rose Gill Hearn ("Hearn"), Keith Schwam ("Schwam"), Darren Keenaghan ("Keenaghan"), Brian Grogan ("Grogan"), and Jayme Naberezny ("Naberezny"). The Individual Defendants at all relevant times were employees of the City's Fire Department ("FDNY") or Department of Investigation ("DOI"). Hearn, Schwam, Keenaghan, and Grogan now move pursuant Rules 12(b)(1), (b)(4) and (b)(6) of the Federal Rules of Civil Procedure ("Federal Rules") to dismiss Kregler's Second Amended Complaint [1] for failure to state a claim. In addition, Naberezny moves to dismiss the Seconded Amended Complaint as time barred. Finally, Kregler cross-moves to preclude the defendants from offering certain evidence or to strike the answer of the City and Garcia.[2] For the reasons stated below, the Court DENIES Kregler's motion and converts the motion of Hearn, Schwam, Keenaghan, Grogan, and Naberezny to dismiss the Second Amended Complaint to a motion for summary judgment pursuant to Rule 12(d) and defers decision on that motion pending additional briefing by the parties.

1 Although entitled "First Verified Amended Complaint," the operative pleading, dated July 9, 2010, is actually the second amended complaint filed by Kregler. Accordingly, for the sake of accuracy, it will be referred to as the "Second Amended Complaint" or "Compl."

2 The Individual Defendants submitted a Memorandum of Law in Support of Gill Hearn, Schwam, Keenaghan, Grogan and Naberezny's Motion to Dismiss the First Verified Complaint, dated August 13, 2010, and a Reply Memorandum of Law in Further Support of Defendants Naberezny, Gill Hearn, Schwam, Keenaghan, and Grogan's Motion to Dismiss

the First Verified Complaint and in Opposition to Plaintiff's Cross–Motion for an Order to Preclude the Defendants from Offering Certain Evidence or Striking the Answer, dated October 12, 2010. Kregler submitted his Memorandum of Law in Opposition to Motion to Dismiss on September 17, 2010 ("Pl. Mem.").

605 *605 ## I. *BACKGROUND* [3]

3 The factual summary that follows derives primarily from the recitation of the pertinent pleadings and other matters of record set forth in the Court's Decision and Order, dated August 17, 2009, *see Kregler v. City of New York,* 646 F.Supp.2d 570 (S.D.N.Y.2009), as supplemented by additional relevant facts presented in the Second Amended Complaint. The Court accepts these facts as true for the purposes of ruling on a motion to dismiss. *See Spool v. World Child Int'l Adoption Agency,* 520 F.3d 178, 180 (2d Cir.2008). Unless specifically referenced, no further citation to these sources will be made.

In March 2004, one month after retiring from his position as Fire Marshal with the FDNY after being employed there for 20 years, Kregler filed a preliminary application for appointment by the City's Mayor as a City Marshal. Candidates for appointment as City Marshals are subject to an investigation by DOI of their personal and financial background and must complete a DOI-administered training program. In January of 2005, Kregler was interviewed by representatives of the Mayor's Committee on City Marshals and was later notified by Schwam, an Assistant Commissioner at DOI, that DOI would commence its personal and financial review of Kregler's background. As a follow-up, Kregler met in April of 2005 with Keenaghan, a DOI investigator, to discuss Kregler's preliminary application. Kregler then made minor modifications to the application, signed the revised form, and provided authorizations for release of his personal information.

On May 25, 2005, Kregler, in his capacity as President of the Fire Marshals Benevolent Association, publicly endorsed the candidacy of Robert Morgenthau ("Morgenthau") for reelection as District Attorney for New York County. At that time, all other law enforcement associations in the City, including two unions of firefighters, supported Morgenthau's opponent, Leslie Crocker Snyder ("Snyder"). An article that appeared in a June 2005 edition of *The Chief,* a local newspaper, reported on Kregler's endorsement of Morgenthau. Grogan, an FDNY Supervising Fire Marshal, posted a copy of that article in a public area within one of the FDNY offices. Kregler alleges that Grogan then "berated" him for the endorsement, stating: "who the f—— do you think you are. Louie [Garcia] makes the endorsement." (Compl. ¶ 29.) At the time of that incident, Garcia was the Chief Fire Marshal of the FDNY's Bureau of Fire Investigation. Both Garcia and Grogan supported Snyder's political campaign against Morgenthau.

On July 7, 2005, Kregler was interviewed by staff of the Mayor's Office in connection with his Fire Marshal application and the following day was told by Schwam that the next step in the process would be the completion of the DOI background check. To that end, Kregler met a second time with Keenaghan to update and refile his application. In September of 2005, Kregler and four other candidates began the DOI training classes, which Kregler successfully completed in October of 2005. In November 2005, Kregler satisfied the last requirement for appointment by demonstrating his ability to obtain a bond. In March of 2006, Kregler was informed by letter from Schwam that he would not be appointed as a City Marshal.

Kregler filed this action in August of 2008, raising a claim of First Amendment retaliation in violation of § 1983. Kregler contends that the explanation proffered to him for the denial of his application—Kregler's failure to disclose details of a Command Discipline he had received in 1999 during his employment by the FDNY—
606 was merely a pretext for defendants' unlawful retaliation. On December 2, 2008, *606 defendants moved to dismiss the first amended complaint, dated November 14, 2008 ("First Amended Complaint"), asserting failure by Kregler to state a claim upon which relief could be granted. By Decision and Order dated March 16, 2009,

the Court deferred ruling on the motion to dismiss pending the outcome of a preliminary hearing pursuant to Rule 12(i) of the Federal Rules ("Rule 12(i) Hearing"). The Court conducted that proceeding on July 16, 2009 and heard the parties' further oral arguments on July 18, 2009. On August 14, 2009, by Decision and Order, the Court dismissed the First Amended Complaint in its entirety. Kregler appealed and, on May 3, 2010, the United States Court of Appeals for the Second Circuit issued a summary order ("Summary Order") vacating the order of dismissal and remanding the case to this Court for further proceedings. *See Kregler v. City of New York,* 375 Fed.Appx. 143, 144 (2d Cir.2010).

On July 9, 2010, Kregler filed his Second Amended Complaint in which, among other things, he added Naberezny, an Inspector General for the DOI, as a defendant. In particular, Kregler now alleges that Garcia was "personally and socially acquainted" with Naberezny (Compl. ¶ 40) and that the two "agreed to cause Kregler's application for appointment as a City Marshal to be rejected by DOI in retaliation for Kregler's support of Morgenthau." (Compl. ¶ 43.)

## II. *LEGAL STANDARDS*

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* —— U.S. ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) ( *quoting Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). This standard is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The Court must accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inferences in the plaintiff's favor. *See Chambers v. Time Warner, Inc.,* 282 F.3d 147, 152 (2d Cir.2002).

To state a claim for First Amendment retaliation under § 1983, Kregler must allege facts that, if proven, could establish that: (1) he engaged in constitutionally protected speech; (2) he suffered an adverse employment action; and (3) a causal connection exists between the speech and the adverse employment action "so that it can be said that the speech was a motivating factor in the determination." *Washington v. County of Rockland,* 373 F.3d 310, 320 (2d Cir.2004) ( *citing Morris v. Lindau,* 196 F.3d 102, 110 (2d Cir.1999)).

Additionally, a complaint that asserts claims pursuant to § 1983 against individual defendants must allege facts that could support a reasonable inference that each named defendant was personally involved in the constitutional deprivation. *See Feingold v. New York,* 366 F.3d 138, 159 (2d Cir.2004) ("A finding of 'personal involvement of [the individual] defendants' in an alleged constitutional deprivation is a prerequisite to an award of damages under Section 1983." (citations omitted)). A plaintiff pleading personal involvement must allege at least one of the following five courses of conduct:

(1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation ... failed to remedy the wrong, (3) the defendant created a policy or custom under
607 which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, *607 (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference ... by failing to act on information indicating that unconstitutional acts were occurring. *Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995).

## III. *DISCUSSION*

### A. *CLAIMS AGAINST HEARN*

Hearn argues that the claims against her must be dismissed because Kregler's counsel admitted on the record at the Rule 12(i) Hearing that there is no factual basis for alleging Hearn was aware of any retaliatory action taken against Kregler. "[A]bsent egregious circumstances, a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in his professional capacity binds his client as a judicial admission." *Haywood v. Bureau of Immigration,* 372 Fed.Appx. 122, 124 (2d Cir.2010). At the Rule 12(i) Hearing, Kregler's counsel stated:

[s]o what I have here is a situation where I think I've named the wrong defendant. And, in fact, I would like to make an application to the Court to substitute in Naberezny for Gill Hearn because it looks to me like the discussion, the understanding about Kregler not becoming a sheriff that was had, was had between Naberezny and Garcia and not between Garcia and Gill Hearn.

(Hr'g Tr. 26, July 28, 2009.)

Because Hearn relies upon materials outside the pleadings, the Court finds it appropriate to convert Hearn's motion to dismiss into a motion for summary judgment pursuant to Rule 12(d) of the Federal Rules. When matters outside the pleadings are presented in connection with a motion to dismiss, "a district court must either exclude the additional material and decide the motion on the complaint alone or convert the motion to one for summary judgment under Fed R. Civ. P. 56 and afford all parties the opportunity to present supporting material." *Friedl v. City of New York,* 210 F.3d 79, 83 (2d Cir.2000) (internal quotation marks and citations omitted).

The Court's preliminary view is that the statements of Kregler's counsel amount to a judicial admission that has a binding effect on all future proceedings. Kregler contends that his counsel's statements constituted an observation rather than a judicial admission and that his counsel was merely speculating that, after learning that it was Naberezny, not Hearn, who had a relationship with Garcia, he erred in "naming Gill Hearn as a defendant *on that basis*." (Pl. Mem. at 8.) Kregler further asserts that other "testimony and documents introduced at the Hearing raise serious questions about Gill Hearn's liability" that are sufficient to withstand a motion to dismiss. ( *Id.* at 8–9.) Based upon a review of the pleadings, the Court is not persuaded that Kregler has made such a showing. However, both parties will be afforded an opportunity to present additional materials outside the pleadings that they believe are pertinent to the motion for summary judgment on the issue of whether the statements of Kregler's counsel at the Rule 12(i) Hearing require a dismissal of the claims against Hearn. **B. *CLAIMS AGAINST SCHWAM AND KEENAGHAN***

Kregler alleges that Schwam and Keenaghan knew that the City's stated reason for terminating his application
608 was false, but "deliberately decided to look the other way." (Compl. ¶ 49.) Schwam and *608 Keenaghan contend that these allegations are insufficient to a state a claim against them because Kregler has failed to plead facts that could support a plausible inference that they had any knowledge that an unconstitutional act was occurring. Rather, Kregler would need to allege sufficient facts that Schwam and Keenaghan had knowledge regarding the purported agreement between Naberezny and Garcia to violate Kregler's constitutional rights.

Additionally, Schwam and Keenaghan contend that an individual who lacks the authority to remedy or "take action with respect to any constitutional violation" cannot be found to be personally involved. *Koulkina v. City of New York,* 559 F.Supp.2d 300, 317 (S.D.N.Y.2008). The Court agrees that because Keenaghan and Schwam were not supervisors of Naberezny, they lacked the authority to prevent the alleged constitutional violation at issue. *See, e.g., id.; Keesh v. Goord,* No. 04 Civ. 271A, 2007 WL 2903682, at *6 (W.D.N.Y. Oct. 1, 2007) (finding no personal involvement where defendant who oversaw prisoner grievances only signed determination

made by the committee on plaintiff's grievance but did not have voting power regarding that decision); *Brody v. McMahon,* 684 F.Supp. 354, 355 (N.D.N.Y.1988). As such, the claims against them should be dismissed because they were not the ultimate decision makers regarding the appointment of Kregler as a City Marshal.

Kregler, on the other hand, argues that the Second Circuit has already rejected Schwam's and Keenaghan's arguments relating to their lack of personal involvement or authority to remedy the constitutional violation. Thus, he contends that under the "law of the case" doctrine, the Court must reject those arguments here. "The 'law of the case' doctrine is a rule of practice followed by New York courts that dictates that 'a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation.' " *Westerbeke Corp. v. Daihatsu Motor Co.,* 304 F.3d 200, 218 (2d Cir.2002) (citations omitted).

In its Summary Order, the Second Circuit stated: "[w]e have considered all of defendants' contentions in support of the Rule 12(b)(6) dismissal and have found them to be without merit." *Kregler,* 375 Fed.Appx. at 144. The Second Circuit, however, did not specify in its ruling what arguments were raised in support of defendants' previous motion to dismiss. Based upon a review of the parties' submissions, the Court is unable to determine which, if any, of Schwam's and Keenaghan's arguments may be foreclosed under the "law of the case" doctrine. This analysis requires a review of the parties' appellate briefs, which are not properly before the Court. As is the case with Hearn's instant motion, the Court converts Schwam's and Keenaghan's motion to dismiss into a motion for summary judgment pursuant to Rule 12(d) of the Federal Rules. The parties are directed to submit additional briefing and materials specifically relating to the issues raised and considered on appeal so that the Court may determine whether the "law of the case" doctrine is applicable here.

Even if the Court finds that the "law of the case" doctrine does not apply, Kregler contends that the Second Amended Complaint alleges additional facts regarding Keenaghan and Schwam's personal involvement that are sufficient to defeat their motion to dismiss. The Court disagrees. As mentioned above, the Court is not persuaded that Schwam, who ultimately reported to Hearn, and Keenaghan, who ultimately reported to
609 Schwam, were in a position to prevent the alleged constitutional*609 violation at issue.[4] *See Koulkina,* 559 F.Supp.2d at 317. ( *See* Compl. ¶¶ 7, 8.) **C. *CLAIMS AGAINST GROGAN***

[4] Kregler also argues that even if Keenaghan and Schwam are subordinates, as law enforcement officers, they have a duty to intervene. Furthermore, Kregler contends that as City employees, Keenaghan and Schwam have an affirmative duty to intervene to prevent an illegality under the Mayor's Executive Order 16. "A law enforcement officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers." *O'Neill v. Krzeminski,* 839 F.2d 9, 11 (2d Cir.1988). An examination of the cases relied upon by Kregler reveals that Keenaghan and Schwam are not the type of "law enforcement officers" to which this principle is meant to apply. Additionally, the type of unconstitutional acts at issue in the authorities Kregler cites involved false arrest, excessive force, or related torts committed against the actual person of the individual, not the type of injury alleged here. Accordingly, the Court finds the rule that law enforcement or City employees have a duty to intervene to prevent a constitutional violation is inapplicable to the case at bar.

Grogan asserts that Kregler's allegations that Grogan was upset about Kregler's endorsement of Morgenthau and that he and Garcia "agreed to take steps to prevent Kregler's appointment in retaliation for Kregler's endorsement" (Compl. ¶¶ 29, 39) are insufficient to state a claim upon which relief can be granted.

The Court finds that even if Grogan was aware of the unconstitutional violation, he lacked the authority to take action to remedy the wrong and thus cannot be held liable. *See Koulkina,* 559 F.Supp.2d at 317. Kregler once again contends that because the Second Circuit has already addressed the issue of Grogan's personal

involvement, the Court is barred from considering those arguments here.

Although the Court is mindful that it is required to consider whether the Second Circuit's decision has any bearing on Grogan's claims, the Court is not persuaded that Grogan, an employee of the FDNY, can be held personally liable for a final decision made solely by the DOI Commissioner. Nevertheless, the Court converts Grogan's motion to dismiss into a motion for summary judgment pursuant to Rule 12(d) of the Federal Rules to allow the parties to submit additional briefing and materials specifically relating to whether the Second Circuit already considered and decided the issues raised by Grogan here. **D. *CLAIMS AGAINST NABEREZNY***

Naberezny argues that the claims against her are time barred. Section 1983 claims have a three-year statute of limitations. *See Owens v. Okure,* 488 U.S. 235, 251, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989). "[T]he timeliness of a discrimination claim is measured from the date the claimant receives notice of the allegedly discriminatory decision, not from the date the decision takes effect." *O'Malley v. GTE Serv. Corp.,* 758 F.2d 818, 820 (2d Cir.1985); *see also Pearl v. City of Long Beach,* 296 F.3d 76, 80 (2d Cir.2002). Kregler alleges that the decision to terminate his application for the position of City Marshal occurred on or about November 14, 2005, and that he was informed of that decision on March 10, 2006. Yet it was not until his filing of the Second Amended Complaint on July 9, 2010, more than three years after the alleged violation occurred, that Kregler first attempted to name Naberezny as a defendant. Therefore, the claims against Naberezny are untimely and must be dismissed unless those claims "relate back" to the claims asserted in the initial complaint.

In order for a complaint that adds a new defendant to relate back to the original complaint for limitations
610 purposes, *610 the following requirements must be satisfied: (1) both complaints must arise out of the same conduct, transaction, or occurrence; (2) the additional defendant must have been omitted from the original complaint by mistake; and (3) the additional defendant must not be prejudiced by the delay. Fed.R.Civ.P. 15(c)(1). Rule 15(c) of the Federal Rules ("Rule 15(c)") also requires that the new defendant have actual or constructive knowledge that she would have been named but for the plaintiff's mistake. *See Tsering v. Wong,* No. 08 Civ. 5633, 2008 WL 4525471, at *6 (S.D.N.Y. Oct. 3, 2008).

The notice required must be such that a reasonably prudent person ought to have been able to anticipate or should have expected that the character of the originally pleaded claim might be altered or that other aspects of the conduct, transaction or occurrence set forth in the original pleading might be called into question. *Id.* ( *citing Pemrick v. Stracher,* No. 92 Civ. 959, 2005 WL 2921621, at *7 (E.D.N.Y. Nov. 4, 2005)).

In his initial and First Amended Complaint, Kregler advanced the theory that it was the personal relationship between Hearn and Garcia that provided the impetus by which the two of them allegedly agreed to reject Kregler's application for City Marshal in retaliation for supporting Morgenthau. Once Kregler conceded at the Rule 12(i) Hearing that Hearn and Garcia did not maintain the close personal relationship Kregler had alleged, he asserted in the Second Amended Complaint that it was Naberezny who had the relationship with Garcia and had colluded with him to cause the denial of Kregler's appointment. Kregler thus proceeded to substitute Naberezny's name for Hearn's in the Second Amended Complaint.[5]

5 The Second Amended Complaint now states that "Naberezny and Garcia are personally and socially acquainted" (Compl. ¶ 40) and they "agreed to cause Kregler's application for appointment as a City Marshal to be rejected by DOI in retaliation for Kregler's support of Morgenthau." (Compl. ¶ 41.)

Kregler claims that he has satisfied all three elements of the Rule 15(c) test. First, Kregler argues that the initial complaint and the two amended complaints all relate to the same conduct. Second, Kregler contends that he was mistaken as to the relationship between Garcia and Hearn and learned of this oversight only after

testimony was introduced on the issue at the Rule 12(i) Hearing. Finally, Kregler asserts that Naberezny does not offer any evidence of prejudice and that she "surely knew that Kregler mistakenly believed that Hearn had the close relationship with Garcia precisely because she was the one with the close personal relationship with Garcia, not her boss." (Pl. Mem. at 18.) Kregler further argues that Naberezny's silence on this issue "proves the point that she knew that, but for Kregler's mistake, she would have been named as a defendant in the initial complaint." ( *Id.*)

While arguably Kregler's amended pleadings may be sufficient to satisfy the first and second prongs of the Rule 15(c) test, it is not clear on the current record whether Naberezny has been prejudiced by the delay. Accepting the factual allegations in the Second Amended Complaint as true, the Court must assume that Garcia and Naberezny agreed to cause the rejection of Kregler's application. *See Iqbal,* 129 S.Ct. at 1950. Although Naberezny was not identified by name or title anywhere in the initial complaint or the First Amended Complaint, accepting that she was the one who made the purported agreement with Garcia, she "ought to have
611 been able to anticipate or should have *611 expected" that Kregler might amend his complaint to correctly substitute her name for Hearn's. *Tsering,* 2008 WL 4525471, at *6. This argument, however, prevails only if Naberezny had the knowledge asserted in the initial or First Amended Complaint concerning Kregler's endorsement of Morgenthau and Garcia's alleged retaliatory motive on that account. A plausible basis for the allegation is not supported by the current pleadings and relevant record.

The Court, therefore, directs the parties to engage in discovery limited to the sole issue of whether Naberezny had actual or constructive knowledge of this action and of her alleged role in it within the time period of the applicable statute of limitations such that she could have reasonably expected that she might be named as a defendant. Accordingly, the Court finds it appropriate to convert Naberezny's motion to dismiss into a motion for summary judgment pursuant to Rule 12(d) of the Federal Rules to allow the parties to submit materials outside the pleadings related to the issue at hand.

## IV. *CROSS–MOTION TO PRECLUDE OR STRIKE THE ANSWER*

In addition to opposing the motion to dismiss, Kregler has cross-moved to preclude the defendants from offering certain evidence or to strike the answer of the City and Garcia because they have failed to respond to discovery demands.

Rule 37.2 of the Local Civil Rules ("Rule 37.2") provides that:

No Motion under Rules 26 through 37 inclusive of the Federal Rules of Civil Procedure shall be heard unless counsel for the moving party has first requested an informal conference with the court and such request has either been denied or the discovery dispute has not been resolved as a consequence of such a conference.

Local Civil Rule 37.2. Because Kregler has not complied with Rule 37.2, nor provided any justification as to why such a drastic remedy is warranted at this time, the Court denies his motion.

## V. *ORDER*

For the reasons discussed above, it is hereby

**ORDERED** that pursuant to Rule 12(d) of the Federal Rules of Civil Procedure ("Federal Rules")/ the Court hereby gives the parties notice of its intention to convert the motion to dismiss (Docket No. 43) of defendants Jayme Naberezny ("Naberezny"), Rose Gill Hearn, Keith Schwam, Darren Keenaghan, and Brian Grogan ("Defendants") to a motion for summary judgment under Rule 56 of the Federal Rules; and it is further

**ORDERED** that the parties are directed to confer and, by March 16, 2011, submit to the Court for approval a briefing schedule for any opposition and reply briefs (the "Summary Judgment Papers") that the parties intend to file, which shall not exceed fifteen (15) pages in length. Any additional materials pertinent to Defendants' motion for summary judgment shall be submitted in accordance with Rule 56(e) of the Federal Rules and Rule 56.1 of the Local Rules of Civil Procedure for this District; and it further

**ORDERED** that plaintiff William Kregler ("Kregler") and Naberezny are directed to engage in limited discovery on the sole question of whether Naberezny had actual or constructive knowledge of the instant action and of her alleged role in it within the time period of the applicable statute of limitations consistent with this Decision and Order. Any additional materials or briefing relevant to the issue regarding Naberezny's knowledge
612 shall be *612 included in the Summary Judgment Papers; and it is finally

**ORDERED** that the motion (Docket No. 49) of Kregler to preclude the Defendants from offering certain evidence or to strike the answer of the City of New York and Louis Garcia is DENIED.

SO ORDERED.

# Nicholson v. Staffing Auth., Alloy, Inc.

Decided Feb 1, 2011

10 Civ. 2332 (JLC)

02-01-2011

SANDY NICHOLSON, Plaintiff, v. THE STAFFING AUTHORITY, ALLOY, INC., ARI ALEXENBURG, and TREY DAVIS, Defendants.

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JAMES L. COTT, United States Magistrate Judge.

## MEMORANDUM AND ORDER

**JAMES L. COTT**, **United States Magistrate Judge.**

In this employment discrimination case, plaintiff Sandy Nicholson ("Plaintiff" or "Nicholson") alleges that defendants The Staffing Authority ("Staffing Authority"), Alloy, Inc. ("Alloy") (together, the "Corporate Defendants"), and Ari Alexenburg ("Alexenburg") discriminated against her on the basis of race, subjected her to a hostile work environment, and retaliated against her in violation of federal, state, and city laws.[1] By Order dated November 12, 2010 (and subsequent to a conference on November 10, 2010), the Court directed the parties to brief the basis for imposing individual liability as to Alexenburg in an effort to determine whether subject matter jurisdiction exists as to the claims against him. (Doc. No. 18).[2] Plaintiff submitted a letter brief to the Court on November 24, 2010, and Alexenburg, proceeding pro se,[3] responded by letter, dated December 10, 2010. Alloy and the Staffing Authority submitted a letter, dated December 3, 2010. *2

[1] Complaint dated March 16, 2010 (Doc. No. 1).

[2] The parties have consented to my handling the case for all purposes pursuant to 28 U.S.C. § 636(c) (Doc. No. 14).

[3] Counsel has recently filed a Notice of Appearance on Alexenburg's behalf (Doc. No. 21).

The Court finds that, while there is no viable claim under Title VII of the Civil Rights Act of 1964,[4] Alexenburg faces potential liability under Section 1981 of the Civil Rights Act,[5] the New York State Human Rights Law,[6] and the New York City Human Rights Law.[7] The Court grants Plaintiff leave to amend her complaint to assert claims for aider and abettor liability under the applicable State and City laws.

[4] 42 U.S.C. $ 2000e et seq.

[5] Id. § 1981.

[6] N.Y. Exec. Law § 296, et seq. (McKinney 2010).

[7] N.Y. City Admin. § 8-107, et seq. (McKinney 2010).

## I. The Claims Asserted

In deciding whether subject matter jurisdiction exists pursuant to Federal Rule of Civil Procedure 12(b)(1), the Court must accept as true the factual allegations in the Complaint, but need not draw inferences in favor of the party asserting such jurisdiction.[8] Plaintiff bears the burden of demonstrating "by a preponderance of the evidence" the existence of subject matter jurisdiction.[9]

8 Morrison v. Nat'l Australia Bank Ltd., 547 F.3d 167, 170 (2d Cir. 2008).

9 Id.

**A. Federal Claims**

1. Section 1981 of the Civil Rights Act

The first count of the Complaint alleges that Defendants violated Section 1981 of the Civil Rights Act.[10] Section 1981 protects the right of "[a]ll persons within the jurisdiction of the United States . . . to make and
3 enforce contracts," including employment agreements, *3 irrespective of race.[11] The Second Circuit has stated that "individuals may be held liable under § 1981."[12] A viable Section 1981 claim alleges that the individual defendant was personally involved in discriminating against the plaintiff.[13] Because the Complaint alleges that Alexenburg discriminated against Nicholson on the basis of race, this claim is legally cognizable.

10 42 U.S.C. § 1981(a); Compl. ¶¶ 44-47.

11 42 U.S.C. § 1981(a), (b); see Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 474-75 (2006) ("Section 1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship . . ..").

12 Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 75 (2d Cir. 2000); see Patterson v. Cnty. of Oneida, N.Y., 375 F.3d 206, 226 (2d Cir. 2004).

13 Patterson, 375 F.3d at 229; Stevens v. New York, 691 F. Supp. 2d 392, 401 (S.D.N.Y. 2009).

The Court notes that the Complaint alleges a single incident of discriminatory conduct by Alexenburg. Specifically, Nicholson alleges that Alexenburg inadvertently left a voicemail message on her answering machine twice referring to her as a "fucking nigger."[14] Nicholson allegedly had no further interactions with Alexenburg.

14 Compl. ¶¶ 21-22.

Accepting the allegations in the Complaint as true, Alexenburg's conduct, though plainly offensive, may be insufficient to demonstrate that Nicholson's work environment was "permeated with discriminatory intimidation, ridicule, and insult . . . sufficiently severe or pervasive to alter the conditions of [her] employment."[15] Though courts have recognized that "'no single act can more quickly alter the conditions of
4 employment than the use of an *4 unambiguously racial epithet such as 'nigger,'"[16] single or infrequent use of such language does not establish that the work environment is hostile.[17] Courts typically find that a hostile work environment exists only where the "racially-harassing comment is one of many facially-motivated comments."[18] The Court is thus not opining on whether Plaintiff's hostile work environment claim will ultimately pass muster against Alexenburg. For subject matter jurisdiction purposes, however, the claim is
5 legally cognizable. *5

15 Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir. 2000) (quoting Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 778 (1998)). See Kaytor v. Elec. Boat Corp., 609 F.3d 537, 547 (2d Cir. 2010); Desir v. Concourse Rehab. & Nursing Ctr., No. 06 Civ. 1109 (LAK), 2008 WL 756156, at *6 (S.D.N.Y. Mar. 21, 2008) ("Unless they are sufficiently severe to alter the terms and conditions of employment, isolated incidents usually do not rise to the level of a hostile work environment.").

16 Bailey v. Colgate-Palmolive, Co., No. 99 Civ. 3228 (CBM), 2003 WL 21108325, at *23 (S.D.N.Y. May 14, 2003) ("quoting Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (1993)).

17 Cruz, 202 F.3d at 570.

18 Fleming v. Maxmara USA, Inc., 371 Fed. App'x 115, 118 (2d Cir. 2010) (summary order) (single instance of derogatory comment not hostile work environment). See also Saqib v. Stein deVisser & Mintz, P.C., 09 Civ. 4624, 2010 WL 2382253, at *1 (2d Cir. June 15, 2010) (summary order) (single reference to Middle Eastern plaintiff as "look[ing] like a terrorist" not hostile work environment); Carter v. New Venture Gear, Inc., 310 Fed. App'x 454, 458 (2d Cir. 2009) (summary order) (note to African-American employee stating "get out we do not want you here" too infrequent and insufficient to create hostile work environment); Williams v. Cnty. of Westchester, 171 F.3d 98, 101 (2d Cir. 1999) ("[E]vidence solely of 'sporadic racial slurs' does not suffice.") (quoting Schwapp, 118 F.3d at 110)); Liburd v. Bronx Lebanon Hosp. Center, No. 07 Civ. 11316 (HB), 2009 WL 900739, at *8 (S.D.N.Y. Apr. 3, 2009), aff'd 372 Fed. App'x 137 (2d Cir. 2010) (granting summary judgment where employer three times referred to plaintiff as "black ass") (summary order); Kaur v. New York City Health and Hosps. Corp., 688 F. Supp. 2d 317, 338 (S.D.N.Y. 2010) ("The two obviously racist comments, though deplorable, are not of sufficient severity to alter the terms and conditions of Plaintiff's employment."); Lessambo v. PricewaterhouseCoopers, L.P., 08 Civ. 6272 (WHP), 2010 WL 3958787, at *11 (S.D.N.Y. Sept. 27, 2010) (three offensive remarks regarding national origin of plaintiff not hostile work environment); Burchette v. Abercrombie & Fitch Stores, Inc., No. 08 Civ. 8786 (RMB) (THK), 2010 WL 1948322, at *12 n.7 (S.D.N.Y. May 10, 2010) (allegations of isolated events not "sufficiently severe to warrant a finding of harassment") (internal quotations omitted); Hill v. Rayboy-Brauestein, 467 F. Supp. 2d 336, 360-61 (S.D.N.Y. 2006) (no hostile work environment claim where plaintiff called "nigger" and "retard" twice over eighteen months).

2. Title VII of the Civil Rights Act

Nicholson's second claim for relief alleges a violation of Title VII of the Civil Rights Act.[19] Title VII makes it unlawful for an employer to "discriminate against any individual with respect to [ ] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."[20] In her letter brief to the Court, Plaintiff concedes that Tomka v. Seiler [21] precludes individual liability on a Title VII claim. Accordingly, this claim against Alexenburg is dismissed for lack of subject matter jurisdiction.

19 42 U.S.C. § 2000e; Compl. ¶¶ 48-51.

20 42 U.S.C. § 2000e-2(a)(1).

21 66 F.3d 1295, 1317 (2d Cir. 1995); see also Stevens, 691 F. Supp. 2d at 397 (citing cases).

**B. State Law Claim**

The third claim for relief alleges liability under the New York State Human Rights Law (the "NYSHRL"),[22] which prohibits an employer from discriminating on the basis of race, creed, color, or sexual orientation.[23] In Patrowich v. Chemical Bank, the New York Court of Appeals defined "employer" narrowly to include only an individual "shown to have an ownership interest in [the business employing the plaintiff] or power to do more than carry out personnel decisions made by others."[24] The factors a court may consider under the second prong,

known as the "economic reality test," include "'whether the alleged employer (1) had the power to hire and *6 fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.'"[25]

[22] N.Y. Exec. Law § 296; Compl. ¶¶ 52-55.

[23] Id. § 296(1)(a).

[24] 63 N.Y.2d 541, 542, 473 N.E.2d 11 (1984); accord, Tomka, 66 F.3d at 1317; Prince v. Madison Square Garden, 427 F. Supp. 2d 372, 385 (S.D.N.Y. 2006) (NYSHRL claim proceeds under section 296(1) against individual defendants with "power to hire and fire" plaintiff, including supervisor who allegedly participated in decision to terminate plaintiff).

[25] Herman v. RSR Sec. Servs., Ltd., 172 F.3d 132, 139 (2d Cir. 1999) (quoting Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984)).

The Corporate Defendants correctly assert that, under the facts alleged in the Complaint, Alexenburg is not an "employer."[26] Although Alexenburg, a part-time Staffing Authority employee, was alleged to have been Nicholson's "direct supervisor,"[27] there is no allegation that he held an ownership interest in either Alloy or the Staffing Authority, had the power to hire or fire Nicholson, or controlled her schedule or salary. Instead, the Complaint alleges that "Alloy controlled the Staffing Authority's employment records, including payroll and taxes; controlled the hiring and firing of Staffing Authority employees and agents; and controlled the day-to-day operations of the business of the Staffing Authority."[28] The Complaint further alleges that Trey Davis,[29] another employee, and the Corporate Defendants together decided to terminate Nicholson's employment in retaliation for complaining.[30] There is no allegation that Alexenburg participated in such decision - a fact similarly detrimental to the retaliation claim against him. *7

[26] See Letter from Michael P. Pappas, dated December 3, 2010, at 1.

[27] Compl. ¶ 8.

[28] Id. ¶¶ 8, 10.

[29] Plaintiff has advised the Court that she intends to dismiss without prejudice Trey Davis, a named defendant in this action. On or about October 12, 2010, the attempted filing of a stipulation of voluntary dismissal was rejected by the Clerk's Office (Doc. No. 13). Per the Court's November 12, 2010 Order, (Doc. No. 18), Plaintiff is directed to either voluntarily dismiss, or submit a stipulation of discontinuance, as to Davis no later than February 14, 2011.

[30] Compl. ¶¶ 41-42.

Recognizing the potential vulnerability of her claims as pled, Plaintiff requests leave to amend the Complaint to assert an aider-and-abettor theory of liability against Alexenburg.[31] Defendants oppose the proposed amendment as futile, arguing that Alexenburg could not have aided and abetted his own conduct.[32] In addition to holding an employer liable for its discriminatory conduct, the NYSHRL makes it unlawful for an employee to "aid, abet, incite, compel or coerce" a violation of the statute.[33] A predicate requirement of aider-and-abettor liability is a finding of primary liability as to the employer.[34]

[31] Letter from Nathaniel B. Smith, dated November 24, 2010 ("Smith Letter"), at 2.

[32] Letter from Michael P. Pappas, dated December 3, 2010, at 2.

[33] N.Y. Exec. Law § 296(6).

34 Schanfield v. Sojitz Corp. of Am., 663 F. Supp. 2d 305, 344 (S.D.N.Y. 2009) (quoting Sowewimo v. D.A.O.R. Sec., Inc., 43 F. Supp. 2d 477, 490 (S.D.N.Y. 1999)); Gallo v. Alitalia-Linee Aeree Italiane-Societa per Azioni, 585 F. Supp. 2d 520, 546 (S.D.N.Y. 2008) ("Before accessorial liability can be found as to an alleged aider and abettor, the plaintiff must first establish liability as to the employer/principal.").

Although Defendants correctly assert that an individual cannot aid and abet his own discriminatory conduct,[35] a co-worker/non-employer may be liable as an aider-and-abettor if he "primarily and directly perpetrated the
8 harassment."[36] In Tomka, the Second Circuit reversed *8 the district court's grant of summary judgment in favor of three individual defendants alleged to have sexually assaulted a female co-worker.[37] Notably, the defendants had no ownership interest in the employer, did not have the ability to hire or fire the plaintiff, or participate in the decision to terminate her in retaliation for complaining.[38] The appellate court explained that an individual who "actually participates in the conduct giving rise to a discrimination claim" may be liable as an aider and abettor, regardless of the individual's authority to hire or fire the plaintiff.[39]

35 Raneri v. McCarey, 712 F. Supp. 2d 271, 282 (S.D.N.Y. 2010) ("An individual cannot aid and abet his own alleged discriminatory conduct."); JGIII v. Cord, No. 08 Civ. 5668 (KMW), 2009 WL 2986640, at *12 n.5 (S.D.N.Y. Sept. 17, 2009) ("Individuals cannot be liable for aiding and abetting their own discriminatory conduct."); Virola v. XO Commc'ns, Inc., No. 05 Civ. 5056 (JG) (RER), 2008 WL 1766601, at *20 (E.D.N.Y. Apr. 15, 2008) ("An individual may not be held liable for aiding and abetting his own discriminatory conduct but only for assisting another party in violating the NYHRL."); Chamblee v. Harris & Harris, Inc., 154 F. Supp. 2d 670, 677 (S.D.N.Y. 2001) ("[P]rimary actor cannot be aider and abettor of his own actions.") (citing Hicks v. IBM, 44 F. Supp. 2d 593, 600 (S.D.N.Y. 1999)); Strauss v. New York State Dep't of Educ., 26 A.D.3d 67, 73, 805 N.Y.S.2d 704 (3d Dep't 2005) ("[W]e hold that individuals cannot be held liable under Executive Law § 296(6) for aiding and abetting their own violations of the Human Rights Law.").

36 Tomka, 66 F.3d at 1317.

37 Id.

38 Id.

39 Id. at 1317.

Subsequently, in Feingold v. New York,[40] the Second Circuit considered the extent of aider and abettor liability in the context of discriminatory conduct arising from harassing comments in the workplace. In that case, the circuit court reversed the district court's grant of summary judgment to three defendants - each administrative law judges - alleged to have discriminated against the plaintiff - also an administrative law judge - by making anti-Semitic and anti-gay remarks.[41] Citing Tomka, the court found that a genuine issue of fact existed "as to whether each of the named individual defendants 'actually participate[d]' in the conduct giving rise to" the discrimination claims, and that the defendants could be found liable for aiding and abetting the employer in
9 creating a hostile work environment.[42] *9

40 366 F.3d 138 (2d Cir. 2004).

41 Id. at 144-45.

42 Id. at 158; see also Cohn v. Keyspan Corp., 713 F. Supp. 2d 143,160 (E.D.N.Y. 2010) (co-workers with no supervisory authority over plaintiff or ownership interest in employer could be liable as aiders and abettors for participating in discrimination); Hargett v. Met. Transit Authority, 552 F. Supp. 2d 393, 407 (S.D.N.Y. 2008) (NYSHRL imposes

liability on individual with no ownership interest in employer, ability to make personnel decisions, or who "actually participated in the conduct giving rise to the discrimination") (citing Tomka, 66 F.3d at 1317).

Although courts have disagreed as to the reach of aider and abettor liability under Tomka,[43] a claim under the NYSHRL is cognizable against an individual, such as Alexenburg, who is alleged to have participated in the discrimination, even though he may not have an ownership interest in the employer, or possess the "power to do more than carry out personnel decisions made by others."[44] Although the NYSHRL claim in its current iteration must be dismissed for lack of subject matter jurisdiction, as explained herein, infra section II, Plaintiff is permitted to amend the Complaint for the limited purpose of asserting aider-and-abettor liability under the NYSHRL.

43 Tully-Boone v. North Shore-Long Island Jewish Hosp. Sys., 588 F. Supp. 2d 419, 427 (E.D.N.Y. 2008) (recognizing "that the Tomka interpretation of § 296(6) is not without controversy"); Lippold v. Duggal Color Projects, Inc., No. 96 Civ. 5869 (JSM), 1998 WL 13854, at *3 (S.D.N.Y. Jan. 15, 1998) (Tomka "creates a strange and confusing circularity where the person who has directly perpetrated the [unlawful discrimination] only becomes liable through the employer whose liability in turn hinges on the conduct of the direct perpetrator.").

44 Patrowich, 63 N.Y.2d at 542.

### C. City Law Claim

Plaintiff's fourth claim for relief is brought under the New York City Human Rights Law (the "NYCHRL"),[45] which prohibits "an employer or an employee or an agent thereof from discriminating against a person on the basis of, inter alia, race in the employment arena.[46] Nicholson argues that the language of the statute "expressly provides for personal liability" against Alexenburg.[47] In 2005, the New York City Council amended the
10 NYCHRL to require a *10 more liberal construction than its state and federal analogs.[48] Courts are now required to undertake an "analysis . . . targeted to understanding and fulfilling . . . the City's HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart State or federal civil rights laws."[49] Some courts have construed this mandate so as to preclude application of federal standards to NYCHRL claims.[50]

45 N.Y. City Admin. Code § 8-107, et seq. (McKinney 2010).

46 Id. § 8-107.1(a); Compl. ¶¶ 56-59.

47 Smith Letter at 2.

48 Local Civil Rights Restoration Act of 2005, Local Law No. 85 of City of New York (McKinney 2005).

49 Williams v. N.Y. City Hous. Auth., 61 A.D.3d 62, 872 N.Y.S.2d 27, 31 (2009) (quoting Local Law No. 85 § 7).

50 Thai v. Cayre Group, Ltd., 726 F. Supp. 2d 323, 337 (S.D.N.Y. 2010) (analyzing retaliation claim under "more permissive NYCHRL standard" than Title VII). But see Kemp v. Metro-North R.R., 316 Fed. App'x 25, at *1 (2d Cir. 2009) (summary order) (applying Title VII and ADA standards to NYCHRL); Ferraro v. Kellwood Co., 440 F.3d 96, 99 (2d Cir. 2006) (NYCHRL standards are "the same as those" under federal law); Pilgrim v. McGraw-Hill Cos., 599 F. Supp. 2d 462, 468 (S.D.N.Y. 2009) ("[T]he standard for all Title VII, section 1981, [New York State Human Rights Law] and [NY]CURL employment discrimination claims is the same.").

Before the 2005 amendment, however, courts applied the Patrowich factors to limit the scope of liability to individuals who held an ownership interest in the employer, or possessed the authority "to do more than carry out personnel decisions made by others."[51] Moreover, the First Department has stated that the NYCHRL was not "intended to afford a separate right of action against any and all fellow employees based on their

independent and unsanctioned contribution to a hostile environment."[52] In light of the 2005 amendment,
11 however, it is unclear whether *11 employees can now be held liable as primary violators, regardless of their ownership interest in the employer or the scope of their ability to make personnel decisions.

51 Lee v. Overseas Shipping Grp., Inc., No. 00 Civ. 9682 (DLC), 2001 WL 849747, at *10 (S.D.N.Y. July 30, 2001); see also Priore v. N.Y. Yankees, 307 A.D.2d 67, 74, 761 N.Y.S.2d 608, 614 (1st Dep't 2003) (NYCHRL includes "fellow employees under the tent of liability, but only where they act with or on behalf of the employer in hiring, firing, paying, or in administering the terms, conditions or privileges of employment.") (internal citations omitted).

52 Priore, 307 A.D.2d at 74, 761 N.Y.S.2d at 614.

Here, the Court need not reach the issue of whether Alexenburg can be liable as a primary violator under the NYCHRL. Because the language of the NYCHRL's aiding and abetting provision[53] is "virtually identical" to that of the NYSHRL,[54] the two statutes are analyzed under the same standard.[55] Accordingly, the NYCHRL claim, as amended, will be legally cognizable against Alexenburg.

53 N.Y. City Admin. Code § 8-107.6 (McKinney 2010) ("It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so.").

54 Feingold, 366 F.3d at 158 (quoting Dunson v. Tri-Maint. & Contractors, Inc., 171 F. Supp. 2d 103, 113-14 (E.D.N.Y. 2001)).

55 Feingold, 366 F.3d at 158 (applying same standard to NYSHRL and NYCHRL aiding and abetting claims); Schanfield, 663 F. Supp. 2d at 344 (same).

## II. Amendment of the Complaint

As noted, Nicholson requests leave to amend the Complaint to assert claims for aider and abettor theories of liability under the NYSHRL and the NYCHRL. "Generally a complaint that gives full notice of the circumstances giving rise to the plaintiff's claim for relief need not also correctly plead the legal theory or theories and statutory basis supporting the claim."[56] To that end, courts have found that a plaintiff is "not prejudiced by [the] failure to include the exact aider and abettor provision" in a complaint where the facts alleged are "sufficient enough to sustain a claim under [each statute]."[57] In any case, because leave to amend
12 under Rule 15 "shall be freely *12 given when justice so requires," the Court grants Nicholson leave to amend the Complaint to add "aider and abettor" claims under the applicable State and City laws.

56 Marbury Mgmt., Inc. v. Kohn, 629 F.2d 705, 712 n.4 (2d Cir. 1980).

57 Duviella, 2001 WL 1776158. at *17 n.12: see McArdle v. Arms Acres, Inc., 2009 WL 755287, at *14 n.17 (S.D.N.Y. Mar. 23, 2009) (rejecting argument that summary judgment should be granted on section 296(6) claim because plaintiff failed to allege such liability in complaint); Maher v. Alliance Mortg. Banking Corp., 650 F. Supp. 2d 249, 261 n.9 (E.D.N.Y. 2009) (same). --------

## III. Conclusion

For the reasons stated herein, the Title VII claim against Alexenburg is dismissed for lack of subject matter jurisdiction. The NYSHRL and NYCHRL claims are also dismissed, but permission is granted to amend the Complaint to add "aider and abettor" claims under both statutes. Nicholson is directed to file and serve an amended complaint asserting claims for aider and abettor liability under the NYSHRL and the NYCHRL no later than February 14, 2011. Dated: February 1, 2011

New York, New York

SO ORDERED:

/s/_____

JAMES L. COTT

United States Magistrate Judge

## Copies sent via ECF to:

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Supreme Court, New York County, New York.

# Arbeeny v. Kennedy Executive Search Inc.

921 N.Y.S.2d 784 (N.Y. Sup. Ct. 2011) · 31 Misc. 3d 494 · 2011 N.Y. Slip Op. 21043
Decided Jan 14, 2011

2011-01-14

Daniel N. ARBEENY, Plaintiff,v.KENNEDY EXECUTIVE SEARCH, INC., Kennedy Associates, Jason Kennedy, Jack Kandy and Joel Kandy, Defendants.

Nathaniel B. Smith, Esq., for the plaintiff.Cary B. Samowitz, Esq. of DLA Piper, for the defendants.

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EILEEN BRANSTEN, J.

785 *785 Nathaniel B. Smith, Esq., for the plaintiff.Cary B. Samowitz, Esq. of DLA Piper, for the defendants.**EILEEN BRANSTEN, J.**

Defendants Jason Kennedy ("Kennedy") and Kennedy Associates ("KA") (collectively the "Moving Defendants") move to dismiss the complaint on the basis of Plaintiff's failure to timely serve the complaint pursuant to CPLR § 306–b. Plaintiff opposes (Motion Sequence 005).

Plaintiff Daniel Arbeeny ("Plaintiff") moves for an accounting, to compel KA to answer the complaint, for an
786 order directing expedient service pursuant to *786 CPLR § 308(5) and for leave to amend the complaint to both add and withdraw claims and to withdraw Joel Kandy as a defendant. The Moving Defendants, Kennedy Executive Search, Inc. ("KES") and defendant Jack Kandy ("Kandy") (collectively "Defendants" [1]) oppose Plaintiff's motion but for Plaintiff's motion for leave to amend the complaint (Motion Sequence 004).

[1] Because the court grants Plaintiff's motion for leave to amend the complaint, Joel Kandy is not treated as a Defendant herein.

## *BACKGROUND*

Prior to its dissolution in February 2009, KES was a New York-based executive search firm. Kandy was KES's president.

KES was affiliated with KA, a British executive search firm.

Kennedy is the president of KA. Kennedy resides in Great Britain.

Plaintiff was formerly employed as an executive recruiter with the now-defunct KES.

Plaintiff signed an employment agreement with KES in January 2006. Pursuant to that agreement, Plaintiff was to receive a salary and a percentage of commissions earned as a result of placements he secured.

Plaintiff alleges that, in October, 2006, the Defendants unilaterally lowered his salary. Plaintiff further alleges that Defendants terminated him in March or April of 2007 for refusing to accept a reduction in his commission-based pay.

Plaintiff brought suit in April 2007, seeking to recover allegedly outstanding salary and commission pay. KES and Kandy, the only defendants Plaintiff served, moved to dismiss the complaint in September 2007. The court granted the motion to dismiss in April of 2008. The First Department reversed in part in January 2010.

Plaintiff now moves for leave to amend the complaint, for an accounting and for an order directing expedient service on Kennedy, directing Defendants to deposit funds with the court and directing KA to answer the complaint.

Defendants Kennedy and KA move to dismiss the claim on the ground that they have not been served.

## *ANALYSIS*

### *I. The Moving Defendants' Motion to Dismiss*

The Moving Defendants move to dismiss the complaint for failure to timely serve pursuant to CPLR § 306–b.

Plaintiff opposes. Plaintiff argues that service upon KES constituted service upon KA on the basis that KES was a "mere department" of KA and that, alternatively, KES was KA's agent. Plaintiff further contends that because he unsuccessfully attempted to serve Kennedy on numerous occasions in New York State and previously indicated his intent to move for expedient service, the court should thus deny the Moving Defendants' motion to dismiss and direct expedient service on Kennedy.

The Moving Defendants reply that Plaintiff's asserted "mere department" and agency theories are inapplicable in actions where the long-arm statute, CPLR § 302, provides a basis for personal jurisdiction. The Moving Defendants contend that the underlying case has New York roots such that the long-arm statute applies.

Plaintiff's "mere department" and agency theories sound in corporate presence doctrine. Both theories examine
787 the relationship between a New York entity and a non-New York entity over which *787 personal jurisdiction is sought in order to determine whether the non-New York entity is doing business in New York. If an entity is doing business in New York, it is present in New York for jurisdictional purposes. ***a. "Mere Department" and Agency Theories of Corporate "Presence"***

In *Taca Intern. Airlines, S.A. v. Rolls–Royce of England, Ltd.,* the Court of Appeals asked "was [subsidiary] a really independent entity or a mere department of [parent]? If the latter, then obviously [parent] was doing extensive business in our State through its local department separately incorporated as [subsidiary]." 15 N.Y.2d 97, 102, 256 N.Y.S.2d 129, 204 N.E.2d 329 (1965). The court in that case found that the domestic subsidiary was a mere department of the foreign parent because of the parent-subsidiary relationship, the sharing of executive personnel between the two, similar training and policies between the two entities and the financial dependence of the subsidiary on the parent. Upon these factors, the court reasoned that service on the subsidiary constituted service on the parent. *Id.; see also Delagi v. Volkswagenwerk A.G. of Wolfsburg, Germany* 29 N.Y.2d 426, 432, 328 N.Y.S.2d 653, 278 N.E.2d 895 (1972) (stating "this court has never held a foreign corporation present on the basis of control, unless there was in existence at least a parent-subsidiary relationship. The control over the subsidiary's activities ... must be so complete that the subsidiary is, in fact, merely a department of the parent"); *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.,* 751 F.2d 117, 120–22 (2d Cir.1984) (finding that, under New York law, important factors to be considered in determining whether a subsidiary is a mere department of its parent corporation include the "financial dependency of the subsidiary on the parent ... the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities ... [and] the degree of control over the marketing and operational policies of the subsidiary").

In *Frummer v. Hilton Hotels International, Inc.,* the Court of Appeals found Hilton Hotels Ltd., a British corporation, to be doing business in New York because the activities of the Hilton Reservation Service, a separate but commonly-owned company with offices in New York, made the latter an agent for the former. 19 N.Y.2d 533, 281 N.Y.S.2d 41, 227 N.E.2d 851 (1967). The court found that common ownership supported an inference of an agency relationship. *Id.* at 538, 281 N.Y.S.2d 41, 227 N.E.2d 851. The court further found —"and this is the significant and pivotal factor—the [Hilton Reservation Service] does all the business which [Hilton Hotels Ltd.] could do were it here by its own officials." *Id.* at 537, 281 N.Y.S.2d 41, 227 N.E.2d 851; *see also Amsellem v. Host Marriott Corp.,* 280 A.D.2d 357, 359, 721 N.Y.S.2d 318 (1st Dep't 2001).

The Moving Defendants cite to Siegel, New York Practice for the proposition that "the *Taca* and *Frommer* [sic] doctrines only arise when the cause of action has no New York roots.' " Affirmation of Cary Samowitz in Partial Opposition to Plaintiff's Motion ("004 Samowitz Aff."), p. 6, quoting Siegel, New York Practice, § 82, at 142–43 (4th ed.). The Moving Defendants argue that Plaintiff's cause of action has a basis in New York, and, thus, Plaintiff may not invoke presence doctrine where another basis for jurisdiction exists. *Id.*

However, the Moving Defendants' citation does not support the proposition for which it is offered. Rather,
788 Siegel merely clarifies that the need to embark *788 on presence doctrine analysis does not arise where the long-arm statute provides a basis for personal jurisdiction over the parent corporation. Siegel, New York Practice, § 82, at 142–43 (4th ed). This reasoning does not mean that presence doctrine is unavailable in the face of an alternative basis for personal jurisdiction. The Moving Defendants do not show that the court is precluded from considering Plaintiff's argument that KES was a mere department of KA.

Plaintiff alleges, but has not shown, the existence of a parent-subsidiary relationship between KES and KA. Plaintiff asserts that his employment agreement with KES "states that [Plaintiff] shall work closely with the team of consultants at KES and at KES's foreign-based Affiliates,' which is defined to refer to KES's parent company, Kennedy Associates" Affirmation of Nathaniel Smith in Support of Plaintiff's Motion ("Smith Aff."), ¶ 25.

Plaintiff's employment agreement defines "Affiliate" to mean "KES's parent company, subsidiaries of KES and its parent company, and any other company under common or similar ownership or control with KES and its parent company." Smith Aff., Ex. B, p. 26. However, KA is not expressly identified as the parent company referred to in Plaintiff's employment agreement. Thus, Plaintiff does not show "a classic parent-subsidiary relationship, [or] nearly identical ownership" as is required by Plaintiff's mere department theory, neither in the employment agreement or anywhere else. *Volkswagenwerk Aktiengesellschaft,* 751 F.2d at 120. To be sure, defendant Kennedy has conceded that KES and KA are affiliated through common ownership. July 5, 2007 Affidavit of Jason Kennedy in Opposition to Plaintiff's Motion for Attachment, ¶ 4. However, Plaintiff has not shown common ownership to be equivalent to the parent-subsidiary relationship or near-identical ownership that Plaintiff's "mere department" theory requires.

Furthermore, as *Taca, Delagi* and *Volkswagenwerk Aktiengesellschaft* explain, the parent-subsidiary relationship is only a threshold inquiry in "mere department" analysis. The court will not find one entity to be a "mere department" of another legally separate entity unless Plaintiff shows more. Courts have found the parent's complete control of the subsidiary, the subsidiary's financial dependence on the parent, the entities' failure to observe corporate formalities and other factors important in this regard. *See* pp. 4–5, *infra.* Plaintiff alleges similar factors, but his evidence does not establish his allegations to be valid. Plaintiff does not establish that KES was a mere department of KA.

However, Plaintiff's agency theory has merit. Kennedy, in his July 5, 2007 Affidavit in Opposition to Plaintiff's Motion for Attachment, stated that:

KA has been engaged in executive recruitment in the United Kingdom for twelve years, with specialization in the financial services industry. Because financial services are increasingly a global industry, in 2005, [KES] was established as a New York corporation to focus on placement in the New York and U.S. financial services industries. Although affiliated through common ownership, defendants KA and KES are separate legal entities. ¶ 4. Thus, KES and KA are commonly owned, and KES was established to "do all the business which [KA] could do were it here by its own officials." *Frummer,* 19 N.Y.2d at 537, 281 N.Y.S.2d 41, 227 N.E.2d 851; *see also Airtran New York, LLC v. Midwest Air Group, Inc.,* 46 A.D.3d 208, 219, 844 N.Y.S.2d 233 (1st Dep't
789 2007) (finding that "[i]t is apparent that Airlines is doing in New York what defendant would do if it *789 were here instead"). Furthermore, Plaintiff's exhibits contain a marketing brochure for the "Kennedy Group" which states, "Headquartered in London under the name Kennedy Associates with an office in New York under the name of Kennedy Executive Search, we are also affiliated with organizations in Asia." Smith Aff., Ex. B, p. 40.

KES is, for jurisdictional purposes, an agent of KA. Therefore, service upon KES suffices as service upon KA, and KA therefore must answer the complaint. The Moving Defendants' motion to dismiss is denied as to KES.

***b. CPLR § 306–b***

The CPLR directs that "service of the summons and complaint ... shall be made within one hundred twenty days after filing of the summons and complaint.... If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." CPLR § 306–b.

The Court of Appeals has clarified that "good cause" and the "interests of justice" under CPLR § 306–b are separate standards. *Leader v. Maroney, Ponzini & Spencer,* 97 N.Y.2d 95, 104, 736 N.Y.S.2d 291, 761 N.E.2d 1018 (2001). In determining whether either standard warrants extension of the 120–day period for service, "[t]he statute empowers a court faced with the dismissal of a viable claim to consider any factor relevant to the exercise of its discretion. No one factor is determinative." *Id.* at 106, 736 N.Y.S.2d 291, 761 N.E.2d 1018.

Plaintiff filed his summons and complaint on April 27, 2007. On August 9, 2007, Judge Moskowitz signed a preliminary conference order directing that "Plaintiff will make a motion for alternative service on Jason Kennedy and will make a motion regarding personal jurisdiction of Kennedy Associates." Plaintiff filed neither motion.

On September 11, 2007, after the 120 day period from Plaintiff's filing of the summons and complaint had expired, Defendants filed a motion to dismiss. On September 17, 2007, Plaintiff wrote a letter to the court explaining, inter alia, his intention to "make an application to the Court to obtain jurisdiction" over Kennedy and KA. Smith Aff., Ex. G, p. 3. Plaintiff wrote another letter to the court on October 11, 2007 requesting expedient service.

The issue of service upon Kennedy and KA next arose at a conference before the court on November 14, 2007. The court noted then that Plaintiff would have to request additional time to serve regardless of how service was to be accomplished because the 120–day period mandated by CPLR § 306–b had expired. Affirmation of Cary Samowitz in Support of Motion to Dismiss, Ex. 3, p. 20:11–15. Plaintiff never filed a motion for an extension of time for service.

On April 29, 2008, the court granted Defendants' motion to dismiss the Complaint in its entirety. Plaintiff appealed the court's decision and order, and the First Department reversed in part on January 14, 2010. On May 20, 2010, more than 120 days after the appellate division rendered its decision and, excluding the period during which Plaintiff's appeal was pending, nearly a year and a half since filing the Complaint, Plaintiff filed his instant motion seeking expedient service on Kennedy and KA. Plaintiff still has not applied for an extension of the 120–day period mandated by the CPLR.

Plaintiff contends that he attempted service upon Kennedy in New York on several occasions with no success.
790 Plaintiff thus appears to argue that reasonable *790 diligence warrants an extension of time. However, Plaintiff has not moved for an extension of time. Even if he had, Plaintiff has not made a showing that would satisfy either the good cause or interest of justice standard—Kennedy lives in Great Britain, not New York. If Plaintiff had wished to serve Kennedy in Great Britain within the 120 days allowed by the CPLR, the Hague Convention offers a means of doing so. Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, 20 UST 361, TIAS No. 6638 (1969). Plaintiff's failure to even attempt compliance with the Hague Convention and failure to move for an extension of time disallows the relief he now seeks.

For the above reasons, the Moving Defendant's motion to dismiss is granted, without prejudice, as to Defendant Jason Kennedy. ***II. Plaintiff's Motion for Leave to Amend***

Plaintiff moves for leave to amend the complaint. Specifically, Plaintiff wishes to withdraw his claims against defendant Joel Kandy, withdraw his claims for improper reduction of his salary, withdraw his claims of unjust enrichment and quantum meruit, increase the amount of damages under his claim for unpaid commissions and add a claim related to unearned commissions.

Defendants do not oppose Plaintiff's motion for leave to amend.

CPLR 3025(b) liberally permits parties to amend pleadings by leave of the court, stating that “A party may amend his pleading ... at any time by leave of the court or by stipulation of all parties.” CPLR 3025. Although leave to amend can be denied, the court sees no reason to do so in the instant case. ***III. Plaintiff's Motion for an Accounting***

Plaintiff moves for an order directing Defendants to account for certain funds. On June 19, 2007, the parties stipulated before the court that “no assets owned by any of the defendants that are in New York ... will be transferred other than in the ordinary course of business without ... ten business days notice to the client.” Smith Aff., Ex. D (June 19, 2007 Hearing Transcript), p. 19:7–15. KES dissolved in February 2009. 004 Samowitz Aff., ¶ 7. Plaintiff contends that, on account of KES's dissolution and the above stipulation, Defendants should be required to “provide an accounting for all transfers of funds for New York-based activities and ... be directed to deposit sufficient funds with the Court to satisfy a judgment in [Plaintiff's] favor.” Smith Aff., ¶ 15.

Defendants argue that Plaintiff demonstrates no basis for an accounting or for his request for an order directing Defendants to deposit money with the court. Defendants further argue that the stipulation expired upon the court's dismissal of the action in 2008 and that Plaintiff did not seek injunctive relief pending appeal, further precluding the relief he now seeks.

In order for the court to order an accounting, Plaintiff must show a fiduciary relationship with Defendants involving the entrustment of money or property, that no other remedy exists, and that Plaintiff demanded and was refused an accounting. *In re Mary XX,* 33 A.D.3d 1066, 1068, 822 N.Y.S.2d 659 (3d Dep't 2006); *see also Kastle v. Steibel,* 120 A.D.2d 868, 869, 502 N.Y.S.2d 538 (3d Dep't 1986) (“In order to be entitled to an

equitable accounting, plaintiff must prove a confidential relationship which induced him to entrust Steibel with money or property and that no adequate legal remedy exists"); *Sirico v. F.G.G. Productions,* 71 A.D.3d 429, 791 434, 896 N.Y.S.2d 61 (1st Dep't 2010) (finding *791 that plaintiff musician lacked requisite fiduciary relationship with defendant music company to compel an accounting).

It is well settled in New York law that at-will employment relationships do not create fiduciary relationships. *Rather v. CBS Corp.,* 68 A.D.3d 49, 55, 886 N.Y.S.2d 121 (1st Dep't 2009). Nor has Plaintiff articulated any other theory upon which a fiduciary relationship any of the Defendants can be based. Moreover, Defendant has not shown that he has no other remedy available. Rather, information about the financial activities of KES and KA will likely be obtainable in discovery. Plaintiff thus has not established his right to an accounting.

Plaintiff likewise has not articulated a proper basis upon which the court may direct Defendants to deposit funds into the court to secure a possible judgment. Plaintiffs claims for unpaid commissions arise from his employment contract. However, in a "disputed contract action the court may not direct payment into the court to provide a party with security for the satisfaction of a possible judgment." *Renad, Inc. v. Grana, Ltd.,* 127 A.D.2d 994, 994, 512 N.Y.S.2d 940 (4th Dep't 1987); *Pepe v. Miller & Miller Consulting Actuaries, Inc.,* 221 A.D.2d 512, 513, 633 N.Y.S.2d 602 (2d Dep't 1995).

Plaintiff's motion for an accounting and order directing Defendants to deposit funds with the court is therefore denied.

Accordingly, it is

ORDERED that Defendants Kennedy Associates' and Jason Kennedy's motion to dismiss the complaint (motion seq. 005) is GRANTED without prejudice as to Jason Kennedy; and it is further

ORDERED that Defendant Kennedy Associates' and Jason Kennedy's motion to dismiss the complaint (motion seq. 005) is DENIED as to Kennedy Associates; and it is further

ORDERED that Plaintiff's motion for leave to amend the complaint (motion seq. 004) is GRANTED; and it is further

ORDERED that Defendant Kennedy Associates shall answer the complaint within 20 days of notice of entry of this decision and order; and it is further

ORDERED that Plaintiff's motion is otherwise denied.

This constitutes the decision and order of the court.

No. 09-3840-cv
United States Court of Appeals, Second Circuit

# Kregler v. City of New York

375 F. App'x 143 (2d Cir. 2010)
Decided May 3, 2010

No. 09-3840-cv.

May 3, 2010.

Appeal from a judgment of the United States District Court for the Southern District of New York (Marrero, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the judgment of the district court be **VACATED** and the matter be **REMANDED** for further proceedings.

Nathaniel B. Smith, Law Office of Nathaniel B. Smith. New York, NY, for Appellants.

Drake A. Colley (Edward F.X. Hart on the brief) for Michael A. Cardozo, Corporation Counsel of the City of New York, New York, NY, for Appellees.

PEESENT: DENNIS JACOBS, Chief Judge, AMALYA L. KEARSE and GUIDO CALABRESI, Circuit Judges.

## *SUMMARY ORDER*

Plaintiff-appellant William Kregler appeals from an August 18, 2009, 646 F.Supp.2d 570, judgment of the
144 United States District Court for the Southern District of New York (Marrero, *J.*) granting *144 defendants' motion to dismiss under Rule 12(b)(6). Kregler appeals, arguing that he sufficiently stated a claim in his complaint brought under 42 U.S.C. § 1983. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

"We review a district court's grant of a motion to dismiss under Rule 12(b)(6) *de novo." Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 115 (2d Cir. 2008) (internal quotation marks omitted). "To state a prima facie case of retaliation under § 1983, a plaintiff must demonstrate that: (1) his or her speech was constitutionally protected; (2) he or she suffered an adverse employment action; and (3) a causal connection exists between the speech and the adverse employment action so that it can be said that the speech was a motivating factor in the determination." *Washington v. County of Rockland*, 373 F.3d 310, 320 (2d Cir. 2004). The appellees contend that Kregler did not adequately plead causation.

"While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbai*, ___ U.S. ___, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009). "A court `can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.'" *Hayden v. Paterson*, 594 F.3d

150, 161 (2d Cir. 2010) ( *quoting Iqbal*, 129 S.Ct. at 1950). "We next consider the factual allegations in [plaintiffs] complaint to determine if they plausibly suggest an entitlement to relief." *Iqbal*, 129 S.Ct. at 1951; *see also Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009).

Kregler's amended complaint pleads facts sufficient to clear this threshold. He alleges that in response to his announced stance in support of a candidate in a heated local political campaign, employees of the New York City Fire Department induced contacts at the Department of Investigation to prevent his appointment as a City Marshal. This allegation is neither a legal conclusion nor asserts a claim that is implausible on its face.[1] Kregler's claim that political animus caused certain defendants to lie about or mischaracterize Kregler's disciplinary record, and that that same political animus caused other defendants to accept their misrepresentations is not implausible on its face and therefore not susceptible to a motion to dismiss. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

[1] The District Court looked further into the matter in a Rule 12(i) hearing. We express no opinion, however, as to the use of that procedure or the impact of the facts adduced therein.

There is no merit in Kregler's argument that the case should be remanded to a different district court judge. *See Shcherbakovskiy v. Da Capo Al Fine, • Ltd.*, 490 F.3d 130, 142 (2d Cir. 2007). Kregler's motion for leave to amend, which was denied below as futile, should be granted upon remand.

We have considered all of defendants' contentions in support of the Rule 12(b)(6) dismissal and have found them to be without merit. Accordingly, the judgment of the district court is hereby **VACATED** and the matter is **REMANDED** for further proceedings consistent with this order. In the event that plaintiff ultimately prevails on the merits of his claim, the 145 *145 district court shall include in the costs awarded the costs of this appeal.

No. 794
Appellate Division of the Supreme Court of New York, First Department

# Arbeeny v. Kennedy Executive Search, Inc.

71 A.D.3d 177 (N.Y. App. Div. 2010) · 2010 N.Y. Slip Op. 306 · 893 N.Y.S.2d 39
Decided Jan 14, 2010

No. 794.

January 14, 2010.

APPEAL from an order of the Supreme Court, New York County (Eileen Bransten, J.), entered April 29, 2008. The order granted the motion of defendants Kennedy Executive Search, Inc., and Jack Kandy to dismiss the
178 complaint. *178

*Nathaniel B. Smith*, New York City, for appellant.

*DLA Piper LLP (US)*, New York City ( *Cary B. Samowitz* of counsel), for respondents.

Before: SAXE, J.P., SWEENY and RICHTER, JJ., concur.

## OPINION OF THE COURT

ACOSTA, J.

On or about January 5, 2006, plaintiff and defendant Kennedy Executive Search (KES), an executive recruitment firm, entered into an agreement whereby KES employed plaintiff as a senior executive search consultant. The agreement, drafted by KES's lawyers and governed by New York law, states that employment may be terminated by plaintiff or KES at any time, with or without cause or prior notice.

The agreement set plaintiff's salary at $125,000 per year and provided that "[s]uch salary shall be reviewed by Management from time to time, and any adjustment to such Salary shall be in the sole discretion of Management." In addition to salary, section 5.1 of the agreement provided that plaintiff was eligible "to earn
179 commission compensation in respect of placements *arranged* *179 by Employee on behalf of KES" as set out in article 5 (emphasis added). Section 5.2 of the agreement set forth a formula by which commissions were to be calculated.[1] Sections 5.3 and 5.7 provided that the commission amount would be paid to plaintiff in the calendar month following the month in which payment in full of the net fee income was received by KES from the client, provided KES had recovered plaintiff's salary and other costs. Section 5.6 (a), the portion at issue in this case, provides that "[n]o commission shall be due" in the event plaintiff "is not in the employ of KES at the date the commission payment would otherwise be made."

[1] Section 5.2 provides, in relevant part, that

> "the commission amount will be a percentage of the Net Fee Income to KES (which is defined as the total fee received by KES from the client, less any sales tax, in respect of placement(s) of candidate(s) arranged by Employee), after achieving the annual threshold amount determined in accordance with subparagraph 5.7 below. Such commission compensation shall be Thirty Percent . . . of up to Five Hundred Thousand . . . Dollars in Net Fee Income to KES, Forty Percent . . . of the Net Fee Income to KES of between Five Hundred Thousand Dollars . . . and One Million Dollars . . ., and Fifty Percent . . . of the Net Fee Income to KES exceeding One Million Dollars."

KES unilaterally reduced plaintiff's salary to $100,000 a year in October 2006, and terminated him on March 28, 2007 because he refused to accept KES's demand that he accept a reduction in his commissions.[2] According to KES, it received a fee in March for a placement plaintiff had handled. Pursuant to section 5.3, payment to plaintiff would have been due in April if plaintiff were still employed. To avoid unnecessary disputes, however, KES paid plaintiff $35,000 "without prejudice."[3] KES received other fees originated by plaintiff after March 2007, but no further commissions were paid to plaintiff.

[2] According to KES, plaintiff left voluntarily.

[3] Pursuant to section 13.4,

> "[t]his Agreement may be amended, modified, superseded, [or] canceled . . . and the terms . . . hereof may be waived, only by a written instrument executed by both of the parties hereto, or in the case of a waiver, by the party waiving compliance . . . The failure of either party at any time or times to require performance of any provision hereof shall in no manner affect the right at a later time to enforce the same. No waiver by either party of the breach of any term . . . contained in this Agreement, whether by conduct or otherwise, . . . shall be deemed to be . . . a further or continuing waiver of any such breach."

In April 2007, plaintiff brought the instant action against KES, Kennedy Associates, Jason Kennedy, Jack
180 Kandy (the president *180 of KES), and Joel Kandy. He alleged that he was owed $12,500 in unpaid salary for six months, $223,970 in unpaid commissions, and another unspecified amount for placements that he was working on when he was terminated. The complaint asserted claims for breach of contract, unpaid salary and commissions pursuant to Labor Law §§ 191 and 198, quantum meruit/unjust enrichment, and violation of Business Corporation Law § 630.

In September 2007, defendants KES and Jack Kandy, the only defendants to have been served, moved to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). In granting the motion, the court noted that "the employment agreement expressly deprives plaintiff of post-termination commissions," and there was "no allegation that [KES] failed to pay to [plaintiff] commissions for placements he finalized and for which fees were received prior to his termination."

With respect to the Labor Law claims, the court found that "[d]espite the fact that [plaintiff]'s title was `senior executive search consultant,' [he] qualifies as an `employee' under the Labor Law." Nevertheless, it dismissed the Labor Law claims because "[t]he statutory remedies against an employer for the wilful failure to timely pay earned wages and commissions are unavailable where . . . there is no enforceable contractual right to those wages or commissions." The court dismissed the quantum meruit claim because of "the existence of [an] enforceable contract covering the disputed issue of the plaintiff's compensation." It dismissed the complaint against the other defendants as well, noting that they had not been served and were "sued only as alter egos of KES.

Plaintiff's claim for $12,500 in unpaid salary for the reduction in pay from $125,000 to $100,000 is unavailing inasmuch as the agreement clearly stated that "any adjustment to such Salary shall be in the sole discretion of Management."

Plaintiff, however, has sufficiently stated a breach of contract claim for unpaid earned commissions that he "arranged" prior to his termination. Although generally an at-will employee is not entitled to post-termination commissions, the parties are certainly free to provide otherwise in a written agreement. For example, in *Yudell v Israel Assoc.* ( 248 AD2d 189), the employee earned commissions based on a percentage of all fees actually received that were "originated by" her. She brought an action to recover commissions for her role in securing
181 two placements that were completed post-termination. *181 The employer contended that as a matter of law, the employee could not recover commissions for placements that were finalized after she left. In denying summary judgment, this Court held that the words "placements . . . originated by you" did not alone specify when or how the placement must be completed in order to entitle the employee to a commission ( *id.* at 189). Had the employer meant to foreclose the possibility of the employee earning a post-termination commission on a placement unquestionably originated by her, it could have said so explicitly, such as "placements . . . originated *and completed* by you" or "placements . . . originated by you *which occur during your employment here" (id.* at 190).

In *Yudell*, we distinguished *McEntee v Van Cleef Arpels* ( 166 AD2d 359, 360), where the employee was not entitled to post-termination commissions because he had "failed to allege the existence of any contract entitling him to such unearned commissions nor the precise terms thereof." Accordingly, we rejected McEntee's "open-ended claim to commissions on unspecified future placements, where there was no contract setting forth either how such commissions would be calculated or what the limits of [the employer]'s purported obligation would be" ( *Yudell* at 190). Likewise, in *Mackie v La Salle Indus.* ( 92 AD2d 821, *appeal dismissed* 60 NY2d 612), we held that a salesperson was not entitled to commissions, on an account that she did not service for over a year, simply because she had originally obtained it. We noted in *Yudell* (at 190) that "[o]ther cases in which an at-will salesman has been denied commissions from post-termination sales similarly involve a plaintiff's indefinite and unlimited claim to commissions from all future transactions between its former employer and certain customers, simply because plaintiff was the one who initially secured these customers." The employee in *Yudell*, by contrast, sought commissions from two specific placements allegedly originated by her and could

> "point to a contract provision that establishes this calculation method and that supports the inference that her termination was not meant to extinguish her rights with respect to those placements. She [did] not claim the right to prospective commissions for the indefinite future simply because she allegedly originated defendant's relationship with those clients" ( *id.* at 190-191).

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Once the commission is earned, it cannot be forfeited ( *see Davidson v Regan Fund Mgt. Ltd.*, 13 AD3d 117;[4] *Yudell*, 248 AD2d 189, *supra*). There is a long-standing policy against the forfeiture of earned wages, and this applies to earned, uncollected commissions as well ( *Weiner v Diebold Group*, 173 AD2d 166, 166-167).

[4] Although *Pachter v Bernard Hodes Group, Inc.* ( 10 NY3d 609, 615-616 [2008]) abrogated that portion of the decision in *Davidson* where we had held that the cause of action under Labor Law § 198 (1-a) was properly dismissed on a finding of employment in an executive capacity, the remainder of *Davidson* remains good law.

Here, as in *Yudell*, plaintiff seeks commissions for placements "arranged" by him during his tenure at KES. Had KES "meant to foreclose the possibility that plaintiff might earn a post-termination commission on a placement" *arranged* by plaintiff, it "could have said so explicitly" ( 248 AD2d at 189-190). Under the doctrine of contra proferentem, an employment agreement should be construed against the drafter ( *id.* at 189). Instead, section 5.1 states simply that plaintiff was entitled to commissions *arranged* by him. Sections 5.2, 5.3 and 5.7 merely provide the formula for determining the amount of the commission and the date when it vests, [5] as well as the month when payment was *183 to be made. They do not, however, otherwise modify the term *arranged* set forth in section 5.1. Being employed, after plaintiff fully performed by arranging a placement, has no bearing on the various calculations specified in sections 5.2 and 5.7.

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[5] *Pachter* ( 10 NY3d at 617) does not dictate a different result. There, the employee's commission consisted of a percentage of the amount billed minus particular charges that were reduced by certain business costs, such as finance charges for late payments, losses attributable to errors in placing advertisements, uncollectible debts, and travel and entertainment expenses, as well as a portion of an assistant's salary. Labor Law § 193, however, prohibits an employer from making deductions from wages, which include commissions, unless permitted by law or authorized by the employee for "insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee" (§ 193 [1] [b]). Since the deductions for business costs noted above were not within the category of permissible deductions delineated in section 193, their legality depended on when a commission was "earned" and became a "wage." "If the adjustments were made before the commissions were earned, section 193 did not prohibit them; but if the charges were subtracted after [the] commissions were earned, [the employer] engaged in impermissible practices under the statute" ( 10 NY3d at 617).

The Court noted that even though commissions under common law were earned when a broker produced a person ready and willing to enter into a contract on his employer's terms, the parties to a transaction were still free to depart from the common law by entering into a different arrangement, adding whatever conditions they might wish ( *Feinberg Bros. Agency v Berted Realty Co.*, 70 NY2d 828, 830 [1987]), including the computation of downward adjustments from gross sales, billings or receivables, in which event the commission would not be deemed earned or vested until computation of the agreed-upon formula ( *Pachter*, 10 NY3d at 617-618). As applied to the present case, plaintiff's commissions were "earned" or "vested" after the various deductions provided for in sections 5.2, 5.3 and 5.7 were made. Otherwise, KES would have been in violation of Labor Law § 193. It does not follow from this holding, however, that a commission must be earned or vested pre-termination for plaintiff to receive it, where the agreement provides that plaintiff is entitled to the commission once it vests if he "arranged" the placement.

Section 5.6 (a), which states that "[n]o commission shall be *due*" (emphasis added) in the event plaintiff "is not in the employ of KES at the date the commission payment would otherwise be made," is thus enforceable only to the extent it seeks to foreclose the right to prospective commissions for the indefinite future, such as sought by the plaintiffs in *McEntee* and *Mackie*. Indeed, the provision does not explicitly express an intent that earned commissions will be retroactively lost upon termination. Rather, the employment agreement provides for an increase in the commission percentage based on annual revenue targets. It also provides that the first year's commissions, i.e. 2006, were based specifically on that year's numbers, and subsequent commissions would be based on the "Employee's salary for the then current calendar year" (section 5.7). Finally, the agreement provides, in section 5.2, that in calculating commissions based on revenues, "there will be no carry-over to the next calendar year or look-back to the preceding year in determining commissions earned." These references support an interpretation that section 5.6 was intended not to cut off retro-active commissions earned during a calendar year, but rather to prevent prospective commissions in later years. Enforcing it in the manner argued by defendants would deprive plaintiff of earned commissions, and thus would be inconsistent with section 5.1 of the agreement as well as the public policy against forfeiting commissions.

Aside from the wording of the contract, inasmuch as an employee is entitled to the fruits of his or her labor, the at-will doctrine should not preclude plaintiff from raising a breach of contract claim for earned commissions. The implied covenant of good faith does not give rise to a contract action for the wrongful, discharge of an at-will employee ( *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304-305). While an at-will employee
184 cannot recover for termination per se, an employee's *184

> "contract for payment of commissions creates rights distinct from the employment relation, and . . . obligations derived from the covenant of good faith implicit in the commission contract may survive the termination of the employment relationship. . . .
>
> "A covenant of good faith should not be implied as a modification of an employer's right to terminate an at-will employee because even a whimsical termination does not deprive the employee of benefits expected in return for the employee's performance. This is so because performance and the distribution of benefits occur simultaneously, and neither party is left high and dry by the termination. Where, however, a covenant of good faith is necessary to enable one party to receive the benefits promised for performance, it is implied by the law as necessary to effectuate the intent of the parties" ( *Wakefield v Northern Telecom, Inc.*, 769 F2d 109, 112 [1985]; *see also Sibbald v Bethlehem Iron Co.*, 83 NY 378, 383-384 [1881]).

Although an at-will employee such as plaintiff would not be able to sue for wrongful termination of the contract, he should nonetheless be able to state a claim that the employer's termination action was specifically designed to cut off commissions that were coming due to the employee. A contract "cannot be read to enable the defendant to terminate an employee for the purpose of avoiding the payment of commissions which are otherwise owed. Such an interpretation would make the performance by one party the cause of the other party's non-performance" ( *Wakefield*, 769 F2d at 112). *Berzin v Carey Co.* ( 293 AD2d 320) does not dictate a different result. In that case we rejected the employee's claim that the employer's "sole motivation in terminating him was to prevent the vesting of additional stock options and other compensation benefits, and that his termination therefore violated the covenant of good faith and fair dealing implied in every contract" (at 321). Stock options, however, are different from earned commissions in that the latter cannot be forfeited ( *Weiner*, 173 AD2d at 167-168). In *Knudsen v Quebecor Print. (U.S.A.) Inc.* ( 792 F Supp 234, 239 [SD NY 1992]), the court distinguished *Gallagher v Lambert* ( 74 NY2d 562), which involved a buy-back provision for
185 employee stock, noting that *Knudsen* (and *Wakefield*, 769 F2d 109) involved *185

> "sales commissions due and owing to employees. A sales commission provision provides for an employer to pay its employees commissions earned through the employees' own efforts. In contrast, a stock buy-back provision affords employees a form of compensation that is related merely to the employees' length of tenure rather than to the extent of their efforts. The Second Circuit's finding of an implied covenant of good faith and fair dealing, while compelling in the sales commissions context, is less so in the stock buy-back context because buy-back provisions do not relate as directly to the efforts of employees as do sales commission provisions."[6]

[6] Defendants argue that *Wakefield*, decided by the Second Circuit, has not been followed by several district courts ( *see Baguer v Spanish Broadcasting Sys., Inc.*, 2007 WL 2780390, *9-10, 2007 US Dist LEXIS 70793, *26-28 [SD NY 2007]; *Plantier v Cordiant plc*, 1998 WL 661474, *3, 1998 US Dist LEXIS 15037, *8-9 [SD NY 1998]; *Collins Aikman Floor Coverings Corp. v Froehlich*, 736 F Supp 480, 486 [SD NY 1990]), but neither the Second Circuit nor the New York State Court of Appeals has rejected it. In fact, *Knudsen* cited it with approval ( 792 F Supp at 239):

> "It is important to note at the outset that the majority in *Gallagher* did not even consider *Wakefield.* Furthermore, given the *Gallagher* dissent's reliance on *Wakefield*, the majority had a clear invitation to signal either its acceptance or its rejection of *Wakefield* but it declined to do so. Therefore, if *Gallagher* is distinguishable from *Wakefield*, there is no reason to read into the majority's decision any assessment of *Wakefield.*"

The motion court also erred in dismissing plaintiff's Labor Law claims. Although it found that plaintiff was an employee and qualified for the protection of the Labor Law, it incorrectly held that there was no enforceable contractual right to those commissions.

We have considered plaintiff's remaining arguments and find them unavailing.

Accordingly, the order, Supreme Court, New York County (Eileen Bransten, J.), entered April 29, 2008, which granted the motion of defendants KES and Jack Kandy to dismiss the complaint, should be modified to the extent of vacating that portion of the judgment dismissing the breach of contract and Labor Law §§ 191 and 198 claims, and otherwise affirmed, without costs.

Motion seeking leave to supplement the record granted and cross motion to strike references to matters outside
186 the record from plaintiff's reply brief denied. *186

Order, Supreme Court, New York County, entered April 29, 2008, modified to the extent of vacating that portion of the judgment dismissing the breach of contract and Labor Law §§ 191 and 198 claims, and otherwise affirmed, without costs. Motion seeking leave to supplement the record granted and cross motion to strike references to matters outside the record from plaintiffs reply brief denied.

187 *187

No. 09-1444-cv
United States Court of Appeals, Second Circuit

# Graves v. Finch Pruyn

353 F. App'x 558 (2d Cir. 2009)
Decided Nov 17, 2009

No. 09-1444-cv.

559 November 17, 2009. *559

Appeal from a judgment of the United States District Court for the Northern District of New York (Sharpe, J.).

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be AFFIRMED.

Nathaniel B. Smith, Law Office of Nathaniel B. Smith, New York, N.Y., for Plaintiff-Appellant.

Michael T. Wallender, Couch White, LLP, Albany, N.Y., for Defendant-Appellee.

PRESENT: PIERRE N. LEVAL, B.D. PARKER and DEBRA ANN LIVINGSTON, Circuit Judges.

## SUMMARY ORDER

Plaintiff-Appellant George Graves ("Graves") appeals from an order of the United States District Court for the Northern District of New York (Sharpe, J.) entered March 27, 2009, granting summary judgment to Defendant-Appellee Finch Pruyn Company, Inc. ("Finch") on Graves's claim of disability discrimination under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(a). We summarized the facts of the underlying dispute in our previous opinion in this case, *Graves v. Finch Pruyn Co., Inc.*, 457 F.3d 181 (2d Cir. 2006) ("*Graves I*"). In that opinion, we determined that a material issue of fact existed as to whether Graves requested an unpaid leave of absence from his job with Finch for two weeks to obtain an appointment with an orthopedic surgeon, Dr. William O'Connor, for an examination of his foot. *Graves I*, 457 F.3d at 184-86. We remanded to the district court indicating that Finch should be allowed to move for summary judgment on the question of whether the accommodation Graves sought provided "insufficient assurance of Graves's successful return to work." *Id.* at 186 n. 6. The district court determined that the two weeks unpaid leave sought by Graves was not a reasonable accommodation given Finch's prior accommodations of Graves, because Graves had made no
560 showing that *560 the accommodation would likely result in his return to work, and because Graves's further absence would cause Finch a business hardship. *Graves v. Finch Pruyn Co., Inc.*, No. 1:03-CV-266, 2009 WL 819380, at *1 (N.D.N.Y. Mar. 27, 2009). We are now faced with the question whether Graves has shown that granting him the requested leave time would have been a "reasonable accommodation" that allowed him to perform the essential functions of his job as a paper inspector. *Graves I*, 457 F.3d at 185.

"We conduct de novo review of the district court's award of summary judgment, construing the evidence in the light most favorable to the non-moving party." *Rodal v. Anesthesia Group of Onondaga, P.C.*, 369 F.3d 113, 118 (2d Cir. 2004). Summary judgment is appropriate where there is no genuine dispute as to any material fact and the record as a whole indicates that no rational factfinder could find in favor of the non-moving party. *Id.;*

*Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 212 (2d Cir. 2001). We examine claims of disability discrimination brought under the ADA according to the burden-shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). A plaintiff's initial burden is to produce evidence showing a prima facie case of disability discrimination. *Graves I*, 457 F.3d at 183-84. This burden requires a plaintiff to show that:

> (1) plaintiff is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations.

*Rodal*, 369 F.3d at 118; *see also* 42 U.S.C. § 12111(8) (defining a "qualified individual" with a disability as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."). The only issue in this appeal is the third prong of this test, whether Graves made a prima facie showing that with reasonable accommodation he could perform the essential functions of his job. It is undisputed that without accommodation, at the time of his leave request Graves could not perform the essential functions of a paper inspector, which included standing on his feet for long periods of time and lifting and pushing large rolls of paper. *Graves I*, 457 F.3d at 184; *Graves*, 2009 WL 819380, at *1.

We have never expressly held that leaves of absence from an employee's job taken in order to recover from the employee's disability are "reasonable accommodations" under the ADA. Even assuming that they can be under certain circumstances, however, they must enable the employee to perform the essential functions of his job. *See* 42 U.S.C. § 12111(8); *Rodal*, 369 F.3d at 120. Moreover, the employee must make a showing that the reasonable accommodation would allow him to do so at or around the time at which it is sought. *See Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995) ("[R]easonable accommodation is by its terms most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question."); *cf. McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 97-98 (2d Cir. 2009) (plaintiff claiming that reassignment was reasonable accommodation must demonstrate that vacant position existed at or within a reasonable amount of time after accommodation was sought).

561 We conclude that Graves failed to make a prima facie case that his requested *561 accommodation of two weeks' unpaid leave in order to consult with Dr. O'Connor was reasonable because he made no showing that Finch at the time of the request had any assurance whatsoever that the accommodation would allow Graves to perform the essential functions of his job. Finch focuses on the January 10, 2001 report of one of Graves's doctors, David G. Welch, which indicated that Graves would not be able to return to his job "in the foreseeable future" and declared that "[Graves] is totally incapable of performing his job as a paper inspector." J.A. 29-30. Graves testified, however, that this report was made in order to allow him to qualify for a disability retirement option, and that Finch's Director of Human Resources, Michael Strich, had told him on January 4 to have a doctor state that Graves was totally disabled in order to qualify. A reasonable jury could find that the January 10 report, therefore, did not accurately state whether Graves was "qualified" to "perform the essential functions" of his job with a reasonable accommodation.

However, Dr. Welch's January 4, 2001 report, which was sent to Strich, indicated unequivocally that "it is unlikely that [Graves] will be able to return to his previous occupation." J.A. 27. With regards to consulting Dr. O'Connor, Dr. Welch indicated that even with surgery "it is likely that it will take another two to three months of recovery following such surgery before [Graves] could return to any kind of gainful employment" and that even if such recovery took place, "there will probably [be] some restrictions in the amount of standing,

walking, lifting, and carrying that he can do." *Id.* Although Graves points to other statements of his doctors indicating that consulting Dr. O'Connor might in general be helpful, Dr. Welch's report gave no assurance at all that the results of that consultation would allow Graves to continue performing his job. Moreover, that Dr. O'Connor was able to treat Graves's disability Graves's retirement date of February 1, 2001, on which Graves relies heavily, is irrelevant to the question of whether the accommodation was reasonable at the time it was sought. *See McBride*, 583 F.3d 92, at 97-98; *Jackan v. N.Y. Dep't of Labor*, 205 F.3d 562, 567 (2d Cir. 2000). We therefore conclude that the evidence as a whole did not give Finch any assurance that Graves's requested accommodation would allow him to perform the essential functions of his job.

Graves's attempts to avert this conclusion are unavailing. First, he contends that Finch, by rejecting his suggested accommodation without investigation, failed sufficiently to engage in an interactive process to find an accommodation that would allow Graves to continue working. Even assuming that Finch did not engage in the interactive process, however, we recently held that an employee may not rely on a company's failure to engage in an interactive process if he cannot also make a prima facie showing that a reasonable accommodation existed at the time of the adverse employment action. *McBride*, 583 F.3d 92, at 99-101. Second, Graves contends that Dr. Welch's reports are inadmissible hearsay. This is incorrect: the medical reports were offered (by both sides) to prove Finch's state of mind when it considered Graves's requested accommodation. *See Capobianco v. City of New York*, 422 F.3d 47, 55-56 (2d Cir. 2005).

We have considered Graves's remaining arguments and find them to be without merit. For the foregoing
562 reasons, the judgment of the district court is hereby AFFIRMED. *562

No. 08 Civ. 6893 (VM)
United States District Court, S.D. New York

# Kregler v. City of New York

646 F. Supp. 2d 570 (S.D.N.Y. 2009)
Decided Aug 14, 2009

No. 08 Civ. 6893 (VM).

August 14, 2009.

Nathaniel B. Smith, Law Office of Nathaniel B. Smith, New York, NY, for Plaintiff.

Christopher Aaron Seacord, New York City Law Department, New York, NY, for Defendants.

## DECISION AND ORDER

VICTOR MARRERO, District Judge.

Plaintiff William Kregler ("Kregler") brought this action pursuant to 42 U.S.C. § 1983 ("§ 1983") alleging that
571 defendants *571 violated his rights under the First and Fourteenth Amendments of the United States Constitution. Defendants consist of the City of New York (the "City") and five individuals who at all relevant times were employees of the City's Fire Department ("FDNY") or Department of Investigation ("DOI") (collectively with the City, "Defendants"). Defendants moved pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") to dismiss Kregler's amended complaint for failure to state a claim upon which relief can be granted. By Decision and Order dated March 16, 2009, [1] the Court deferred ruling on the motion pending the outcome of a preliminary hearing it scheduled pursuant to Federal Rule of Civil Procedure 12(i)
2 ("Rule 12(i)"). The Court conducted *2 that proceeding on July 16, 2009 and heard the parties' further oral arguments on July 28, 2009. For the reasons stated below, the Court grants Defendants' motion.

[1] The Decision and Order is reported as Kregler v. City of New York, 608 F. Supp. 2d 465 (S.D.N.Y. 2009).

## II. FACTS

In its earlier Decision and Order, familiarity with which is assumed, the Court fully stated the facts relevant to this litigation as presented in the amended complaint, dated November 7, 2008 ("Amended Complaint"). See Kregler, 608 F. Supp. 2d at 468-69. However, insofar as necessary for a proper understanding of this ruling, a factual summary follows.

In March 2004, one month after retiring from his position as Fire Marshal with the FDNY after being employed there for 20 years, Kregler filed a preliminary application for appointment by the City's Mayor as a City Marshal. Candidates for appointment as City Marshals are subject to a DOI investigation of personal and financial background, and must complete a training program administered by DOI. In January 2005, Kregler was interviewed by representatives of the Mayor's Committee on City Marshals and was later notified by defendant Keith Schwam ("Schwam"), an Assistant Commissioner at DOI, that DOI would commence its personal and financial review of Kregler's background. As a follow-up, Kregler met in April 2005 with

defendant Darren Keenaghan ("Keenaghan"), a *3 DOI investigator, to discuss Kregler's preliminary application. Kregler then made minor modifications on the application, signed the revised form, and provided authorizations for release of personal information.

On May 25, 2005 Kregler, in his capacity as President of the Fire Marshals Benevolent Association ("FMBA"), publicly endorsed the candidacy of Robert Morgenthau ("Morgenthau") for reelection as District Attorney for New York County. Kregler asserts that at that time all other law enforcement associations in the City, including two unions of firefighters, supported Morgenthau's opponent, Leslie Crocker Snyder ("Snyder"). An article that appeared in a June 2005 edition of The Chief, a local newspaper, reported on Kregler's endorsement of Morgenthau. According to Kregler, defendant Brian Grogan ("Grogan"), an FDNY Supervising Fire Marshal, posted a copy of that article in a public area within one of the FDNY offices. Kregler further alleges that Grogan "berated" him for the endorsement, stating: "who the f___ do you think you are. Louie [Garcia] makes the endorsement." (Amended Complaint ("Compl.") ¶ 28.) Defendant Louis Garcia ("Garcia") was then Chief Fire Marshal of the FDNY's Bureau of Fire Investigation. Kregler alleges that both Garcia and Grogan politically supported Snyder's campaign *572 against Morgenthau, that Garcia was "personally and socially *4 acquainted" with defendant Rose Gill Hearn ("Gill Hearn") (Compl. ¶ 39), the DOI Commissioner, and that Gill Hearn also politically supported Snyder's candidacy.

On July 7, 2005, Kregler was interviewed by staff of the Mayor's Office in connection with his Fire Marshal application and the following day was told by Schwam that the next step in the process would be the completion of the DOI background check. To that end he met a second time with Keenaghan to update and refile his application. In September 2005, Kregler and four other candidates began the DOI training classes, which Kregler states he successfully completed in October 2005. In November 2005, Kregler satisfied the last requirement for appointment by demonstrating his ability to obtain a bond.

In March 2006, Kregler was informed by letter from Schwam that he would not be appointed as a Fire Marshal. Kregler filed this action in August 2008, raising a claim of First Amendment retaliation in violation of § 1983. In the Amended Complaint, Kregler alleges that Garcia and Gill Hearn "agreed to cause Kregler's application for appointment as a City Marshal to be rejected by DOI in retaliation for Kregler's support of Morgenthau." (Compl. ¶ 41.) He further asserts that Garcia, Grogan and other FDNY employees requested that Gill Hearn, Schwam, Keenaghan, and other DOI employees misuse *5 their authority to cause the rejection of his application. Responding to the reason Defendants proffered to him for denying his application — Kregler's failure to disclose details of a Command Discipline he had received in 1999 during his employment by the FDNY — Kregler contends that this explanation was merely a pretext for Defendants' unlawful retaliation.

## III. STANDARD OF REVIEW AND PRIOR PROCEEDINGS

In scheduling the Rule 12(i) hearing in this matter as a step to further inform the Court's evaluation of Defendants' motion to dismiss the Amended Complaint, the Court applied the standard of review for such motions articulated by the Supreme Court in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). There, the Supreme Court stated that to be sufficient under Federal Rule of Civil Procedure 8(a) ("Rule 8(a)") and survive a Rule 12(b)(6) motion to dismiss, the factual allegations in a complaint must be "enough to raise a right to relief above the speculative level,"id. at 555, and state a claim "plausible on its face," id. at 570.

As interpreted and applied by the Second Circuit in Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), Twombly enunciated "a flexible `plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the *6 claim plausible." 490 F.3d at 157-58 (emphasis in original). The Second Circuit in Iqbal concluded that to survive a motion to dismiss under

Twombly's plausibility standard, "a conclusory allegation concerning some elements of a plaintiff's claims might need to be fleshed out." Id. at 158. To that end, the Circuit Court counseled that a district court consider "exercising its discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff's claims and a plaintiff may probe such matters as a defendant's knowledge of relevant facts and personal involvement in challenged conduct." Id.

In prior proceedings in this action, the Court, in response to Defendants' pre-answer motion to dismiss Kregler's
573 original complaint, and in an effort to resolve serious *573 charges of official misconduct as expeditiously as possible with a minimum of motion practice, permitted Kregler to file an Amended Complaint. The revised pleadings Kregler submitted prompted Defendants' renewed motion to dismiss.

Upon review of the Amended Complaint the Court found that underTwombly's plausibility standard Kregler's pleadings remained borderline at best in stating a First Amendment retaliation claim. See Kregler, 608 F. Supp.
7 2d at 474. The Court stated that to survive Defendants' new motion to *7 dismiss, the pleadings as modified would require the Court to accept as true numerous conclusory allegations, to make substantial inferential leaps, and to resolve considerable doubts in Kregler's favor. Specifically, the Court noted that Kregler did not allege that Gill Hearn had any direct knowledge of Kregler's endorsement of Morgenthau. Thus, the plausibility of Kregler's retaliation claim would turn on a finding that because Garcia and Gill Hearn were "personally and socially acquainted" (Compl. ¶ 39), and because allegedly they both supported Snyder, then by inference, Garcia used his contacts with Gill Hearn improperly to influence her determination on Kregler's application, and Gill Hearn and Garcia then agreed to cause Kregler's appointment to be rejected by DOI in retaliation for Kregler's support of Morgenthau.

This Court envisioned the Rule 12(i) hearing as an opportunity to provide, as the Second Circuit suggested in Iqbal, 490 F.3d at 158, the "amplication" or "flesh[ing out]" of Kregler's claims in respect of two threshold issues which his Amended Complaint addressed in generalized or conclusory terms: the various Defendants' direct involvement in the alleged retaliatory conduct, and the causal connection between Kregler's protected
8 speech and Defendants' alleged adverse employment action of denying Kregler's application for *8 appointment as a City Marshal.

Recently, and prior to this Court's scheduled Rule 12(i) hearing, the Supreme Court further elaborated on Twombly's plausibility standard. In Ashcroft v. Iqbal, reversing one aspect of the Second Circuit's application of Twombly, the Supreme Court explained that a claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 129 S. Ct. 1937, 1949 (2009). Further, the Supreme Court noted that the standard "is not akin to a `probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S. at 556). Rather, the Supreme Court continued, where a complaint pleads facts "that are `merely consistent with' a defendant's liability, it `stops short of the line between possibility and plausibility of `entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557).

The Supreme Court then reiterated two longstanding basic principles governing a court's evaluation of a motion to dismiss. First, the rule that a court must accept as true all well-pleaded allegations in a complaint does not apply to legal conclusions or to "[t]hreadbare recitals of the elements of a cause of action, supported by mere
9 conclusory *9 statements." Id. And second, "only a complaint that states a plausible claim for relief survives a motion to dismiss." Id. at 1950. This determination, the Supreme Court counseled, is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. Concluding this

574 analysis and instructions, the Supreme Court stated that "where the well-pleaded *574 facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not `show[n]' — `that the pleader is entitled to relief.'" Id. (quoting Fed.R.Civ.P. 8(a)(2)).

The Court recites the Supreme Court's discussion of the standard of review governing a motion to dismiss in Iqbal at such length because the decision provides an additional explanation of the controlling standard to guide this Court's review of Kregler's Amended Complaint with and without the benefit of the record produced at the Rule 12(i) hearing. The Court finds that under either factual basis, in the light of Iqbal's elaboration of the Twombly plausibility standard, Kregler's pleadings are insufficient to state a retaliation claim under the First Amendment.

## IV. DISCUSSION

### A. FACIAL REVIEW OF THE COMPLAINT UNDER IQBAL

10 A facial examination of the Amended Complaint reveals *10 numerous allegations Kregler makes which amount to "[t]hreadbare recitals" of the elements of a cause of action "supported by mere conclusory statements," to which the Court need not accord a presumption of truth. Id. at 1949. These deficient pleadings include Kregler's speculation that because Garcia and Gill Hearn were "personally and socially acquainted" (Comp. ¶ 39), they "agreed to take steps to interfere with and prevent Kregler's appointment," and that they "agreed to cause Kregler's appointment as a City Marshal to be rejected by DOI, in retaliation for Kregler's support of Morgenthau" (id. ¶¶ 40, 41); and that Garcia and Grogan requested Gill Hearn, Schwam, Keenaghan and/or other DOI officials to misuse their legal authority to cause rejection of Kregler's application in retaliation for his endorsement of Morgenthau (id. ¶¶ 45, 46).

In essence, Kregler asks the Court to draw an inference that Gill Hearn, merely by reason of some alleged personal and social acquaintance with Garcia, knew of Krelger's support for Morgenthau and improperly joined Garcia in a conspiracy to deprive Kregler of a public appointment in retaliation for his political activity. Similarly, the Amended Complaint contains no factual allegations about any direct, personal knowledge of Kregler's endorsement of Morgenthau on the part of Schwam or Keenaghan, or of any personal involvement by
11 these defendants *11 and Grogan in the decision to reject Kregler's application.

Under the Supreme Court's formulation of Twombly's plausibility standard in Iqbal, such conclusory pleadings are not entitled to facial acceptance as true, and the Court may reject them without permitting Kregler even limited discovery. See Iqbal, 129 S. Ct. at 1953 (rejecting the Second Circuit's proposed "careful-case-management approach" and reaffirming that "the question presented on a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process"). Absent sufficient factual allegations that Gill Hearn, who is the only decision-maker named in the Amended Complaint, had knowledge of Kregler's support of Morgenthau and agreed to cause his application to be denied for that reason, Kregler has not pled facts "enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. Accordingly, Kregler cannot state a claim of unlawful retaliation in violation of the First Amendment against any of the Defendants.

Even if Kregler's conclusory allegations were credited to some degree, the Court finds that the Amended
575 Complaint pleads nothing more than "facts that are `merely consistent with' a defendant's liability," but *575
12 "stops short of the line between possibility and plausibility of `entitlement to relief.'" *12 Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 557, 127 S.Ct. 1955). Drawing upon the Court's "judicial experience and

common sense" in the "context-specific" circumstances of this case, the Court is not persuaded that the factual content of Kregler's pleadings permits a reasonable inference that unlawful retaliation was the likely explanation for the Defendants' alleged misconduct. Id. at 1950.

Kregler's endorsement of Morgenthau occurred in June of 2005. Yet, Defendants allowed his application to proceed through all of stages of the appointment process until completed in November of 2005. These steps included numerous interviews with officials of DOI, the Mayor's Office, and the Mayor's Committee on City Marshals; amendments of Kregler's application forms; financial and background investigations; and approximately 30 hours of extensive training, classroom lectures and homework, field trips, and working with existing City Marshals. In addition, Kregler was allowed to demonstrate his ability to obtain the required bond. According to the allegations in the Amended Complaint, Defendants' decision to reject Kregler's application was made sometime between November 2005 and the date Kregler was informed of the decision, on March 10, 2006. It would not comport with experience and common sense for Defendants to expend so much public time,
13 energy and resources fully *13 processing the papers of an applicant whose appointment they allegedly had already agreed to reject for unlawful reasons.

The plausibility of Kregler's hypothesis that only unlawful retaliation explains Defendants' decision concerning his application diminishes even more in the light of an additional consideration: the "context-specific" factual issue pertaining to the Command Discipline Kregler was issued in 1999 while employed by the FDNY. Kregler acknowledges in the Amended Complaint that the City informed him that the rejection of his application related to his alleged failure to disclose to DOI all relevant details regarding that disciplinary action. As the Supreme Court suggested in Twombly and Iqbal, when presented with factual circumstances "not only compatible with, but indeed . . . more likely explained by, lawful . . . behavior," a finding of retaliatory misconduct here does not constitute a reasonable inference, and thus does not plausibly support the conclusion Kregler advances. Id. at 1950 (quoting Twombly, 550 U.S. at 557).

## B. THE RULE 12(i) HEARING

The Court finds that even if it considered any further amplification of Kregler's Amended Complaint by means of the record of the hearing the Court conducted pursuant to Rule 12(i), Kregler's pleadings so fleshed out still
14 fail to show that his factual allegations push his claim of entitlement to *14 relief over the line between possibility and plausibility. See Twombly 550 U.S. at 557. Rather, not only does the record of that proceeding not permit the Court to find more than a mere possibility of misconduct, it strengthens a more reasonable inference that Defendants' rejection of Kregler's application is "more likely explained by . . . lawful . . . behavior." Iqbal, 129 S. Ct. at 1950 (citing Twombly, 550 U.S. at 567.)

As this Court noted in its initial ruling on Defendants' motion to dismiss, the Court envisioned the Rule 12(i) hearing as a means of responding to a longstanding concern courts are frequently called upon to address. As backdrop for the Court's analysis and its disposition of the results of the Rule 12(i) hearing it conducted, the
576 Court's earlier observations bear full repetition. *576 See Kregler, 608 F. Supp. 2d at 466-68.

Not uncommonly, on the basis of nothing more than the barest conclusory allegations, government officials are summoned to court to defend private lawsuits charging constitutional violations and other serious official misconduct. In most cases the costs the parties incur in litigating such actions, measured by expenditures of
15 time and public resources, disruption of government operations, and *15 potential damage to professional and personal reputations, are quite extensive.

Frequent instances arise in which the underlying issues raise matters involve the formulation of government policy or, as in the case at hand, the appointment of public officers. These circumstances may implicate inquiry into confidential communications, thought processes and internal documents containing sensitive matters the public disclosure of which in itself could entail judicial proceedings. Equally significant are the attendant impacts of such lawsuits on the courts' dockets and the administration of justice. See Iqbal, 129 S. Ct. at 1953 ("If a Government Official is to devote time to his or her duties . . . it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation . . . exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government."); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) ("[I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty — at a cost not only to the defendant officials, but to society as a whole. These
16 social costs include the expenses of litigation, the diversion of official energy from pressing *16 public issues, and the deterrence of able citizens from acceptance of public office.").

More fundamentally, the question regarding the personal and social costs associated with litigating insubstantial lawsuits reduces to a far greater value: fairness. It is inequitable to subject a government official — or indeed any party — to the burdens of defending a claim challenged on legitimate grounds as insubstantial or frivolous for any longer than the minimum time reasonably necessary to ascertain whether sufficient basis exists to warrant allowing the action to proceed. However, the same open door that welcomes the just cause also admits the nuisance suit; the flimsy or frivolous allegation is as free to enter the courthouse as the valid claim. As the Supreme Court has recognized, accusations of unconstitutional conduct on the part of public officials are easy to level, but very difficult and costly to defend against. See Crawford-El v. Britton, 523 U.S. 574, 584-85 (1998) (noting a "potentially serious problem" that the District of Columbia Circuit had sought to address: "Because an official's state of mind is `easy to allege and hard to disprove,' insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government
17 officials.") (citation omitted); Tenney v. Bandhove, 341 U.S. 367, 378 (1951) ("In times of *17 political passions, dishonest or vindictive motives are readily attributed to [government official] conduct and as readily believed.").

Over the course of many years courts concerned with the severe hardships that insubstantial lawsuits place on litigants, on the justice system and on society as a whole have struggled with this dilemma, not only as it
577 pertains to complaints lodged against government officials, but to litigation *577 in general. To address these issues, courts have devised several tests meant both to instruct plaintiffs on drafting well-pleaded claims, and to guide the courts' review of the legal sufficiency of claims for relief.

Fundamentally, the "plausibility" standard that the Supreme Court articulated in Twombly and Iqbal reflect one judicial means to part the wheat from the chaff in assessing the sufficiency of pleadings. Yet, as the case at hand illustrates and the law reports amply record, the problem persists, a sign of an intrinsic tension built into the federal rules. Whether in their factual allegations as originally crafted, or upon being granted leave to replead deficient claims, seasoned plaintiffs' counsel know to charge the pleadings with enough adjectives that reverberate of extreme malice, improper motives, and bad faith to raise factual issues sufficient to survive a
18 dispositive motion, *18 thus securing a hold on the defendant strong enough for the duration, however long and costly the ultimate resolution of the claim may be.

In practical terms, the philosophy of pleading that these rules embody, a one-rule-fits-all principle, defines the scope of the problem engendered by its unintended outcomes. For instance, in theory the same generalized minimal Rule 8(a) standards that govern the plaintiff's drafting, as well as the court's review, of a complaint

alleging common law negligence stemming from a slip and fall, or a breach of a simple contract for failure to pay a debt, apply to writing and evaluating a complaint charging civil violations of intricate federal antitrust, intellectual property, or racketeering statutes. Similarly, the bare bones essence of a claim that is necessary to survive a motion to dismiss is the same whether the complaint is authored by John Dioguardi or by Wall Street lawyers. See Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).

In consequence, the Court's Rule 12(i) hearing represented an effort to employ an infrequently used procedure to bring about speedier and better-informed resolution of a motion to dismiss involving serious accusations of violations of constitutional rights leveled against high-ranking government officials. This endeavor accords
19 with guidance by *19 the Supreme Court and the Second Circuit instructing district courts to exercise their broad discretion to guard public officials from being "subjected to unnecessary and burdensome discovery or trial proceedings." Crawford-El, 523 U.S. at 597-98;Iqbal, 490 F.3d at 159; Harlow, 457 U.S. at 817-18 (stating that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery"). Although these cases were decided in connection with defenses asserting qualified immunity, as the Supreme Court made clear in Twombly the underlying concerns over insubstantial or frivolous lawsuits could apply with no less force in the context of certain other litigation as well. In fact, the effects of such actions may be compounded in cases charging abuse of power, dereliction of duty for political purposes, and other serious accusations of unconstitutional conduct by government officials where qualified immunity may not apply, or the defendant chooses not to invoke it.

As scheduled, the hearing was limited to two threshold issues raised in Defendants' objections to the pleadings in the Amended Complaint: the absence of sufficient allegations of personal involvement by various individual defendants in making the decision to reject Kregler's application, and lack of a causal connection between
20 Kregler's endorsement of *20 Morgenthau and the rejection of his application for appointment as a City
578 Marshal. These questions constitute fundamental aspects of a sufficient *578 claim of First Amendment retaliation, and are thus decisive in any review of whether the pleadings, as amplified by the pertinent record of the preliminary hearing, satisfy the Twombly/Iqbal plausibility standard.

To summarize its purpose and scope, Rule 12(i) authorizes the Court to conduct a preliminary hearing to consider and decide before trial a motion raising any defense listed in Rule 12(b)(1)-(7). See Fed.R.Civ.P. 12(i). As appropriate, the Court may use that procedure to determine jurisdictional as well as other threshold issues. See Rivera-Gomez v. de Castro, 900 F.2d 1, 2 (1st Cir. 1990) (noting that Rule 12(i) "can be an excellent device for conserving time, expense, and scarce judicial resources by targeting early resolution of threshold issues"); Cruz v. Sullivan, 802 F. Supp. 1015, 1016-17 (S.D.N.Y. 1992). The Court may order such a hearing on motion or sua sponte. See Rivera-Gomez, 900 F.2d at 2. As regards matters involving factual issues that bear on the subject of the hearing the Court may consider affidavits, depositions or documents, or testimony presented orally. See Unicon Mgmt. Corp. v. Koppers Co., 38 F.R.D. 474, 476-77 (S.D.N.Y. 1965), aff'd, 366 F.2d 199
21 (2d Cir. 1966). *21 However, this procedure cannot be employed to decide the merits of a dispute, or issues so closely interwoven with the merits so as to render it unlikely or impractical that the hearing would achieve a productive outcome. See United States v. Montreal Trust Co., 358 F.2d 239 (2d Cir. 1966), cert. denied, 384 U.S. 919 (1966); Louisiana Power Light Co. v. United Gas Pipe Line Co., 456 F.2d 326 (5th Cir.), rev'd on other grounds, 406 U.S. 621 (1972); see generally 5C Charles A. Wright and Arthur R. Miller,Federal Practice and Procedure § 1373 at 278-90 (3d ed. 2004).

Here, on repleading to address deficiencies in the original complaint, Kregler described the threshold issues either in conclusory terms or with generalized allegations which still require substantial inferential leaps to make his claims plausible, rather than with well-pleaded facts that, accepted as true, plausibly suggest

Defendants' retaliatory misconduct as the likely explanation for their rejection of Kregler's application. The Rule 12(i) hearing, even limiting the Court's consideration solely to Kregler's testimony on direct and cross-
22 examination, confirms the Court's finding in this regard.[2] *22

2 During the hearing, at the conclusion of Kregler's testimony, Defendants argued that their motion should be granted even without consideration of their testimony. To preserve the widest range of options and fullest flexibility in its resolution of this matter, the Court decided to hear the testimony of Schwam, Grogan, Garcia and Gill Hearn, who testified in support of Defendants' motion to dismiss. Upon consideration, the Court finds that Defendants are entitled to dismissal of the Amended Complaint on the basis of the pleadings, with or without weighing Kregler's testimony. Consequently, the Court need not address Defendants' testimony at the Rule 12(i) hearing because it played no role in the Court's decision.

## C. KREGLER'S TESTIMONY

Kregler testified about the basis for his allegations that the individual defendants had personal involvement in the decision to reject his application, as well as the basis for his allegation that Garcia and Gill Hearn agreed to cause his application to be rejected. Kregler's testimony demonstrates that he essentially had no factual basis for alleging that Keenaghan, Grogan, and Schwam were involved in the decision to reject his application in retaliation for his endorsement of Morgenthau. Kregler's testimony also shows that he lacked a plausible factual
579 basis for alleging that *579 he was denied the City Marshal appointment because Gill Hearn and Garcia conspired to have his application rejected. Kregler's testimony therefore failed to convince the Court that Kregler has sufficiently alleged either personal involvement by the individual defendants in making the decision to reject Kregler's application, or a causal connection between Kregler's endorsement of Morgenthau and the rejection of his application for appointment as a City Marshal.

23 1. Personal Involvement of Keenaghan, Grogan, and Schwam *23

Regarding his claim against Keenaghan, Kregler testified that he never discussed his endorsement of Morgenthau with Keenaghan during their two conversations, and that he had no factual basis for believing that Keenaghan had been in contact with Grogan or Garcia, or that Keenaghan had been a decision-maker with respect to the City Marshal application process. (Tr. at 76-78.)

With respect to Grogan, Kregler testified that he had no factual basis to support a claim that Grogan had conversations with DOI personnel regarding Kregler's City Marshal application or regarding Kregler's endorsement of Morgenthau. (Id. at 84.) Kregler also testified that he had no factual basis to support a claim that Grogan was a decision-maker. (Id. at 85.)

Regarding his claim against Schwam, Kregler testified that he had no factual basis to support a claim that Schwam had spoken with Grogan about the City Marshal application; that Schwam had ever spoken to Garcia or Gill Hearn about Kregler's endorsement of Morgenthau; or that Schwam discussed the possibility of stopping Kregler's application with Grogan or Garcia. (Id. at 82-83.)

Based on this testimony, the Court finds that Kregler has not sufficiently alleged that Keenaghan, Grogan, and
24 Schwam were personally involved in the decision to reject Kregler's *24 City Marshal application, and that the statements in his pleadings that these individuals played material roles in that determination amount to conclusory allegations grounded on bare speculation. The Amended Complaint's factual allegations regarding these defendants are that Keenaghan met with Kregler twice to interview him as part of the DOI investigation; that Grogan posted an article about Kregler's endorsement of Morgenthau and berated Kregler for the endorsement; and that Schwam communicated with Kregler regarding his application and conducted the

training course. These allegations, as supplemented by Kregler's testimony, do not "allow[] the [C]ourt to draw the reasonable inference that the defendant[s] [are] liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949. The Court does not find Kregler's claim that Keenaghan, Schwam, and Grogan were involved in denying Kregler's application in retaliation for his endorsement of Morgenthau to raise a plausible claim for relief.See id.

2. Agreement Between Garcia and Gill Hearn

Kregler testified that he was told by the vice president of the Fire Marshal's Benevolent Association that Garcia was a frequent patron of a Manhattan restaurant called Elaine's, as was Snyder. Kregler also stated that he was told that Garcia, Snyder, and Gill Hearn knew each other very well. (Tr. at 38.) Beyond these bare statements
25 he offered no other *25 factual basis to support his claim that Gill Hearn also backed Snyder's candidacy and that she and Garcia agreed to cause the rejection of Kregler's application because of his endorsement of Morgenthau. In fact, Kregler testified that he did not believe that Gill Hearn was upset or angry about his
580 endorsement of Morgenthau. (Id. at 72.) However, Kregler testified that he *580 nonetheless believes that a collusive, retaliatory effort existed to deny him appointment as City Marshal after he had completed all of the requirements presented to him. (Id. at 74.)

Kregler also testified regarding the basis for his assertion in paragraph 40 of the Amended Complaint, which alleges that "after the defeat of Snyder in November of 2005, Garcia and Gill Hearn learned that Kregler was on the verge of being appointed as a City Marshal and agreed to take steps to interfere with and prevent Kregler's appointment." (Id. at 40.) Kregler indicated that the sole basis for this allegation was the denial of his application "after doing a complete two-year process, going through several interviews, several background investigations." (Id. at 86.) Kregler cited his completion of the City Marshal course; his fulfillment of the bond requirement; and the forwarding of all necessary applications. Kregler believed that there was nothing left in
26 the process other than the actual appointment. *26 (Id. at 87.) As Kregler stated, "There was nothing left to do but to be appointed. There was nothing left." (Id. at 89.) Kregler stressed his belief that because he had completed the entire application process, the decision not to offer him the appointment must have been made "up high, it had to be done up high." (Id. at 92.) Specifically, Kregler testified that, "based on [Garcia and Gill Hearn's] relationship, I felt that was the reason why I was denied appointment [as] City Marshal, that they knew each other, that they were both high-ranking officials and that there was some sort of communication because nothing else showed up to deny me this appointment." (Id. at 94.)

When asked about the basis for his allegation that Garcia learned that Kregler "was on the verge of being appointed as a City Marshal," Kregler testified that he believed Garcia knew about his impending appointment to the City Marshal position because of his friendship with Gill Hearn. (Id. at 89, 91-92). Kregler stated, however, that he had no factual basis to support his belief that Garcia and Gill Hearn had a close personal and social relationship on the basis of which they had communicated regarding his application. (Id. at 94.)

Kregler also testified that he had been told of a November 2005 conversation between James Kelty, a friend
27 and associate of Garcia's, and Barry Goffred, a friend of *27 Kregler's who was a retired fire marshal. Kregler's understanding was that Kelty conveyed to Goffred that Kelty had heard that Kregler "ain't becoming no Sheriff." (Id. at 43.) Kregler later interpreted this statement to support his belief that Garcia and Gill Hearn had agreed to have Kregler's City Marshal application rejected.

The Court finds that the factual allegations presented in the Amended Complaint as amplified by Kregler's testimony hearing do not allow the Court to conclude that Kregler has sufficiently alleged factual basis to support a reasonable inference that Garcia and Gill Hearn agreed to reject Kregler's application. See Iqbal, 129

S. Ct. at 1949. Kregler's belief that Garcia and Gill Hearn were socially acquainted and his supposition that his appointment must have been derailed at a high level if it was rejected after he completed the application process simply do not constitute factual allegations that cross the "line between possibility and plausibility of `entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557). Kregler's testimony provided a more complete picture of the allegations in the Amended Complaint, but in the Court's view, the amplification either fails to support Kregler's factual allegations or predominantly works against his claims. Kregler's inability to offer
581 anything but speculation, especially in the face of *28 a factual explanation *581 "not only compatible with, but indeed . . . more likely explained by, lawful . . . behavior" — the lack of disclosure regarding the Command Discipline incident — convinces the Court that Kregler has not raised "a plausible claim for relief." Id. at 1949-50.

## D. EVALUATION OF THE RULE 12(i) HEARING

Although the Court has determined that the Amended Complaint fails by itself under the standard enunciated by Iqbal andTwombly, the Court is satisfied that the Rule 12(i) hearing proved useful in this case. It served the purpose the Court envisioned: a means to expedite resolution of serious accusations of official wrongdoing leveled against high-ranking government employees.

The procedure helped amplify Kregler's sketchy factual pleadings with live testimony. Subjecting Kregler's allegations to more direct elaboration, cross-examination and questions by the Court, brought out details and explanations far more informative than what would have been produced by additional written submissions in motion practice. The hearing thus created a fuller and clearer record which the Court could employ in reviewing Defendants' motion to dismiss. The greater exposition of the facts alleged enhanced the Court's understanding, and possibly also that of the parties, of the claims in dispute, thereby facilitating resolution of
29 *29 what had appeared to be a closer call on the paper record comprising the original motion.

The procedure demonstrated its value even when consideration of the record for decision is limited, as the Court ultimately chose to do, to Kregler's own testimony and exhibits. Although the Court heard the testimony and viewed the material proffered by Defendants, and in the end found it unnecessary to consider that portion of the hearing in deciding the motion, creating the amplified record was nonetheless useful. First, in preparation for the hearing, the Court permitted limited discovery through exchange of documents relevant to the two threshold issues. This discovery produced additional factual material that helped to place Kregler's allegations in context and to further crystalize the dispute. Together with Defendants' testimony, the material also created another option for the Court to weigh in the event Kregler's direct case had left open any factual gaps in the explanation of his claims that might have been filled by Defendants' presentation. Second, had the Court denied Defendants' motion, Defendants' testimony at the hearing is the equivalent of Court-supervised testimony at depositions, which might still have served a valuable purpose at later stages of the litigation, especially as
30 evidence *30 useful in the preparation and defense of any motion for summary judgment.

In terms of time, it took approximately five months from the Court's preliminary decision to order the Rule 12(i) hearing to the disposition of the case by the instant ruling. Thus, the Court was able to resolve this matter in a far shorter time than would have been required if it had denied Defendants' original motion to dismiss by reason of the closeness of the call at the initial review and thereby permitting the litigation to proceed into lengthier discovery and probably more time-consuming summary judgment motions — a process which, given the type of case involved, in this District would ordinarily consume as much as two years of litigation to conclude with the Court's determination.

## E. NO LEAVE TO AMEND

Based on discovery that was produced before the Rule 12(i) hearing and testimony by Defendants at the
582 hearing, Kregler suggested at the closing arguments following the hearing that he might seek leave to *582
amend his complaint to name DOI Inspector General Jayme Naberezny ("Naberezny") as a defendant, in place of Gill Hearn. Kregler implied that perhaps it was Naberezny who had agreed with Garcia to stop Kregler's
31 appointment because Naberezny had contacted Garcia *31 to obtain Kregler's FDNY personnel files for her work on Kregler's background investigation.

A court "should freely give leave" to replead "when justice so requires." Fed.R.Civ.P. 15(a)(2). However, "it is within the sound discretion of the district court to grant or deny leave to amend. A district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." McCarthy v. Dun Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007) (internal citations omitted).

The Court finds that allowing the proposed repleading would be futile because the claim against Naberezny would be based on pure speculation. Kregler has no factual basis for alleging that Naberezny agreed with Garcia to obstruct Kregler's City Marshal application. As with the current Amended Complaint's claim against Gill Hearn, a claim against Naberezny would rely upon an allegation that she and Garcia discussed Kregler's endorsement of Morgenthau, that she shared Garcia's alleged unlawful retaliatory motives, and that she improperly caused Gill Hearn to reject Kregler's application on this impermissible ground. The Court declines to allow Kregler to proceed with this type of theory on the basis of such bare speculation. The Court also notes
32 that it has *32 already permitted Kregler to amend his complaint once before. Accordingly, any request for leave to replead would be denied.

## V. ORDER

For the reasons discussed above, it is hereby

**ORDERED** that the motion to dismiss the amended complaint (Docket No. 10) of defendants The City of New York, Louis Garcia, Brian Grogan, Rose Gill Hearn, Keith Schwam, and Darren Keenaghan is GRANTED, and the amended complaint is dismissed with prejudice.

The Clerk of the Court is directed to withdraw any pending motions and to close this case.

SO ORDERED.

615 *615

No. 08-3602-cv
United States Court of Appeals, Second Circuit

# Falchenberg v. N.Y. State

338 F. App'x 11 (2d Cir. 2009)
Decided Jun 8, 2009

No. 08-3602-cv.

12 June 8, 2009. *12

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment and orders of the United States District Court for the Southern District of New York be **AFFIRMED.**

Nathaniel B. Smith, (Kristian K. Larsen, Drohan Lee Kelley LLP, on the brief), Law Offices of Nathaniel B. Smith, New York, NY, for Appellant.

Phillip S. McKinney, (James P. Rogers, on the brief), Rogers Hardin LLP, Atlanta, GA, for Appellee National Evaluation Systems, Inc.

Cecelia Chang, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Benjamin N. Gutman, Deputy Solicitor General, of counsel), for Andrew M. Cuomo, Attorney General of the State of New York, New York, N.Y. for Appellee State of New York and New York State Department of Education.

Present: Hon. WALKER, Hon. RICHARD C. WESLEY and Hon. J. CLIFFORD WALLACE,– Circuit Judges.

– The Honorable J. Clifford Wallace, United States Court of Appeals for the Ninth Circuit, sitting by designation.

## SUMMARY ORDER

Plaintiff-appellant Marsha Falchenberg appeals from various discovery orders and the amended opinion filed
13 on July 10, 2008, *13 642 F.Supp.2d 156, in the United States District Court for the Southern District of New York (Sweet, J.), (1) granting the motion of the State of New York, the New York State Education Department ("SED"), and National Evaluation Systems, Inc. ("NES") for summary judgment and denying plaintiffs cross-motion for summary judgment; (2) denying plaintiffs motion to preclude the defendants from introducing evidence; and (3) denying plaintiff discovery on the defenses raised by the defendants in their motion for summary judgment.[1] We assume the parties' familiarity as to the facts, the procedural context, and the specification of appellate issues.

[1] Falchenberg also appeals from the district court's July 1, 2005 decision dismissing her claims against the New York City Department of Education and the City of New York (collectively, the "City Defendants"). On April 15, 2009, this Court granted the City Defendants' motion to dismiss the appeal, concluding that Falchenberg waived all claims against the City Defendants by voluntarily omitting them as named parties from the Amended Complaint.

First, Falchenberg argues that the district court erred in holding that NES provided her with reasonable accommodations to take the Liberal Arts and Sciences Test ("LAST") and, thus, did not discriminate against her on the basis of her disability in violation of Titles II and III of the Americans with Disabilities Act

("ADA"), 42 U.S.C. § 12111 *et seq.*, the Rehabilitation Act, 29 U.S.C. § 794a, the New York State Human Rights Law ("NYSHRL"), or the New York City Human Rights Law ("NYCHRL"). Disabled individuals are entitled to receive "reasonable accommodations" that permit them to have access to and take a meaningful part in public services and public accommodations. *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir. 2004). However, "a defendant need not make an accommodation at all if the requested accommodation would fundamentally alter the nature of the service, program, or activity." *Id.* at 88 (internal quotation marks omitted); *see also* 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 35.130(b)(7). To be in compliance with the ADA, examinations like the LAST must be selected and administered so as to ensure that, when administered to an individual with a disability, the examination results do not reflect the individual's impaired ability or skill, "except where those skills are the factors that the examination purports to measure." 28 C.F.R. § 36.309(b)(1)(i); *see also* 28 C.F.R. § 36.309(b)(3) (requests for accommodation on examination need not be granted if they would "fundamentally alter the measurement of the skills or knowledge the examination is intended to test."). Thus, where a test applicant seeks an accommodation that would prevent her scores from accurately evaluating the skills intended to be measured by the test, the denial of the requested accommodation is not unlawful. *Powell*, 364 F.3d at 89.

Here, Falchenberg's request for an "oral" examination that does not require her to indicate spelling, punctuation, capitalization and paragraphing would effectuate precisely the type of fundamental alteration that need not be made as a matter of law. It is undisputed that spelling, punctuation, capitalization and paragraphing are among the skills tested on the LAST. Falchenberg's competency at these skills — competencies that all other examinees are required to demonstrate — cannot be tested without requiring her to actually spell, punctuate, capitalize and paragraph. NES granted Falchenberg every accommodation she requested that did not
14 interfere with the measurement of skills actually *14 tested on the LAST, including an offer to provide her with a reader to read each test question to her, a transcriber to write down her dictated written assignment for her, extra time to take the test, and a separate testing room to avoid distractions from other test takers. However, NES was not legally obligated to grant her additional accommodations fundamentally altering the LAST. Thus, the district court was correct to enter summary judgment in the Defendants' favor on Falchenberg's disability discrimination claim.[2]

> 2 On appeal, Falchenberg also argues that, even if the LAST does test an examinee's spelling, punctuation, capitalization, and paragraphing skills, those skills are unrelated to the skills needed to work as a qualified teacher. As the district court noted, however, Falchenberg failed to challenge the job-relatedness of any aspect of the LAST in her complaint. Set' *Falchenberg v. N.Y. State Dep't of Educ.*, 642 F.Supp.2d 156, 165 (S.D.N.Y. 2008) ("[T]he certification examination is not an issue in this case. There is no allegation that the certification test itself is discriminatory. . . ." ) (internal quotation marks omitted). Thus, we need not, and do not, consider whether the LAST tests job-related skills. *See Wilkerson v. Meskill*, 501 F.2d 297, 298 (2d Cir. 1974) (concluding that "we cannot hear" arguments that were not "properly raised below").

Second, Falchenberg argues that the district court improperly limited the scope of discovery through various discovery orders entered in November 2006, May 2007, and June 2007. We review discovery orders for an abuse of discretion, and will reverse a district court's discovery rulings only "`when the discovery is so limited as to affect a party's substantial rights.'" *In re "Agent Orange" Prod. Liab. Litig.*, 517 F.3d 76, 102-03 (2d Cir. 2008) (quoting *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 795 (2d Cir. 1985)). Because the discovery orders made by the district court were for the purpose of limiting discovery to the claims actually made by Falchenberg, we conclude that the orders were not an abuse of discretion.

Third, we agree with the district court that, because Falchenberg's disability discrimination claim fails on its merits, her aiding and abetting claims fail as well. *See Falchenberg*, 642 F.Supp.2d at 165-66. Falchenberg challenges the dismissal of her aiding and abetting claims against SED and NES. However, aiding and abetting is only a viable theory where an underlying violation has taken place. 18 U.S.C. § 2(a); *see also United States v. Reifler*, 446 F.3d 65, 96 (2d Cir. 2006). Because we hold that there was no underlying violation of the ADA, the Rehabilitation Act, or the New York State and New York City Human Rights Laws, we hold that the district court did not err in dismissing Falchenberg's claims for aiding and abetting.

Finally, Falchenberg's claim against NES under the Rehabilitation Act mirrors her claim under the ADA and fails for the same reasons. In any event, because NES is a unit of a business corporation and does not receive any federal financial assistance, it is beyond the reach of the Rehabilitation Act. *See* 29 U.S.C. § 794(a).

We have reviewed all remaining claims made by Falchenberg and find them to be similarly without merit.

Accordingly, for the reasons set forth above, the judgment and orders of the district court are AFFIRMED.

15 *15

1:03-CV-266 (GLS/RFT)
United States District Court, N.D. New York

# Graves v. Finch Pruyn Company, Inc.

Decided Mar 27, 2009

1:03-CV-266 (GLS/RFT).

March 27, 2009

**FOR THE PLAINTIFF:** NATHANIEL B. SMITH, ESQ., Office of Nathaniel B. Smith, New York, NY.

**FOR THE DEFENDANT:** MICHAEL T. WALLENDER, ESQ., Couch, White Law Firm, Albany, NY.

## DECISION AND ORDER

GARY SHARPE, Magistrate Judge

## I. Introduction

2 Following remand from the Second Circuit, Finch Pruyn Company, *2 Inc. ("Finch Pruyn") has renewed its summary judgment motion seeking dismissal of the Americans with Disabilities Act ("ADA") claim of its employee, George Graves.[1] The sole issue is whether Graves was denied a reasonable accommodation when Finch Pruyn refused to give him two weeks unpaid leave.[2] An objective evaluation of the circumstances existing at the time of Finch Pruyn's decision reveals that it had already accommodated Graves for a year, it was confronting a business hardship because of Graves's absence, and it had no assurance that the requested accommodation would likely result in Graves's successful return to work. Accordingly, Finch Pruyn's decision was reasonable as a matter of law, its motion for summary judgment is granted and Graves's complaint is dismissed.

1 Familiarity with the Circuit's opinion is presumed. *See Graves v. Finch Pruyn Co.*, 457 F.3d 181 (2d Cir. 2006).

2 Finch Pruyn also asserts that while it denied Graves's request for an additional two weeks, it granted an equivalent accommodation because it provided Graves with three weeks partial duty at full pay. If this was Finch Pruyn's sole argument, the court would deny summary judgment because there are factual issues as to whether the substitute accommodation was indeed equivalent to that which Graves sought.

## II. Facts

Over a lengthy career, Graves worked his way up from laborer in the wood room of paper manufacturer Finch
3 Pruyn to a position of paper *3 inspector in the quality-assurance department. He was promoted to that position in 1991 and successfully performed his duties until he began having problems with a bone spur on his heel in late 1999. Paper inspectors are on their feet 85% of their shifts, frequently lift up to 30 pounds of paper and move rolls weighing up to 3500 pounds. By early 2000, Graves could no longer perform these essential job duties without surgical repair and treatment of the bone spur.

In anticipation of impending surgery and as an accommodation to Graves's disability, Finch Pruyn assigned him light duty work from January through May 10, 2000. If consistent with its operational business needs, Finch Pruyn's employment policy authorized temporary light duty assignments for those with a short-term medical prognosis of returning to the full-time duties of their regular job.

On May 10, Graves left work on temporary disability in order to surgically repair his heel. Finch Pruyn's temporary disability policy provided six months of benefits, and Graves received full pay until his postsurgical return on September 4, 2000. When he returned, he still experienced foot pain and could not perform his
4 essential job functions. Again, Finch Pruyn accommodated his disability, and gave him a light duty, *4 full pay assignment of training two new paper inspectors. That assignment ended on October 30, 2000, Finch Pruyn told Graves that it had no further light duty assignments consistent with its operational needs. Accordingly, Graves again left work on temporary disability leave. His six months of entitlement ended in December 2000, but Finch Pruyn continued his fulltime pay through January 4, 2001.

On January 4, 2001, Michael Strich, Finch Pruyn's Human-Resources Director, gave Graves three options: (1) return to full-duty work immediately; (2) take a 64% pay cut and work at a desk job; or, (3) have a doctor state that Graves was totally disabled and take disability retirement with resulting disability pension benefits of $269,000. The details of the January 4 Strich and Graves conversation and the ensuing events are at the heart of the Circuit's remand. *See generally*, *Graves*, 457 F.3d at 184-186.

For purposes of Finch Pruyn's renewed motion, the Circuit has concluded that Graves responded to Strich's options by requesting a finite two week unpaid leave of absence in order to determine his chances for rehabilitation by consulting a foot specialist, Dr. O'Connor. This additional two weeks would not have required
5 Finch Pruyn to hold open Graves's *5 position indefinitely. *See id.* at 185-86. In this court's original oral decision, it referred to this request for two weeks leave as "indefinite." That statement violated the summary judgment rule requiring the resolution of disputed facts in favor of Graves, the non-moving party. *See id.* at 186. As is sometimes unfortunate with oral decisions, the court was not as clear as, in hindsight, it should have been.

Unquestionably, Graves sought a finite period of two weeks to consult with Dr. O'Connor. However, the reasonableness of that request requires analysis of what the two weeks would have accomplished regarding the feasability of his return to work. In support of its summary judgment motion and this issue, Finch Pruyn cites a January 10, 2001, report authored that day by Dr. Welch, Graves's primary physician. ( *See* Defendant's Supplemental Rule 7.1(a)(3) Statement of Material Facts ("Def. SMF") at ¶ 2; Dkt. No. 60-3.) In that report, Dr. Welch opined that Graves was totally incapable of performing his job, and his physical limitations would preclude the resumption of full-time employment for a period of at least six months. ( *See id.*) In his response, Graves admitted the Welch prognosis, but argued that the report was drafted at his request so that it would
6 support his disability election. ( *See* Plaintiff's Response *6 ("Pl. SMF") to Def. SMF at ¶ 2; Dkt. No. 64.) He further averred that Dr. Welch supplied Finch Pruyn with a different report six days earlier on January 4, 2001. ( *See id.*) According to Graves, that report noted: he was seeking a consultation with Dr. O'Connor; a surgical procedure might relieve the foot disability; and, after two or three months of recuperation from surgery, he might be able to return to gainful employment. ( *See id.*) Graves now argues that the January 4 report provided assurances that he would return to full-time work. ( *See* Graves Memorandum of Law ("MOL") at 8-11; Dkt. No. 63.)

As the court recently observed, conclusory allegations, conjecture and speculation do not create disputed factual issues sufficient to thwart summary judgment. Often, the cogent facts are self-evident in the underlying record. *See Reinhart v. City of Schenectady Police Dep't*, Nos. 1:05-CV-630 (Lead), 1:04-CV-317 (Member), 2009 WL 383756, at *1 fn. 5 (N.D.N.Y. Feb. 10, 2009). As it relates to Graves's ability to return to fulltime employment, the January 4 report actually states:

> . . . it is unlikely that he will be able to return to his previous occupation. We anticipate that he will be left with a permanent restriction of activities. This restriction will include not being on his feet for more than an hour to an hour and a half total in an eight hour day. Secondly, this hour to hour and a half must
> 7 be *7 broken up into frequent intervals of not more than three to five minutes each at a frequency of at least two per hour. . . . He also cannot be in a situation that he has to lift or carry anything weighing more than 5 to 7lbs. This is basically describing an extremely sedentary job which is totally different then (s *ic.*) anything that he has been doing up until the present time."

( *See* Ex. Tab 10 to Wallender Aff.; Dkt. No. 21:21.) As it relates to future recovery post-consultation with an orthopedic surgeon, the report states:

> . . . [i]f there is something surgically that can be done to relieve the symptomatology in his foot, it is likely that it will take another two to three months of recovery following such surgery before he could return to any kind of gainful employment, and even then there will probably [be] some restrictions in the amount of standing walking lifting and carrying that he can do. I have asked George to try to obtain copies of job descriptions of both his current job title as well as any potentially lighter job titles that might come close to matching the above description. If no such job is going to be available on a permanent basis, then we will probably be forced next week to make the assumption he will be permanently disabled from working at Finch Pruyn. . . . I've tried very hard to explain to George that the impairment he has will remain unchanged regardless of whatever jobs may or may not be available. We are both in agreement that . . . this overall disability is probably not total in that he could indeed handle a very light sedentary type job, but this maybe [sic] only on a part-time basis, and may not be fully available to him through a company such as Finch Pruyn.

( *See id.*).

Strich refused Graves's request for two additional weeks. *See*, *Graves*, 457 F.3d at 185. Consequently, Graves
8 elected to take the *8 disability retirement because he felt he had no other choice. (Pl. SMF at ¶¶ 4, 5.) He then caused Dr. Welch to transmit a January 10 report to Finch Pruyn finding Graves to be totally disabled for the foreseeable future; at least six months. ( *Id.* at ¶ 2.) After this Welch diagnosis, there was no further discussion about Graves's medical condition with Finch Pruyn. ( *Id.* at ¶¶ 3, 7, 8, 12.) As a courtesy to Graves, Finch Pruyn allowed him to continue employment in a light duty capacity at full pay until the end of January. ( *Id.* at ¶ 23.) He subsequently retired on February 1st, and received a lump sum disability payment of $269,335. ( *Id.* at ¶ 5.) Down three paper inspectors due to disability, Finch Pruyn permanently filled Graves's paper inspector position with an employee who previously occupied a temporary position. ( *Id.* at ¶¶ 24, 25.)

On February 2, 2001, Graves consulted with Dr. O'Connor who diagnosed Graves with an inflamed ossicle in his foot and treated him with steroid injections. (See Graves Tr. 128:14-129:11, Dkt. No. 45.) In mid-February the ossicle was surgically removed. ( *Id.* at 129:17-130:1.) As a result, Graves has apparently regained full use of his foot without pain. ( *Id.* at 143:22-144:1.) He did not seek reemployment with Finch Pruyn nor did he
9 rescind his retirement. (Pl. SMF ¶ 17.) *9

# III. Discussion

## A. Summary Judgment Standard

The summary judgment standard is well-established, and will not be repeated here. For a full discussion, the court refers the parties to its opinion in *Bain v. Town of Argyle,* 499 F. Supp. 2d 192, 194-95 (N.D.N.Y. 2007).

## B. Graves's ADA Claim

Graves must establish a *prima facie* case in order to survive summary judgment on his ADA disability claim. *See Rodal v. Anesthesia Group of Onondaga*, 369 F.3d 113, 118 (2d Cir. 2004). In order to satisfy his initial burden, he must show: "(1) [he] is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, [he] could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations." *Id.* Here, only the third and fourth elements are at issue, and the narrow question is whether Graves's two week request to schedule a consultation with Dr. O'Connor was a reasonable accommodation which Finch Pruyn
10 should have granted. *See Graves*, 457 F.3d at 186 n. 6. Graves has the burden of proof on this issue. *See* *10
*Parnahay v. United Parcel Serv., Inc.*, 20 Fed. Appx. 53, 56 (2d Cir. 2001).

The Second Circuit has not expressly held that a temporary leave of absence can be a reasonable accommodation. However, numerous other courts have so held, depending on the circumstances.

In *Criado v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998), for instance, an employee requested temporary leave to treat her depression, even though her employer had already allowed her three weeks absence. *Id.* at 439-41. The employer denied the further accommodation and, on appeal from a verdict for the plaintiff, argued that such accommodation was not reasonable. *Id.* at 443-44. The First Circuit disagreed, stating that "[b]ecause [the employee's] physician was optimistic that the [additional] leave would ameliorate her disability, the jury could find her request a reasonable accommodation." *Id.* at 444. The court also noted that granting the accommodation would not pose an undue burden to the employer as the employee "was not asking for more leave than would be granted to a non-disabled, sick employee." *Id.*

In the Ninth Circuit case of *Humphrey v. Memorial Hosp. Ass'n*, 239 F.3d 1128 (9th Cir. 2001), the court found
11 an issue of fact existed as to whether a leave of absence was a reasonable accommodation for an *11
employee's obsessive compulsive disorder. While the benefits of the leave were not definite, the court provided that "[a]s long as a reasonable accommodation available to the employer could have plausibly enabled a handicapped employee to adequately perform his job, an employer is liable for failing to attempt that accommodation." *Id.* at 1136 (quoting *Kimbro v. Atl. Richfield Co.*, 889 F.2d 869, 879 (9th Cir. 1989)). The court also found that a letter from the employee's doctor stating that her "condition was treatable and that `she may have to take some time off until we can get the symptoms under better control'" was "sufficient to satisfy the minimal requirement that a leave of absence could plausibly have enabled [the employee] to perform her job." *Id.* In so holding, however, the court cautioned:

> the requirement to grant leave where there are plausible reasons to believe that it would accommodate the employee's disability can not be repeatedly invoked, thus permitting an unqualified employee to avoid termination by requesting a leave of absence each time he is about to be fired. . . . [T]he fact that a prior leave was granted and was unsuccessful may be a relevant consideration in determining whether additional leave would be a reasonable accommodation.

*Id.* at 1136 n. 13. *See also Evans v. Fed. Exp. Corp.*, 133 F.3d 137, 140 (1st Cir. 1998) (employer not required
12 to grant additional leave for *12 substance abuse disability in light of prior accommodations). *But see, e.g.,*

*Criado*, 145 F.3d at 445 (stating that past accommodations do not absolve employer from providing future accommodations); *Picinich v. United Parcel Serv.*, 321 F.Supp. 2d 485, 516 (N.D.N.Y. 2004) ("An employer's duty to make reasonable accommodations is a continuing one, and will not be satisfied by a single effort.").

The Sixth Circuit case of *Walsh v. United Parcel Serv.*, 201 F.3d 718 (6th Cir. 2000), is most similar to the present situation. In *Walsh* an employee was given a year of paid disability leave and six months unpaid disability leave as an accommodation for disabilities arising out of an automobile accident. *Id.* at 721, 726. Still unable to return to work following those accommodations, the employee sought more time for further medical evaluation, which was denied by the employer. *Id.* at 721-22, 726. Upholding the employer's action, the Circuit noted that the plaintiff had been given a year and a half of leave, during which he inexplicably failed to have the desired evaluation. *Id.* at 727. Even when finally completed, the evaluation "did not indicate a time frame or circumstances under which plaintiff could return to work." *Id.* The court concluded that "when . . . an employer
13 has already provided a substantial leave, an *13 additional leave period of significant duration, with no clear prospects for recovery, is an objectively unreasonable accommodation." *Id. See also Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995) (holding that an accommodation which will not allow an employee to perform the essential functions of his job "presently, or in the immediate future" is not reasonable).

While this Circuit has not yet held that a temporary leave of absence can be a reasonable accommodation, it will undoubtedly do so when it decides the matter. However, the fact that such a request may constitute a reasonable accommodation does not, *ipso facto*, mean that it is reasonable in every case. The appropriate analysis requires an objective evaluation of all circumstances, including whether the request is reasonable in light of the unique employment circumstances and whether the employer has some assurance that the absence could plausibly allow the employee to perform the essential functions of his job in the near future. In essence, the cited cases seek to objectively juxtapose the sometimes competing aims of allowing disabled employees to perform their duties with reasonable accommodations, and the burden such accommodations place on the
14 employer. *See, e.g., Jackan v. N.Y. State Dept. of Labor*, 205 F.3d 562, *14 565-67 (2d Cir. 2000). Accordingly, the court turns to an objective analysis of the current case.

Graves initially asserts that `[h]ad Finch Pruyn] given [him] sufficient time to learn of the chances for rehabilitation, then [he] would have been able to inform it of Dr. O'Connor's diagnosis" and that, with treatment, he would likely be able to return to work without restrictions. ( *See* Graves MOL at 6; Dkt. No. 63.) This argument ignores the fact that Finch Pruyn had already provided Graves with nearly a year of intermittent accommodations, and there was no diagnosis suggesting a return to fulltime employment. The court recognizes that an employer's past accommodations do not relieve it of an obligation to grant reasonable future requests. *See Picinich*, 321 F. Supp. 2d at 516. However, an employee must still exercise some diligence in using an accommodation, such as a leave of absence, to cope with his disability or neutralize it. *See Humphrey,* 239 F.3d at 1136 n. 13; *Walsh*, 201 F.3d at 727. Here, Graves has offered no explanation as to why the past accommodations afforded by Finch Pruyn were insufficient to obtain his consultation, nor has he explained why an additional two weeks would have provided any assurance to Finch Pruyn that he would return to his
15 full-time duties. *15

As to the latter, Graves's argument is flawed inasmuch as it posits that Dr. O'Connor's ultimate success in rectifying Graves's disability dictates that Finch Pruyn should have granted his request for more time to schedule further medical consultation. However, a requested accommodation is unreasonable if the objective circumstances demonstrate that even if granted, there is no likelihood that it will facilitate a successful return to work. The ADA does not require an employer to prognosticate a miraculous recovery or grant seemingly futile

requests on the off chance that they may succeed. Rather, the question is whether, at a time proximate to Graves's request for leave and its denial, Finch Pruyn was given some assurance that such leave could feasibly result in Graves's successful return to work.

Graves points to the January 4th report of Dr. Welch as providing such assurances. In bald and conclusory fashion, he contends that the report optimistically predicts that surgery would allow him to return to full employment. The court has extensively quoted that report which speaks for itself. There is no "disputed fact" needing resolution at trial because no reasonable jury could accept Graves's selective interpretation which
16 grossly overstates any prognosis for his recovery. As quoted, the report *16 definitively states that Graves will be permanently disabled, and will permanently suffer physical restrictions that will preclude his resumption of his full-time job. While the report endorses an orthopedic consultation, it clearly states that such intervention is unlikely to ever result in Graves's return to full-time duties. Thus, the report gave Finch Pruyn no assurance that the definite leave of absence Graves sought could plausibly result in his ability to perform the essential functions of his job in the near future. While a more optimistic report might have imposed a duty to accommodate on Finch Pruyn, the January 4th report was followed by the January 10th report which was even more dire in its prognosis, finding Graves totally disabled for at least the next six months.[3]

[3] Graves has objected to this report on the ground that it is inadmissible hearsay. To the extent Finch Pruyn relies on Graves's medical records, it is to show their effect on Finch Pruyn's decisions, not to prove that their contents are true. As such they are not hearsay.

While Graves argues that the January 10 report was prepared so that he could qualify for disability retirement, the report unquestionably provided no hope for a plausible recovery. Subsequent to the January 10th report, Finch Pruyn received no further information whatsoever regarding Graves's medical condition. Thus, at all times proximate to Graves's request for additional leave, the available information indicated that the request
17 was *17 futile.

Although Graves's prognosis for recovery is a significant factor in this analysis, it is not the only factor. An objective evaluation also requires consideration of the business situation facing the employer who must determine the reasonableness of the requested accommodation. For example, the analysis might differ if the employer was a sizeable company with a large, interchangeable work force. Despite earlier accommodations, a request for an unpaid, two week leave of absence might be entirely reasonable if the employer could simultaneously accommodate a valued disabled employee and easily fill the vacuum caused by the employee's absence.

However, that is not the situation objectively confronted by Finch Pruyn. In January 2000, it accommodated Graves's disability by honoring its employment policy and giving him a four month light-duty assignment while he consulted with his doctor in an effort to eliminate his disability. It then held his job open for four months and paid him full-time disability benefits while he was out for remedial surgery. When he returned, he still could not do his job, but they provided him with almost two more months of light-duty work. Although he
18 still could not do his job, there were no further *18 light-duty assignments, and he had exhausted his remaining disability leave, Finch Pruyn still gave him full-time benefits through January 4, 2001. Thus, when Strich had the conversation with Graves on January 4, Finch Pruyn had already provided a full year of various accommodations, and nothing had changed. Graves still could not return to his duties and Finch Pruyn, at best, was faced with the prospect of a two week leave of absence, followed by three to four months of recovery,

resulting in only partial rehabilitation. Additionally, Finch Pruyn was then indisputably short at least two other paper inspectors due to disability during the time in question. These burdens unquestionably outweighed the virtually nonexistent expected benefit from the leave Graves sought.

The fact that Graves's disability was ultimately diagnosed, treated and remedied is certainly troublesome, at least from his perspective. Indeed, it is unfortunate that Dr. O'Connor was not consulted sooner. That is not a situation, however, that can be laid at Finch Pruyn's doorstep. Given the accommodations afforded Graves over the course of a year, given the lack of any prognosis that an additional two weeks would lead to his reasonable return to work, and given the undue hardship Finch Pruyn was confronting, the failure to provide an additional
19 two weeks of unpaid *19 leave was not a violation of the ADA. Under the ADA, "an employer is not required to provide a disabled employee with an accommodation that is ideal from the employee's perspective, only an accommodation that is reasonable." *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 484 (8th Cir. 2007) (citation omitted.)

## IV. Conclusion

**WHEREFORE**, for the foregoing reasons, it is hereby

**ORDERED** that the defendant's motion for summary judgment ( **Dkt. No. 60**) is **GRANTED** and the complaint is **DISMISSED IN ITS ENTIRETY**; and it is further

**ORDERED** that the Clerk of the Court enter judgment and close this case; and it is further

**ORDERED** that the Clerk of the Court provide the parties with a copy of this Order.

IT IS SO ORDERED.

No. 08 Civ. 6893 (VM)
United States District Court, S.D. New York

# Kregler v. City of New York

608 F. Supp. 2d 465 (S.D.N.Y. 2009)
Decided Mar 16, 2009

No. 08 Civ. 6893.

466 March 16, 2009. *466

Nathaniel B. Smith, Law Office of Nathaniel B. Smith, NewYork, NY, for Plaintiff.

Christopher Aaron Seacord, New York City Law Department, New York, NY, for Defendants.

## DECISION AND ORDER

VICTOR MARRERO, J.

Plaintiff William Kregler ("Kregler") brought this action pursuant to 42 U.S.C. § 1983 ("§ 1983") alleging that defendants violated his rights under the First and Fourteenth Amendments of the United States Constitution. Defendants consist of the City of New York (the "City") and five individuals who at all relevant times were employees of the City's Fire Department ("FDNY") or Department of Investigation ("DOI") (collectively with the City, "Defendants"). Defendants move pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") to dismiss the amended complaint for failure to state a claim upon which relief can be granted. For the reasons stated below, the Court defers decision on the motion pending the outcome of a preliminary hearing it
2 will conduct pursuant to Federal Rule of Civil Procedure 12(i) ("Rule 12(i)"). *2

## I. INTRODUCTION

This case raises a longstanding concern frequently noted by the Supreme Court and the Second Circuit, as well as by federal courts across the country. Not uncommonly, on the basis of nothing more than the barest conclusory allegations, government officials are summoned to court to defend private lawsuits charging constitutional violations and other serious official misconduct. In most cases the costs the parties incur in litigating such actions, measured by expenditures of time and public resources, disruption of government operations, and potential damage to professional and personal reputations, are quite extensive. Frequent instances arise in which the underlying issues raise matters involving the formulation of government policy or, as in the case at hand, the appointment of public officers. These circumstances may implicate inquiry into confidential communications, thought processes and internal documents containing sensitive matters the public disclosure of which in itself could entail judicial proceedings. Equally significant are the attendant impacts of such lawsuits on the courts' dockets and the administration of justice. See Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) ("[I]t cannot be disputed seriously that claims frequently run against the innocent as well as the
3 guilty — at a cost not only to the defendant officials, but to society as a whole. *3 These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.").

More fundamentally, the question regarding the personal and social costs associated with litigating insubstantial lawsuits reduces to a far greater value: fairness. It is inequitable to subject a government official — or indeed any party — to the burdens of defending a claim challenged on legitimate grounds as insubstantial or frivolous for any longer than the minimum time reasonably necessary to ascertain whether sufficient basis exists to warrant allowing the action to proceed. For essentially the same social costs and fairness considerations, our justice system prescribes speedy trial rules demanding the earliest feasible resolution of charges against
467 defendants in criminal cases. *467

The consequences described above, however, are not always, and not necessarily, of the complainant's making. Rather, to a large degree they reflect unintended side effects, by-products of the lenient notice pleading standards embodied in Federal Rules of Civil Procedure 8(a) ("Rule 8(a)") and 12(b)(6) and related case law. These rules are designed to insure that litigants with meritorious claims obtain adequate access to resolve their
4 disputes in court. *4 But, in a judicial instance of the duality that generally pervades so much of life, the same open door that welcomes the just cause also admits the nuisance suit; the flimsy or frivolous allegation is as free to enter the courthouse as the valid claim. As the Supreme Court has recognized, accusations of unconstitutional conduct on the part of public officials are easy to level, but very difficult and costly to defend against. See Crawford-El v. Britton, 523 U.S. 574, 584-85 (1998) (noting a "potentially serious problem" that the District of Columbia Circuit had sought to address: "Because an official's state of mind is `easy to allege and hard to disprove,' insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials.") (citation omitted); Tenney v. Bandhove, 341 U.S. 367, 378 (1951) ("In times of political passions, dishonest or vindictive motives are readily attributed to [government official] conduct and as readily believed.").

Over the course of many years courts concerned with the severe hardships that insubstantial lawsuits place on litigants, on the justice system and on society as a whole have struggled with this dilemma, not only as it pertains to complaints lodged against government officials, but to litigation in general. To address these issues,
5 courts have *5 devised several tests meant both to instruct plaintiffs on drafting well-pleaded claims, and to guide the courts' review of the legal sufficiency of claims for relief. Among such judicial means employed to part the wheat from the chaff are: imposing "heightened" pleading standards, discounting conclusory allegations, rejecting recitations of law and factually unsupported incantations of the statutory or common law elements of a cause of action. Yet, as the case at hand illustrates and the law reports amply record, the problem persists, a sign of an intrinsic tension built into the federal rules. The Supreme Court has repeatedly rejected the notion that the Federal Rules of Civil Procedure countenance any universal heightened pleading standard, and has consistently reaffirmed that Rule 8(a) calls for nothing more than what its clear text prescribes: "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2); see Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Erickson v. Pardus, 551 U.S. 89, (2007); Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002);Leatherman v. Tarrant County Narcotics Intelligence Coordination Unit, 507 U.S. 163 (1993); see also Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007). Moreover, whether in their factual allegations
6 as originally crafted, or upon being granted leave to replead deficient claims, seasoned *6 plaintiffs' counsel know to charge the pleadings with enough adjectives that reverberate of extreme malice, improper motives, and bad faith to raise factual issues sufficient to survive a dispositive motion, thus securing a hold on the defendant strong enough for the duration, however long and costly the ultimate resolution of the claim may be.

In practical terms, the philosophy of pleading that these rules embodies, a one-rule-fits-all principle, defines the
468 scope of *468 the problem engendered by its unintended outcomes. For instance, in theory the same generalized minimal Rule 8(a) standards that govern the plaintiff's drafting, as well as the court's review, of a complaint

alleging common law negligence stemming from a slip and fall, or a breach of a simple contract for failure to pay a debt, apply to writing and evaluating a complaint charging civil violations of intricate federal antitrust, intellectual property, or racketeering statutes. Similarly, the bare bones essence of a claim that is necessary to survive a motion to dismiss is the same whether the complaint is authored by John Dioguardi or by Wall Street lawyers. See Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).

To be sure, the federal rules include provisions designed to ensure that factual allegations in pleadings have some evidentiary and legal support and are made in good faith, as *7 well as sanctions to deter abusive practices. Specifically, Federal Rule of Civil Procedure 11 ("Rule 11") deems any litigation papers submitted to the court as embodying a certification that, to the person's knowledge, information and belief, "formed after an inquiry reasonable under the circumstances," the filing is not presented for an improper purpose, the claims are warranted by law, and the factual allegations have or will likely have evidentiary support. Fed.R.Civ.P. 11(b)(1)-(3). But these rules are difficult to police effectively, and, under the rigorous bar that governs imposition of Rule 11 sanctions, they are infrequently invoked and only rarely enforced.

These considerations serve as a backdrop for the Court's review of Defendants' motion to dismiss the complaint in this case. Below, the Court outlines a procedure it will employ to reach a resolution it deems appropriate to do substantial justice for the parties and to promote judicial economy as expeditiously as possible. The Court regards the means proposed, if somewhat uncommon, nonetheless permissible under the federal rules and applicable case law.

## II. FACTS

Until his retirement in March 2004, Kregler had been employed by the FDNY for 20 years. One month after retiring, Kregler filed a preliminary application for appointment by the *8 Mayor as a City Marshal, a process governed by Article 16 of the New York City Civil Court Act. See N.Y. City Civil Ct. Act § 1601(1) ("§ 1601"). Pursuant to § 1601 and the Mayor's Executive Order 44 ("Executive Order 44"), the Mayor's Committee on City Marshals (the "Mayor's Committee") is charged with recruiting and recommending candidates for appointment as City Marshals. Candidates are subject to a DOI investigation of personal and financial background, and to a training program administered by DOI. In January 2005 Kregler was interviewed by representatives of the Mayor's Committee and was later notified by defendant Keith Schwam ("Schwam"), an Assistant Commissioner at DOI, that DOI would commence its personal and financial review of Kregler's background. As a follow-up, Kregler met in April 2005 with defendant Darren Keenaghan ("Keenaghan"), a DOI investigator, to discuss Kregler's preliminary application. Kregler then made minor modifications, signed the revised application, and provided authorizations for release of personal information.

On May 25, 2005 Kregler, in his capacity as President of the Fire Marshals Benevolent Association ("FMBA"), an organization of the FDNY Fire Marshals, publicly endorsed the candidacy of Robert Morgenthau ("Morgenthau") for reelection as District Attorney for New York County. Kregler asserts that at that time all other *469 law enforcement associations, *9 including the two other unions of firefighters, supported Morgenthau's opponent, Leslie Crocker Snyder ("Snyder"). An article that appeared in a June 2005 edition of The Chief, a local newspaper, reported on the endorsement of Morgenthau by Kregler acting as president of the FMBA. According to Kregler, defendant Brian Grogan ("Grogan"), an FDNY Supervising Fire Marshal, posted a copy of that article in a public area within one of the FDNY offices. Kregler further alleges that Grogan "berated" him for the endorsement, stating: "who the f — do you think you are. Louie [Garcia] makes the endorsements." (Amended Complaint ("Compl.") ¶ 28.) Defendant Louis Garcia ("Garcia") was Chief Fire

Marshal of the FDNY's Bureau of Fire Investigation. Kregler alleges that both Garcia and Kregler politically supported Snyder's campaign against Morgenthau, that Garcia was socially acquainted with defendant Rose Gill Hearn ("Hearn"), the DOI Commissioner, and that Hearn also politically supported Snyder's candidacy.

On July 7, 2005, Kregler was interviewed by staff of the Mayor's Office in connection with his Fire Marshal application and the following day was told by Schwam that the next step in the process would be the completion of the DOI background check. To that end he met a second time with Keenaghan to update and refile his application. In September 2005 Kregler *10 and four other candidates began the DOI training classes, which Kregler states he successfully completed in October 2005. Kregler describes the training program as consisting of "about 30 hours of classroom lectures, extensive homework, a final examination, field trips to court houses, and working with existing City Marshals in the course of their regular duties." (Compl. ¶ 34.) In November 2005[1] Kregler satisfied the last requirement for appointment by demonstrating his ability to obtain a bond.

[1] The Amended Complaint states that Kregler satisfied this requirement in November 2006. (See Compl. ¶ 36.) This statement may reflect a typographical error because Kregler's application was denied in March 2006.

Morgenthau was reelected as District Attorney in November 2005. In March 2006 Kregler was informed by letter from Schwam that he would not be appointed as a Fire Marshal. He filed this action in August 2008 alleging that Garcia and Hearn "agreed to cause Kregler's application for appointment as a City Marshal to be rejected in retaliation for Kregler's support of Morgenthau." (Comp. ¶ 41.) He further asserts that Garcia and Grogan and other FDNY employees requested Hearn, Schwam, Keenaghan, and other DOI employees to misuse their authority to cause the rejection of his application. Responding to the reason Defendants proffered for denying him an appointment — his failure to disclose details of a command discipline he had received in 1999 during his employment by *11 the FDNY — Kregler states that this explanation is merely a pretext for Defendants' unlawful retaliation.

## III. DISCUSSION

Defendants argue that Kregler's complaint must be dismissed because his pleadings fail to satisfy the elements of an action for First Amendment retaliation under § 1983. To state a such claim, a plaintiff must demonstrate that (1) he engaged in constitutionally protected speech, (2) suffered an adverse employment action, and (3) a causal connection exists between the speech and the adverse employment action "so that it can be said that the speech was a motivating factor in the determination." Washington v. County of *470 Rockland, 373 F.3d 310, 320 (2d Cir. 2004) (citing Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999)). Defendants contend that even assuming, for the purposes of this motion, that Kregler engaged in protected speech and suffered an adverse employment action, he has not stated factual allegations sufficient to support a reasonable finding of a causal connection between his endorsement of Morgenthau's candidacy and Defendants' decision not to offer Kregler a position as City Marshal. Defendants also maintain that Kregler fails to assert retaliatory animus or personal involvement by Defendants in the decision not to appoint Kregler, and thus that he fails to satisfy the third element of a First Amendment retaliation *12 claim.

A plaintiff may satisfy the element of causal connection between the alleged protected speech and the adverse employment action "(1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment . . . or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant." Gordon v. New York City Bd. of Educ., 232 F.3d 111, 117 (2d Cir. 2000). Kregler's only allegation connecting his protected speech and the retaliation he claims is that Grogan "berated" him on account of Kregler's public endorsement of Morgenthau, stating, "among other things," that it was Garcia who

made public endorsements. (Compl. ¶ 28.) Defendants argue that Grogan's reaction manifests nothing more than his anger that Kregler had stepped out of bounds by performing an FMBA function that properly belonged to Garcia. Interpreting Kregler's assertion in the light most favorable to him, and without a factual record of what "other things" Grogan may have said to Kregler on that occasion, the Court cannot determine to what extent Grogan may have harbored retaliatory animus beyond that which may have been conveyed by the one remark Kregler specifies.

A more fundamental issue touching upon the sufficiency of Kregler's retaliation claim is that nothing in the
13 record *13 indicates that Grogan or Garcia made the decision to deny Kregler a City Marshal appointment, or had any direct personal involvement in the matter. Under § 1601 the final determination not to offer Kregler a position was presumably made by the Mayor's Committee upon the recommendation of DOI officials. A basic premise of Kregler's claim is therefore that, for retaliatory reasons arising from Kregler's endorsement of Morgenthau, Grogan and Garcia communicated and agreed with DOI employees to interfere with Kregler's application, and that Hearn and other DOI officials then influenced representatives of the Mayor's Committee and the Mayor's Office to prevent Kregler's appointment. Kregler does not allege that Schwam, Keenagham, Hearn, or any other DOI officials had any direct knowledge of his endorsement of Morgenthau. He thus grounds his theory of retaliation on suggestion supported by a chain of inferential links that would connect the alleged improper political motives of the FDNY officials he names with the actions of the officials at DOI.

Defendants argue that, at its core, Kregler's action amounts to a claim of conspiracy to violate his constitutional rights. According to Defendants, Kregler developed his alleged conspiracy theory to overcome the dilemma
14 that the FDNY officials he claims had political motives to oppose his *14 City Marshal application were not the persons in DOI or the Mayor's Committee who actually made the decision not to offer him an appointment. Faced with this legal impediment, Kregler alleges that first Garcia and Grogan and then Garcia and Hearn "agreed to take steps to interfere with and prevent Kregler's appointment," (Compl. ¶ 40), and that Garcia and
471 Hearn "agreed" to cause Kregler's application for appointment *471 as a City Marshal to be rejected by DOI in retaliation for Kregler's support of Morgenthau (id. ¶ 41). Reading Kregler's pleadings as asserting a conspiracy claim, Defendants contend that under Second Circuit law a heightened pleading standard governs such actions, pursuant to which specific facts tending to demonstrate that a "meeting of the minds" occurred must be pleaded, rather than bare conclusory allegations that an agreement was reached. (Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint, dated December 2, 2008, at 13) (citing Pangburn v. Culbertson, 200 F.3d 65, 72 (2d Cir. 1999)).

In response, Kregler points out that his complaint does not allege any conspiracy claim, and that in any event recent Supreme Court decisions have rejected the existence of any general heightened pleading standard. Instead, Kregler asserts that the applicable test by which to assess the sufficiency of his complaint is the short
15 and plain statement *15 of the claim called for under Rule 8(a)(2), which requires that the pleadings need only give the defendant "fair notice of what the claim is and the grounds upon which it rests." Swierkiewicz, 534 U.S. at 513. With regard to the standard governing review of Rule 12(b)(6) motions to dismiss, Kregler points to authority declaring that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Ricciuti v. NYC Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

Surprisingly, in squaring off their conflicting stands on the proper standard of review, the parties use as foils the test of a "heightened pleading standard" pointed against the language of "no set of facts." But neither of them mentions either of two recent cases that essentially dispatched those phrases from our procedural law as general

pleading guides: Twombly, now the most relevant Supreme Court decision articulating the applicable test to evaluate Rule 12(b)(6) motions to dismiss for failure to state a claim, and Iqbal, the Second Circuit's reading and application of Twombly. In Twombly, an antitrust case, the Supreme Court, though reiterating the
16 traditional liberal tests pertaining to pleading under Rule 8(a) and to reviewing motions to dismiss *16 under Rule 12(b)(6), nonetheless gave Conley's "no set of facts" formula a decent burial, and somewhat modified the traditional notice pleadings standard. See Twombly, 550 U.S. at 563 (declaring that Conley's "no set of facts" language "has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard"). The Twombly Court then stated that to be sufficient under Rule 8(a) and survive a Rule 12(b)(6) motion to dismiss, the factual allegations in a complaint must be "enough to raise a right to relief above the speculative level," id. at 555, and state a claim "plausible on its face," id. at 570.

Explaining Twombly in the context of a defense invoking qualified immunity, the Second Circuit in Iqbal concluded that the Supreme Court had not recognized a universal standard of heightened fact pleading, but instead required "a flexible `plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." 490 F.3d at 157-58 (emphasis in original). In applying the Twombly standard to the facts of the case before it, the Iqbal Court noted that some of the plaintiff's claims were based on generalized allegations of supervisory involvement
17 rather than on facts supporting the claim. It *472 concluded that to survive *17 a motion to dismiss under Twombly's plausibility standard "a conclusionary allegation concerning some elements of a plaintiff's claims might need to be fleshed out." Id. at 158.

Running through Twombly and Iqbal is a common theme that has long troubled the courts: the tension between, on the one hand, the lenient notice pleading standards embodied in Rules 8(a) and 12(b)(6) to ensure that plaintiffs with meritorious claims have maximum access to the courts, and on the other hand the imperative to "weed out" groundless actions early in the litigation so as to minimize the expenditure of time and resources of the parties and the courts. See Twombly, 550 U.S. at 557-60; see also Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005) (noting the importance of a pleading standard requiring something more than a mere possibility of loss causation lest "a plaintiff with `a largely groundless claim'" be allowed to "`take up the time of a number of other people with the right to do so representing an in terrorem increment of the settlement value'") (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975)).

These cases underscore various rationales to justify a pleading standard which requires factual allegations that rise above the traditional Rule 8(a) notice pleading standard and that cross into the realm of "plausibility." In
18 Twombly, the Supreme Court stressed the need to "avoid the potentially *18 enormous expense of discovery in cases with no `reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support a claim. Id. 550 U.S. at 559-60. (quoting Dura Pharms., 544 U.S. at 347) (alteration in original). Other cases addressing these concerns have focused not just on the expense of litigation, but on the burdens that bare allegations of misconduct, especially those charging malice or other wrongful intent, place on government officials, and on the need to "protect officials from the costs of `broad-reaching' discovery."Crawford-El, 523 U.S. at 584 (citing Harlow, 457 U.S. at 818);see also Harlow, 457 U.S. at 817-18 (declaring that "bare allegations of malice should not suffice to subject government officials to either the costs of trial or to the burdens of broad-reaching discovery").

Concern over the effects of sketchy, generalized claims of misconduct brought against government officials underlies the Second Circuit's reading in Igbal of Twombly's "plausibility standard." There the Circuit Court noted that "qualified immunity is a privilege that is essential to the ability of government officials to carry out their public roles effectively without fear of undue harassment by litigation." 490 F.3d at 158. The court

19 recognized that without some "countervailing discovery safeguards" of the *19 pleadings with factual allegations to render a claim plausible, "Rule 8(a)'s liberal pleading requirement . . . threatens to create a dilemma between adhering to the Federal Rules and abiding by the principle that qualified immunity is an immunity from suit as well as from liability." Id. at 159.

To address considerations regarding the costs that insubstantial litigation imposes on the parties and its adverse effects on government administration, the Supreme Court and Second Circuit, while rejecting the imposition of a universal heightened pleading standard, have recognized that a district court "must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n. 17 (1983);see also Car Carriers,
473 *473 Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) (noting in an antitrust case that the costs of federal litigation and the increasing case load of federal courts "counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint"). Specifically, the courts have devised several rules and offered guidance suggesting other means to "weed out unmeritorious claims sooner rather than later."Leatherman, 507 U.S. at 168-69.
20 InTwombly, the Supreme Court *20 formulated its plausibility standard. In Crawford-El, it suggested that before allowing discovery to proceed, a court could apply Federal Rule of Civil Procedure 7(a) to order a reply to the defendant's answer, or Rule 12(e) to require a more definite statement. By these means, the courts could seek to ensure that the plaintiff "put forward specific, nonconclusory factual allegations that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." 523 U.S. at 598 (citation omitted). The Supreme Court further advised that if the action survives these initial hurdles, entitling the plaintiff to some discovery, "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery." Id.

In Iqbal, the Second Circuit expanded upon this guidance. It suggested that "amplification" of factual allegations to survive a motion to dismiss under Twombly's plausibility standard may be required in response to a defendant's motion for a more definite statement pursuant to Federal Rule of Civil Procedure 12(b). 490 F.3d at 158. In addition, the Circuit Court counseled that a district court consider "exercising its discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a
21 plaintiff's claims and a plaintiff may *21 probe such matters as a defendant's knowledge of relevant facts and personal involvement in challenged conduct." Id. The Circuit Court added that the district court could structure such limited discovery by examining responses to written interrogatories and requests to admit before authorizing depositions. See id.

These suggestions, though perhaps suitable and practical in some circumstances, may not achieve their intended benefits in others. Calling for more definite statements under Rule 12 may be taken as an invitation for additional motion practice. Authorizing reciprocal discovery, however tightly controlled, raises the reality recognized by the Supreme Court in Twombly that even the most careful case management may not suffice to weed out groundless claims early in discovery "given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." 550 U.S. at 559 (citing Easterbrook, Discovery as Abuse, 69 B.U. L. Rev. 635, 638 (1989) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves.")). Moreover, in many cases, for the parties and the court to wait until the completion of discovery and rely on a summary judgment motion to dispose of an unmeritorious claim would essentially moot any effort to mitigate the concerns
22 expressed above, and in *22 fact would enable the occurrence of precisely the ill-effects the courts have been grappling to avoid.

The instant litigation raises many of those issues and concerns. It entails serious charges of constitutional violations and abuse of power allegedly committed for political purposes by high officials of the City's FDNY
474 and DOI, including the DOI *474 Commissioner. Defendants' filed a pre-answer motion to dismiss the original complaint. To streamline the litigation and minimize motion practice the Court scheduled an early conference prior to Kregler filing any response. The Court concurred with Defendants objections that, as pled, the original complaint contained certain deficiencies, particularly in asserting a conspiracy count pursuant to 42 U.S.C. § 1985(3), and in inadequately pleading personal involvement by Defendants in Kregler's § 1983 claim. In response, Kregler filed an Amended Complaint that removed the § 1985(3) claim, but nonetheless invited a renewed motion to dismiss. Defendants contend that while the Amended Complaint dropped the § 1985(3) conspiracy claim, it essentially reintroduces a conspiracy theory through a backdoor in Kregler's reformulated § 1983 claim. Defendants point to a renewed conspiracy claim in Kregler's allegations that Defendants discussed
23 Kregler's application for appointment as a City Marshal and "agreed" to prevent him from *23 obtaining the position for improper motives that violated Kregler's constitutional rights.

The Court finds that under Twombly's plausibility standard Kregler's amended complaint remains at best borderline in stating a First Amendment retaliation claim. To survive the new motion to dismiss the pleadings as modified would require the Court to accept as true numerous conclusory allegations, to make substantial inferential leaps, and to resolve considerable doubts in Kregler's favor. For example, Kregler does not allege that Hearn had any direct knowledge of his endorsement of Morgenthau. Thus, the plausibility of Kregler's retaliation claim may turn on this vital link in the causal chain. It would require finding that because Garcia and Hearn were "personally and socially acquainted" (Compl. ¶ 39), and that allegedly they both supported Snyder, then by inference, Garcia used his contacts with Hearn improperly to influence her determination on Kregler's application, and that Hearn and Garcia then agreed to cause Kregler's appointment to be rejected by DOI in retaliation for Kregler's support of Morgenthau.

Moreover, the Court would need to stretch the temporal and causal connection between the alleged protected activity and the adverse action at issue. Kregler's endorsement of Morgenthau occurred in May 2005, but he
24 was notified about the *24 denial of his application in March 2006. During the intervening time, he was permitted to proceed with all of the steps involved in the appointment procedure, including interviews with representatives of the Mayor's Office at City Hall, further interviews with Keenaghan and filing new application forms, a full investigation by DOI, completion in September 2005 of an extensive training course, and demonstration of his ability to obtain the required bond. There is authority holding that a lapse of time of as much as the nine months in question here may be too long to support a reasonable finding of a connection between the protected activity and the alleged retaliatory act. See, e.g.,Gorman-Bakos v. Cornell Co-op Extension of Schenectady County, 252 F.3d 545, 554-55 n. 5 (2d Cir. 2001). Accordingly, to state a plausible retaliation claim Kregler would need to flesh out his conclusory allegations with a factual showing supporting his assertion that such a causal connection exists.

Perhaps not cognizant of the gloss Twombly added to the Rule 8(a) pleading standard, Kregler simply points the Court to the traditional "no set of facts" standard that governed review of motions to dismiss under Conley: that factual allegations in the complaint are presumed to be true; that all reasonable inferences must be drawn
25 and doubts resolved in the plaintiff's *475 favor; that these standards apply with particular *25 strictness as regards complaints of civil rights violations; and that an inquiry as to the factual issue of causation addresses the quality of the evidence and is thus more appropriate on a motion for summary judgment rather than on the basis of the pleadings. This argument overlooks that Twombly's intent, as read by the Second Circuit, was "to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since

Conley v. Gibson." Iqbal, 490 F.3d at 155. Nonetheless, the Court is mindful of the traditional standards insofar as they survive Twombly, and also of other strictures that limit judicial authority to dismiss a complaint pursuant to Rule 12(b)(6). See, e.g., Twombly, 550 U.S. at 556 (instructing that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and `that a recovery is very remote and unlikely'" (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

Weighing the considerations described above, and acknowledging that this case presents a close call, to minimize additional motion practice at this stage and avert potentially unnecessary extensive discovery, the Court proposes two steps intended to achieve the "amplication" of factual allegations by means of a "flesh[ing] out" procedure such as that suggested in Iqbal. 490 F.3d at 158. First, the *26 Court will exercise its discretion pursuant to Rule 12(i) to schedule a preliminary hearing at which the parties may present the testimony of live witnesses and other evidence limited to Defendants' objections to the pleadings, specifically the threshold legal issues upon which, under the Twombly and Iqbal plausibility test, the sufficiency of Kregler's retaliation claim is grounded. Second, the hearing would serve as an occasion for the Court to probe, in accordance with Rule 11(b), the extent to which some of Kregler's conclusory allegations have factual support and were formed after an inquiry reasonable under the circumstances.

Rule 12(i) authorizes the Court to conduct a preliminary hearing to consider and decide before trial a motion raising any defense listed in Rule 12(b)(1)-(7). See Fed.R.Civ.P. 12(i). As appropriate, the Court may use that procedure to determine jurisdictional as well as other threshold issues. See Rivera-Gomez v. de Castro, 900 F.2d 1, 2 (1st Cir. 1990) (noting that Rule 12(i) "can be an excellent device for conserving time, expense, and scarce judicial resources by targeting early resolution of threshold issues"); Cruz v. Sullivan, 802 F. Supp. 1015, 1016-17 (S.D.N.Y. 1992). The Court may order such a hearing on motion or sua sponte. See Rivera-Gomez, 900 F.2d at 2. As regards matters involving factual issues that bear on the subject of the hearing the *27 Court may consider affidavits, depositions or documents, or testimony presented orally. See Unicon Mgmt. Corp. v. Koppers Co., 38 F.R.D. 474, 476-77 (S.D.N.Y. 1965), aff'd, 366 F.2d 199 (2d Cir. 1966). However, this procedure cannot be employed to decide the merits of a dispute, or issues so closely interwoven with the merits so as to render it unlikely or impractical that the hearing would achieve a productive outcome. See United States v. Montreal Trust Co., 358 F.2d 239 (2d Cir. 1966), cert. denied, 384 U.S. 919 (1966); Louisiana Power Light Co. v. United Gas Pipe Line Co., 456 F.2d 326 (5th Cir.), rev'd on other grounds, 406 U.S. 621 (1972); see generally 5C Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 1373 at 278-90 (3d ed. 2004).

The Court finds that employment of this procedure is particularly fitting to achieve *476 early resolution of certain threshold issues in this case. The action involves serious accusations of violations of constitutional rights brought against public officials. The Supreme Court and the Second Circuit have instructed district courts to exercise their broad discretion to guard public officials from being "subjected to unnecessary and burdensome discovery or trial proceedings." Crawford-El, 523 U.S. at 597-98; Harlow, 457 U.S. at 817-18 (stating that "bare allegations of malice *28 should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery");Iqbal, 490 F.3d at 159. Although these cases were decided in connection with defenses asserting qualified immunity, as the Supreme Court made clear in Twombly the underlying concerns over insubstantial or frivolous lawsuits could apply with no less force in the context of certain other litigation as well. In fact, the effects of such actions may be compounded in cases charging abuse of power, dereliction of duty for political purposes, and other serious accusations of unconstitutional conduct by government officials where qualified immunity may not apply, or the defendant chooses not to invoke it.

Here, the Court, in response to Defendants' original motion to dismiss, has already accorded Kregler an opportunity to amend his complaint. The revised pleadings made only marginal changes to address Defendants' first set of objections to Kregler's conspiracy theory, thereby giving rise to a renewed motion to dismiss. The sufficiency of the amended pleadings, and hence whether the complaint now satisfies Twombly's test of plausibility, depends upon whether Kregler ultimately can make out a prima facie case of First Amendment
29 retaliation. Resolution of this question in turn rests upon certain threshold issues raised by the objections *29 stated in Defendants' motion: the extent of Defendants' personal involvement in the decision to deny Kregler an offer of an appointment as a City Marshal, and the existence of a causal connection between Kregler's endorsement of Morgenthau's candidacy and the denial of his application for appointment. These issues are grounded on basic questions of law that the Court could resolve at this stage in the proceedings, or decide on a motion for summary judgment, or even defer until a trial.

On the repleading that the Court permitted, Kregler addressed these issues either in conclusory terms or with generalized allegations which still require substantial inferential leaps, rather than with factual assertions which more directly support his claim. See Iqbal, 490 F.3d at 158 (expressing concern that "allowing some of the Plaintiff's claims to survive a motion to dismiss might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent"). If the Court were to deny Defendants' motion because Kregler has amended the pleadings to add enough generalized or conclusory statements suggesting Defendants' personal involvement in the alleged adverse action and a causal connection
30 between it and Kregler's projected speech, so as to barely survive dismissal at this point, this would *30 send the case into further litigation proceedings likely to entail broad-ranging discovery against the City and the five officials. Typically, those proceedings would include interrogatories, requests to admit, depositions, affidavits, and production of correspondence and other documents. Almost predictably in these types of cases, the discovery would culminate — many months, of even years from now, and at a financial cost of tens if not
477 hundreds of thousands of dollars — in a motion for summary judgment that in all *477 probability would turn on resolution the same threshold issues pivotal to any decision on the motion at hand.

Much of this litigation potentially could be avoided by means of a preliminary hearing at this juncture. At that proceeding the Court can hear oral testimony and consider other evidentiary material addressing discrete threshold questions that may resolve the sufficiency of Kregler's retaliation claim, as well as the reasonableness of the inquiry Kregler made upon which he represented in his pleadings that his factual allegations have or will likely have evidentiary support. As appropriate, the Court may sustain the claim as plausible, order further limited discovery, or dismiss the action. At a conference with the parties, the Court will discuss the structure
31 and scope of the hearing and resolve any procedural issues that may arise. At *31 minimum, the Court contemplates the appearance of some of the parties to address limited and targeted questions pertaining to the threshold issues described above.

Admittedly, the approach the Court proposes here entails passage through relatively unchartered ground. Difficulties are bound to arise along the way. At this point some of the bumps and detours are entirety unknown, while others, though likely in the repertory of anticipated legal argument, do not appear insurmountable. But such challenges go with the territory in any form of exploration for new paths and different ways of doing things.

## IV. ORDER

For the reasons stated above, it is hereby

**ORDERED** that the parties are directed to appear at a conference with the Court on March 27, 2009 at 2:00 p.m. to review preparation for a preliminary hearing pursuant to Federal Rule of Civil Procedure 12(i) concerning the matters described in the preceding discussion.

SO ORDERED.

08 Civ. 4458 (SAS)
United States District Court, S.D. New York

# Arnone v. CA, Inc.

Decided Mar 6, 2009

08 Civ. 4458 (SAS).

March 6, 2009

**For Plaintiff:** Nathaniel B. Smith, Esq., Law Office of Nathaniel B. Smith, New York, New York.

**For Defendants:** Jamie Mark Brickell, Esq., Anna E. Hutchinson, Esq., Pryor Cashman LLP, New York, New York. *1

## MEMORANDUM OPINION AND ORDER

SHIRA SCHEINDLIN, District Judge

In his complaint, Michael Arnone asserted that CA, Inc., his former employer; the CA Severance Plan; and Andrew Goodman, plan administrator of the CA Severance Plan and Senior Vice President of Human Resources of CA, Inc., each violated his pension rights under the Employee Retirement Income Security Act ("ERISA").[1] This lawsuit addressed the fiduciary duties that accompany a delegation of administrative functions under ERISA, as well as the procedural protections afforded to a claimant under ERISA and Department of *2 Labor regulations promulgated to facilitate compliance with the statute. On February 13, 2009, this Court rendered judgment in favor of Arnone and awarded $56,693.43 in damages, as well as the fees and costs of this action.[2] However, the Court delayed calculation of the fee award until after submission of supplementary filings by both parties.[3] For the reasons stated below, this Court now awards Arnone $56,628.25 for fees and costs incurred in this action.

1 29 U.S.C. §§ 1001- 1461.

2 *See Arnone v. CA, Inc.*, No. 08 Civ. 4458, 2009 WL 362304, at *9 (Feb. 13, 2009).

3 *See id.* at *10.

## I. FINDINGS OF FACT

Arnone first accrued substantial legal bills while exhausting administrative remedies under the CA Severance Plan. Arnone incurred $24,300 in fees to Larry Silverman based on 54 hours at a rate of $450 per hour.[4] Additionally, Arnone incurred $12,738.14 in legal fees to the firm of Schlam, Stone Dolan, based on 3.9 hours of work by Harvey M. Stone at a rate of $525 per hour, 31 hours by Bennette D. Kramer, at a rate of $425 per hour, and .4 hours of paralegal time at a rate of $125 per hour, less a discount of $2,534.35.[5] A small *3 portion of these hours reflect assistance to Arnone's litigation counsel. Specifically, Silverman spent 2.5 hours in a meeting with litigation counsel, and Kramer spent a total of 3.6 hours sending documents, speaking on the phone, and meeting concerning litigation.[6]

4 *See* 2/20/09 Affirmation of Nathaniel B. Smith, plaintiff's attorney ("Smith Aff.") ¶ 16; 2/13/09 Silverman Billing Statement, Ex. 3 to Smith Aff.

5 *See* Smith Aff. ¶ 16; 2/18/09 Schlam Stone Dolan LLP Billing Statement, Ex. 2 to Smith Aff.

6 *See* Silverman Billing Statement; Schlam Stone Dolan LLP Billing Statement.

After Arnone determined that litigation would be necessary, he hired Nathaniel Smith as litigation counsel; Smith did not participate in administrative appeals or other pre-litigation proceedings.[7] Although the retainer between Smith and Arnone contemplated payment on a contingent fee basis, the agreement specified that a rate of $425 per hour would be applied if representation were to terminate prematurely.[8] Smith has over twenty years of experience as an attorney, split between six years in the litigation department at Paul, Weiss, Rikfind, Wharton Garrison and fourteen years as a solo practitioner focusing on employment law.[9] Smith expended 168.3 hours on this case, from development of the complaint through submission of the fee application.[10] Thus
4 if Smith had *4 charged Arnone at his hourly rate, the total bill would have been $71,527.50.[11] Smith also incurred $2,973.25 in costs, including deposition transcripts, filing fees, witness fees, and the cost of service of a subpoena.[12]

7 *See* Smith Aff. ¶ 12.

8 *See id.* ¶ 18.

9 *See id.* ¶¶ 5-6.

10 *See id.* ¶ 18; 2/19/09 Smith Invoice, Ex. 1 to Smith Aff.

11 *See* Smith Aff. ¶ 28A; Smith Invoice.

12 *See* Smith Aff. ¶ 27.

This Court awarded Arnone the entirety of his disputed severance, as well as a fine against Goodman for failure to provide Arnone with documents related to the benefits determination.[13] However not every legal theory advanced by Arnone succeeded. Specifically, this Court rejected Arnone's claim "that CA, Inc., the CA Severance Plan, or Goodman terminated him for cause for the express purpose of interfering with his severance rights."[14] Moreover prior to trial, the Court rejected Arnone's claims for compensatory and punitive damages.[15] Finally, not all theories advanced in the fee application are accepted in this opinion. It is not possible, based on the billing records submitted to the Court, to determine precisely how many hours were expended on the
5 rejected claims.[16] *5

13 *See Arnone*, 2009 WL 362304, at *10.

14 *Id.* at *8.

15 *See* Transcript, *Arnone v. CA, Inc.*, No. 08 Civ. 4458, Docket Entry 19 (S.D.N.Y. Jan. 21, 2009).

16 *See* Smith Invoice (describing activities in general terms).

## II. LEGAL STANDARD

### A. Attorney's Fees

In the absence of a statutory fee-shifting provision, litigants bear their own attorney's fees in nearly all cases.[17] However, in most ERISA private enforcement actions, "by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."[18] "`ERISA's attorney's fee provisions must be liberally construed to protect the statutory purpose of vindicating' employee benefits rights."[19] However, ERISA "authorizes a district court to award fees incurred *only after a district court has assumed jurisdiction over a case.* Thus, fees incurred in administrative proceedings prior to filing suit in the district court are unavailable."[20] *6

17 *See Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 186 (2d Cir. 2008) (citing *Alyeska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975)).

18 29 U.S.C. § 1132(g)(1). In some actions brought by a fiduciary or on behalf of a plan, attorney's fees are mandatory. *See id.* § 1132(g)(2)(D).

19 *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 47 (2d Cir. 2009) (quoting *Chambless v. Masters, Mates Pilots Pension Plan*, 815 F.2d 869, 872 (2d Cir. 1987)).

20 *Peterson v. Continental Cas. Co.*, 282 F.3d 112, 119 (2d Cir. 2002) (emphasis added).

A district court maintains "considerable discretion" to establish the proper award under a fee-shifting statute.[21] The Supreme Court has directed district courts to utilize the lodestar method of calculating fees.[22] "[T]he `lodestar' is `the product of reasonable hours times a reasonable rate.'"[23] Most recently, the Second Circuit directed district courts to include equitable considerations in the initial determination of a reasonable rate, rather than adjusting the lodestar after the fact to address equitable concerns.[24] When "`a plaintiff has achieved only *7 partial or limited success' . . . [t]he District Court may, in its discretion, `attempt to identify specific hours that should be eliminated, or it may simply reduce the [requested] award to account for the limited success.'"[25]

21 *Arbor Hill Concerned Citizens*, 522 F.3d at 190. *Accord Farbatko v. Clinton County*, 433 F.3d 204, 210 (2d Cir. 2005) ("The district court is in closer proximity to and has greater experience with the relevant community whose prevailing market rate it is determining.").

22 *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Although the Second Circuit has cautioned that "lodestar" has deteriorated to a misnomer, the Circuit acknowledged that the term is deeply entrenched in the legal lexicon and explicitly declined to order its abandonment. *See Arbor Hill Concerned Citizens*, 522 F.3d at 190 n. 4.

23 *City of Burlington v. Dague*, 505 U.S. 557, 559 (1992) (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986)). In ERISA cases, district courts may use the prevailing rate for ERISA practitioners rather than general litigators as a reasonable starting point. *See McDonald ex rel. Prendergast v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 450 F.3d 91, 97 (2d Cir. 2006).

24 *See Arbor Hill Concerned Citizens*, 522 F.3d at 190. Specifically, the Circuit instructed district courts to consider the twelve factors addressed by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

*Id.* at 187 n. 3, 190 (citing *Johnson v. Georgia Highway Express, Inc.* 488 F.2d 714, 717-19 (5th Cir. 1974)).

25 *Abrahamson v. Board of Educ.*, 374 F.3d 66, 79 (2d Cir. 2004) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436-47 (1983)).

Guidance from the Second Circuit concerning determination of the lodestar is somewhat in tension. The recent decision in *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany* cautioned that "[t]he reasonable hourly rate is the rate a paying client would be willing to pay."[26] The Circuit also stated that "a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively."[27] On the other hand, in *Koam Produce, Inc. v. DiMare Homestead, Inc.*, the Circuit expressly "`reject[ed] the notion that an *8 award of attorneys' fees [must] be proportional to the amount of damages recovered.'"[28] The Circuit has also rejected a "billing judgment" approach to attorney's fees and noted, "Congress enacted fee-shifting in civil rights litigation precisely because the expected monetary recovery in many cases was too small to attract effective legal representation."[29]

26 522 F.3d at 190.

27 *Id.*

28 329 F.3d 123, 131 (2d Cir. 2003) (quoting *Dunlap-McCuller v. Riese Org.*, 980 F.2d 153, 160 (2d Cir. 1992)). A proportionality requirement may be imposed by statute. *See, e.g.*, Prison Litigation Reform Act, 42 U.S.C. § 1997e(d)(1)(B)(I). No such requirement is present in ERISA.

29 *Quaratino v. Tiffany Co.*, 166 F.3d 422, 426-27 (2d Cir. 1999) (citing *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (plurality opinion)).

## B. Costs

Even in the absence of a fee-shifting statute, "costs — other than attorney's fees — should be allowed to the prevailing party."[30] Taxable costs include court reporter fees, docket fees, witness fees, and service costs.[31]

30 Fed.R.Civ.P. 54(d)(1).

31 *See* 28 U.S.C. § 1920.

# III. CONCLUSIONS OF LAW

As an initial matter, as noted earlier, Arnone may not recover attorney's fees incurred before "a district court has assumed jurisdiction over a *9 case."[32] Like any ERISA claimant, Arnone had to exhaust administrative remedies before initiating litigation, even if those remedies ultimately proved futile.[33] Although a prerequisite to litigation, pursuit of administrative remedies is distinct from crafting a complaint or researching jurisdiction.[34] Therefore, Arnone is not entitled to attorney's fees for the bulk of work done by Silverman or the firm of Schlam, Stone Dolan.

32 *Peterson v. Continental Cas. Co.*, 282 F.3d 112, 119 (2d Cir. 2002) (emphasis added).

33 *See Paese v. Hartford Life Accident Ins. Co.*, 449 F.3d 435, 445-46 (2d Cir. 2006).

34 *See Peterson*, 282 F.3d at 121 n. 5.

Turning to fees related to litigation, I first find that Smith's billing rate of $425 per hour is reasonable, based on Smith's experience and expertise, as well as Arnone's acceptance of the rate in the retainer agreement. Moreover, I find that $425 per hour is a typical rate for experienced labor lawyers in this district.[35] Therefore, I find the billing rates of $450 and $425 used by Silverman and Kramer respectively to be appropriate.

35 *See, e.g., Sheehan v. Metropolitan Life*, 450 F. Supp. 2d 321, 328 (S.D.N.Y. 2006) ($425 per hour for an "experienced and effective" ERISA attorney); *Winkler v. Metropolitan Life Ins. Co.*, No. 03 Civ. 9656, 2006 WL 2347826, at *1 (S.D.N.Y. Aug. 10, 2006).

10 However, the total number of hours billed must be reduced in light of *10 defendants' successful defense of multiple claims. In light of Arnone's partial success, I find that 120 hours is a reasonable basis for the lodestar calculation for Smith's work. In addition, I find the 2.5 hours spent by Silverman and the 3.6 hours spent by Kramer to be reasonable expenditures of time, given that their development of the facts of this case undoubtedly assisted Smith in the litigation.

Therefore, this Court awards attorney's fees of $51,000 for work performed by Smith, $1,125 for work performed by Silverman, and $1,530 for work performed by Kramer. The total accepted fees are $53,655. Moreover, all costs asserted by Smith are recoverable. The total accepted costs are $2,973.25.

I note that a "reasonable" client would not pay fees and costs amounting to nearly the entire judgment. However, given the liberal construction afforded to ERISA's attorney's fee provision, the statutory purpose of promoting vindication of employee rights, and the deterrent effect against employer misconduct, I find the total reasonable in this case. Arnone is awarded $56,628.25 for fees and costs.

## III. CONCLUSION

The Clerk of the Court is directed to close this motion (Docket Number 22) as well as Docket Number 25, which has been resolved. The Clerk is additionally directed to prepare a judgment consistent with the Opinion
11 and Order *11 of February 13, 2009 and this Memorandum Opinion and Order and to close this case.

SO ORDERED:

08 Civ. 4458 (SAS)
United States District Court, S.D. New York

# Arnone v. CA, Inc.

Decided Feb 13, 2009

08 Civ. 4458 (SAS).

February 13, 2009

**For Plaintiff:** Nathaniel B. Smith, Esq., Law Office of Nathaniel B. Smith, New York, New York.

**For Defendants:** Jamie Mark Brickell, Esq., Anna E. Hutchinson, Esq., Pryor Cashman LLP, New York, New York.

## OPINION AND ORDER

SHIRA SCHEINDLIN, District Judge

## I. INTRODUCTION

Michael Arnone asserts that CA, Inc., his former employer; the CA Severance Plan; and Andrew Goodman, plan administrator of the CA Severance Plan and Senior Vice President of Human Resources of CA, Inc., each violated his pension rights under the Employee Retirement Income Security Act ("ERISA").[1] This lawsuit addresses the fiduciary duties that accompany a delegation of administrative functions under ERISA, as well as
2 the procedural protections *2 afforded to a claimant under ERISA and Department of Labor ("DoL") regulations promulgated to facilitate compliance with the statute. Goodman claims $39,350.39 in unpaid benefits, along with compensatory damages, punitive damages, interest, attorney's fees, costs, and other relief as the Court deems proper.

[1] 29 U.S.C. §§ 1001- 1461.

On January 21, 2009, this Court issued a decision from the bench narrowing the issues for trial. Specifically, the Court ruled (1) that Arnone's sole private cause of action arises from 29 U.S.C. § 1132(a)(1)(b), although that provision could also be used as a vehicle to enforce other ERISA provisions; (2) that all three defendants were subject to suit; and (3) that ERISA's express remedies are exclusive, eliminating Arnone's claims for compensatory and punitive damages. The Court also provided some guidance concerning the standard of review to be applied at trial, although ongoing factual disputes prevented a final determination.

On January 27, 2009, this Court conducted a one-day bench trial. On the basis of the findings of fact and conclusions of law stated below, judgment is rendered in favor of Michael Arnone, in the amount of $46,693.34 against Goodman and the CA Severance Plan and in the amount of $10,000 against Goodman individually.
3 Arnone is also awarded fees and costs, to be determined *3 based on further submissions.

## II. FINDINGS OF FACT

### A. The Parties

Arnone was employed by CA, Inc. from September 1994 until December 5, 2006.[2] In those twelve years, Arnone had a spotless employment record and was considered a valuable and trusted employee.[3] As of December 2006, Arnone worked in software development in the Enterprise Systems Management group, where he was supervised by Darrin Solomon.[4]

2 *See* Joint Pretrial Order, Undisputed Facts ("UF") ¶ 1.

3 *See* Trial Transcript ("Tr.") at 45:1-45:5 (Buonaiuto); *id.* at 76:24-77:25 (Solomon).

4 *See id.* at 13:14-15:18 (Arnone).

CA, Inc. — formerly known as Computer Associates International, Inc. — is a business software company with more than 13,000 employees.[5] The CA Severance Plan ("the Plan") is a benefits plan whose purpose "is to provide . . . severance benefits to certain employees of [CA, Inc.] who lose their positions with the Company
4 involuntarily and only under certain circumstances."[6] Andrew *4 Goodman is Executive Vice President of Human Resources for CA, Inc.[7] He also serves as plan administrator for the CA Severance Plan.[8]

5 *See id.* at 15:3-15:9 (Arnone); *id.* at 96:20-96:23 (Goodman).

6 Severance Policy, Ex. 10, at 1.

7 *See* UF ¶ 12; Tr. at 96:16-96:19 (Goodman).

8 *See* UF ¶ 12.

## B. The Severance Plan

The CA Severance Plan provides certain substantive and procedural rights for employees after termination of employment at CA, Inc.[9] An employee is eligible for severance benefits if he or she is involuntarily terminated, unless termination results from an enumerated exception, including dishonesty.[10] An employee who qualifies for full severance will receive a "Separation Payment" equal to two weeks of his or her base salary for each full year of continuous service at CA, along with a COBRA assistance payment.[11] CA pays "benefits under the Plan from its general assets to the extent available."[12]

9 *See* Severance Policy at 1.

10 *See id.* at 2.

11 *Id.* at 2-3.

12 *Id.* at 4.

5 The first sentence of the Plan documents states that severance *5 benefits are provided "within the sole discretion of the Plan Administrator."[13] The Plan later establishes that the Plan Administrator has "the responsibility and the absolute discretionary authority to interpret the terms and provisions of the Plan, to determine eligibility for benefits under the Plan, and to determine the amount of such benefits."[14] The Plan does not expressly establish whether the Administrator may delegate investigative or decision-making authority.[15]

13 *Id.* at 1.

14 *Id.* at 6.

15 *See id. See also* Tr. at 105:12-107:10 (Goodman) (noting the absence of express authority to delegate).

Plan documents establish procedures for review of an initial determination, including written notification of the outcome of a claim.[16] After a denial, an employee has a right to appeal, along with rights to review pertinent Plan documents and submit written argument in support of appeal.[17] The Plan does not expressly provide an
6 employee with a right to review documents or evidence relied upon by the Plan Administrator.[18] *6

16 *See* Severance Policy at 4.

17 *See id.* at 5.

18 *See id.*

## C. The November 30, 2006 ATM Incident

At approximately 7 p.m. on the evening of November 30, 2006, Jason Medina, a CA employee, attempted to use the ATM in the lobby of CA's building[19] Medina requested forty dollars from the ATM, but the machine did not disburse the funds.[20] He spent approximately ten minutes trying to work out the problem, [21] including seeking assistance from building security.[22] After security informed him that he would have to take up the issue with Bethpage Federal Credit Union — the operator of the ATM — he left the building.[23]

19 *See* UF ¶ 5; Call Center Request Detail, Ex. 5.

20 *See* Call Center Request Detail.

21 *See* Security Camera Video, Ex. 2.

22 *See* Call Center Request Detail.

23 *See id.*

At approximately 7:30 p.m., Arnone entered the lobby of CA's building.[24] He crossed the turnstile and began to
7 walk toward the only set of functioning doors, which were on his right.[25] After a few steps, he pivoted away *7
from the door and began walking toward the ATM.[26] He reached his right hand towards the cash slot, quickly withdrew it, then pivoted, walked to the functioning doors, and left.[27]

24 *See* UF ¶ 3.

25 *See* Security Camera Video. The doors directly in front of him were blocked by cones. *See id.*; Tr. at 149:20-149:25 (Arnone).

26 *See* Security Camera Video; Tr. at 153:2-153:5 (Arnone).

27 *See* Security Camera Video; Tr. at 153:9-153:19 (Arnone). *See also* Photograph of ATM, Ex. 1 (indicating the location of the cash slot on the ATM).

The security camera that captured the incident provides grainy footage at a slow, choppy frame rate.[28] As Arnone withdrew his hand from the machine, no cash is seen.[29] Moreover, Arnone crossed the lobby with his right hand visible to the camera, and no cash is seen in his hand.[30] If Arnone had taken money from the ATM, he could have hidden it from the camera only by transferring the bills to his left hand as he pivoted or by deftly palming them.

28 *See* Security Camera Video.

29 *See id.*

30 *See id.*

## D. December 5, 2006 Termination

On December 5, 2006, Paul Buoniauto — who was then a Vice President of Relationship Management at CA — received a call from CA's Global Safety Asset Protection Group alerting him of the November 30 incident.[31]

8 *8 Buoniauto then retrieved an incident report.[32] The report stated that shortly after the ATM had failed to provide Medina with the money he requested, Arnone entered the lobby, began walking toward the door, then "unexpecteedly . . . return[ed] to the machine where it appeared he[] had removed something from the cash tray."[33]

31 *See* Tr. 30:25-31:7, 35:17-36:1 (Buonaiuto).

32 *See id.* at 36:2-37:12 (Buonaiuto).

33 Call Center Request Detail.

Based on that accusation, Buoniauto immediately called Darrin Solomon and asked him to bring Arnone to the Human Resources department to discuss the incident.[34] First Buoniauto asked Arnone to explain "what had happened" on November 30, but Arnone replied that he did not understand the question.[35] Buoniauto then told Arnone that a woman had attempted to use the ATM on November 30th, that the machine had failed to disburse her money, and that the bank had reported that the ATM was short funds for the day.[36] He then explained that

9 security indicated that Arnone was the next person to approach the *9 ATM and asked him if he had taken money from the ATM.[37]

34 *See* Tr. at 37:13-37:25 (Buonaiuto).

35 *See id.* at 39:12-39:23 (Buonaiuto).

36 *See id.* at 16:21-17:6 (Arnone).

37 *See id.* at 17:6-11 (Arnone).

Arnone vehemently denied the accusation.[38] On November 30, Arnone had made a mortgage payment at Washington Mutual using a check from an account at Chase.[39] Before making his payment, Arnone had scheduled a fund transfer from a savings account to his checking account in order to insure that the check for his mortgage payment did not bounce.[40] Arnone claimed that as he was walking out of the lobby, he thought to check his bank balance on the ATM and get a receipt stating that the scheduled transfer had been completed.[41] However, he stated that as he approached the ATM, he observed an error message concerning the cash door, so

10 he turned and left.[42] He stated that he had reached *10 toward the cash drawer to tap it and see if it would close.[43] Buonaiuto told Arnone that he had not yet personally reviewed the video, and Arnone stated that the video would exonerate him.[44]

38 *See id.* at 40:12-41:5 (Buonaiuto).

39 *See id.* at 17:13-19:4 (Arnone); 11/30/06 Washington Mutual Receipt, Ex. 16, at 1; 11/30/06 Chase Check No. 1010, Ex. 16, at 3.

40 *See* Tr. at 19:5-19:10 (Arnone); 11/30/06 Chase Transfer Schedule Confirmation, Ex. 16, at 2.

41 *See* Tr. at 19:5-19:18, 20:3-20:12, 138:8-138:15 (Arnone); *id.* at 41:11-41:14 (Buonaiuto); *id.* at 81:6-81:8 (Solomon). Given the substantial documentary evidence supporting this assertion, as well as his demeanor on the stand, I find Arnone's explanation credible.

42 *See id.* at 20:12-20:29 (Arnone); *id.* at 41:19-41:20 (Buonaiuto); *id.* at 81:8-81:20 (Solomon). Given the ATM malfunction prior to Arnone entering the lobby, the conspicuous lack of contrary evidence concerning the error message displayed on the screen (which CA could have learned by asking Medina), along with Arnone's demeanor on the stand, I find it credible that the machine continued to display an error message when Arnone approached it.

43 *See id.* at 41:14-41:20 (Buonaiuto).

44 *See id.* at 21:10-21:18 (Arnone); *id.* at 41:20-41:22 (Buonaiuto).

Buonaiuto then watched the surveillance video from November 30.[45] On the basis of the video, he formed the opinion that Arnone had taken money from the cash tray of the ATM and decided to terminate him.[46] Buonaiuto then showed the video to a co-worker, reviewed Arnone's personnel records, and spoke with Joel Katz, an attorney for CA.[47] Finally, Buonaiuto went to Goodman's office, explained Arnone's story and what he had seen on the video, then informed Goodman of his decision to terminate Arnone on the basis of theft and
11 dishonesty.[48] At some point, Buonaiuto had also spoken to Solomon, who told *11 Buonaiuto that Arnone was a hard-working, dedicated employee.[49] He did not speak to Medina or any security guards who might have personally observed the incident.[50] Nor did he consider the staffing needs of Arnone's department when making his decision.[51]

45 *See id.* at 42:2-42:8 (Buonaiuto).

46 *See id.* at 43:5-43:6, 60:17-60:20 (Buonaiuto).

47 *See id.* at 44:19-45:5, 47:7-10 (Buonaiuto).

48 *See id.* at 45:6-45:21 (Buonaiuto); *id.* at 102:9-23 (Goodman).

49 *See id.* at 24:18-24:22 (Arnone); *id.* at 90:21-91:23 (Solomon). During his recitation of the chronology of his investigation, Buonaiuto failed to mention this conversation. This conspicuous absence speaks against the general credibility of Buonaiuto's testimony.

50 *See id.* at 61:14-61:18 (Buonaiuto). Although Buonaiuto stated at trial that he also called the Bethpage Federal Credit Union and that the conversation "further solidified" his opinion, *id.* at 46:3-46:18 (Buonaiuto), I do not find this testimony credible. Buonaiuto's notes describe all other aspects of the investigation but make no reference to contacting Bethpage. *See* Buonaiuto Notes, Ex. 4. Nor did Buonaiuto tell Goodman that he had called Bethpage when he described the investigation. *See* Tr. at 127:5-128:5 (Goodman). Moreover, Medina's account was not debited, *see* Medina Bank Statement, Ex. 3, and Bethpage reported that it had no records of an ATM malfunction on November 30. *See* 11/13/08 Bethpage Subpoena Response, Ex. 18. This documentary evidence severely undermines the credibility of Buonaiuto's assertion.

51 *See id.* at 79:3-79:5 (Goodman).

Approximately an hour after the first meeting between Arnone, Buonaiuto, and Solomon, Buonaiuto asked Solomon to bring Arnone back to Human Resources.[52] Buonaiuto again asked Arnone if he had taken the
12 money, and Arnone maintained his innocence.[53] Buonaiuto then showed Arnone the *12 video, but Buonaiuto

would neither let Arnone observe the individual who had made the prior transaction nor tell him how much money was involved.[54] Afterward, Buonaiuto informed Arnone that he was terminated effective immediately and that any attempt to vindicate himself would be futile.[55]

52 *See id.* at 21:24-22:2 (Arnone); *id.* at 47:21-47:25 (Buonaiuto).

53 *See id.* at 22:2-22:5 (Arnone); *id.* at 48:2-48:12 (Buonaiuto).

54 *See id.* at 22:5-23:15, 24:4-24:9 (Arnone); *id.* at 48:7-21, 70:24-71:7 (Buonaiuto).

55 *See id.* at 23:22-23:25 (Arnone); 49:10-50:6, 71:8-71:12 (Buonaiuto).

Arnone was not awarded severance after his termination.[56] Had he been awarded severance, he would have received a Separation Payment of $33,852.96[57] and a $4,500 COBRA assistance payment.[58]

56 *See id.* at 23:19-23:20 (Arnone); *id.* at 50:10-50:1 (Buonaituo).

57 Arnone's annual salary at the time of his termination was $73,600. *See id.* at 27:25:29:1 (Arnone). His weekly salary — found by dividing his annual salary by 365.25 and multiplying it by seven — was $1,410.54. Because Arnone had been at CA for over twelve years, his severance would have been twenty-four weeks of salary. This totals to $33,852.96.

58 *See id.* at 28:3-28.8 (Arnone). *See also* CA Severance Plan at 3 (providing $4,500 in COBRA Assistance to individuals with ten years or more of continuous service and prior spousal coverage).

## E. The February 2007 Severance Request

On February 26, 2007, Arnone — through counsel — filed a formal claim for severance benefits pursuant to
13 the Plan, along with requests for *13 information considered as a part of the severance determination.[59] The next day, Goodman sent a letter directly to Arnone stating that the claim was denied because "[t]he Plan does not provide benefits to employees whose employment termination is the result of dishonestly, including theft."[60] The letter states that Goodman personally "concluded that [Arnone] took money from an [ATM] located on CA premises that did not belong to [him] and then provided dishonest and otherwise evasive answers to CA representatives conducting an investigation into [his] conduct related to the ATM incident."[61] The letter provides notice of appellate rights and procedures but does not lay out what evidence Goodman relied upon in rendering his decision.[62]

59 *See* 2/26/07 Letter from Harvey M. Stone, plaintiff's former attorney, to Goodman, Ex. 11. This request included copies of two previous letters sent by Stone to Buonaiuto and Katz concerning Arnone's termination. *See* Tr. at 118:15-118:20 (Goodman). *See also* 12/22/07 Letter from Stone to Buonaiuto, Ex. 7; 1/9/07 Letter from Stone to Joel Katz, defendants' attorney.

60 2/27/07 Letter from Goodman to Arnone, Ex. 12.

61 *Id.*

62 *See id.*

While Goodman testified that he personally read the February 26th letter — including Arnone's assertion that
14 he would be willing to take a polygraph *14 administered by an expert of CA's choosing[63] — he did not engage in any independent review of the facts. Rather, he delegated fact-finding to Buonaiuto and solely relied on the short conversation between the two that had occurred approximately three months earlier and the representation of CA counsel that no new evidence had come to light since the decision to terminate for cause was made on

December 5.[64] Although Goodman did see Arnone's request for information concerning the event — including a copy of the video, the name of the individual who had purportedly lost money, and the amount of money involved — he did not address those requests.[65] Rather, he delegating that request to CA attorneys, who failed to respond.[66] Like Buonaiuto, he did not consider the staffing needs of Arnone's department when rendering his decision concerning severance.[67]

63 *See* Tr. at 112:17-112:19, 116:1-116:24 (Goodman). *See also* 12/22/06 Letter from Stone to Buonaiuto at 3 (outlining the polygraph offer).

64 *See* Tr. at 104:8-104:14, 112:6-114:9 (Goodman).

65 *See id.* at 118:2-119:25 (Goodman).

66 *See id.* at 116:1-116:15 (Goodman).

67 *See id.* at 107:11-107:21 (Goodman).

### F. The March 2007 Severance Appeal

15 On March 6, 2007, Arnone — again through counsel — filed an appeal *15 of the denial of severance.[68] The appeal directly challenged CA's allegations concerning the ATM incident and pointedly protested CA's ongoing refusal to provide Arnone with the security camera recording.[69] On April 30, 2007, Goodman replied directly to Arnone in a short letter indicating that he had considered the appeal and that the claim was denied for the reasons set forth in the February 27, 2007 letter.[70] Goodman's review of the appeal consisted solely of reading the letter from Arnone's counsel, asking a CA attorney whether new evidence had come to light since the last appeal, and then signing a letter drafted by counsel.[71]

68 *See* 3/6/07 Letter from Stone to Goodman, Ex. 14.

69 *See id.*

70 *See* 4/30/07 Letter from Goodman to Arnone, Ex. 15.

71 *See* Tr. at 121:16-122:16 (Goodman).

## III. LEGAL STANDARD

### A. Delegation by a Plan Administrator

The duties of the plan administrator are primarily established by the plan documents.[72] Under the common law
16 of trusts, which serves as a foundation *16 to ERISA.[73] "A trustee has a duty to perform the responsibilities of the trusteeship personally, except as a prudent person of comparable skill might delegate those responsibilities to others."[74] "[T]he degree to which a trustee may rely on the agent to make decisions and take action without personal investigation . . . depends on what is reasonable and appropriate under the circumstances. . . ."[75] On the other hand, "[i]n accepting the delegation of a trust function from a trustee, an agent assumes a fiduciary role with fiduciary responsibilities. Thus, the agent has a duty to the trust and its beneficiaries to act with reasonable care in performing a delegated function. . . ."[76]

72 *See, e.g.*, *Daniel v. UnumProvident Corp.*, 261 Fed. Appx. 316, 319 (2d Cir. 2008).

73 *See McCauley v. First Unum Life Ins. Co.*, 551 F.3d 126, 130 (2d Cir. 2008).

74 *Restatement (Third) of Trusts* § 80(1) (2007).

75 *Id.* § 80 cmt. g.

76 *Id.* (internal citations omitted). *Accord Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1219 (2d Cir. 1987) (applying fiduciary duties to the delegate of an administrator in an ERISA matter). *See generally Restatement (Third) of Trusts* §§ 76-79 (establishing Duty to Administer, Duty of Prudence, Duty of Loyalty, and Duty of Impartiality).

## B. Full and Fair Review

The procedures for review by a plan administrator are established by the plan documents. However, ERISA
17 requires that such procedures provide "full *17 and fair review" of a benefits determination.[77] DoL regulations flesh out this standard and provide minimum procedures necessary for full and fair review.[78] In particular,

77 29 U.S.C. § 1133.

78 *See* 29 C.F.R. § 2560.503-1(h)(2).

> the claims procedures of a plan will not be deemed to provide a claimant with a reasonable opportunity for a full and fair review of a claim and adverse benefit determination unless the claims procedures . . . [p]rovide that a claimant shall be provided, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to the claimant's claim for benefits.[79]

79 *Id.* § 2560.503-1(h)(2)(iii). *See also id.* § 2560.503-1(m)(8) (defining what documents are "relied upon" in rendering a benefits determination). *See generally Massachusetts v. Morash*, 490 U.S. 107, 116 (1989) (affording *Chevron* deference to DoL regulations interpreting ERISA). A similar duty exists under the common law of trusts. *See Restatement (Third) of Trusts* § 82(2).

The statutory and regulatory scheme (as authoritatively construed by an agency charged with promulgating regulations pursuant to ERISA) takes precedence over the terms of a qualifying benefits plan.[80]

80 *See Esden v. Bank of Boston*, 229 F.3d 154, 159 (2d Cir. 2000).

18 The typical remedy for failure to provide a claimant with full *18 procedural rights "is remand for further administrative review."[81] Where disclosures are completed, albeit in a tardy fashion, administrative remand is foreclosed as futile.[82] A benefits determination made without proper disclosures is not subject to heightened scrutiny upon judicial review.[83]

81 *Krauss v. Oxford Health Plans, Inc.*, 517 F.3d 614, 630 (2d Cir. 2008) (citations omitted).

82 *See id.* (citing *Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir. 1995)).

83 *See id.* (finding that the benefits determination at issue was merely " *an* appropriate implementation" of the plan rather than *the* appropriate implementation, indicating deferential review).

## C. Judicial Review

Under 29 U.S.C. § 1132(a)(1)(B), a plan participant or beneficiary may bring a civil action "to recover benefits due to him under the terms of his plan." The Second Circuit recently clarified the standard of review to be utilized in such cases.

According to principles of trust law, a benefit determination is a fiduciary act, and courts must review *de novo* a denial of plan benefits unless the plan provides to the contrary. However, where the plan grants the administrator discretionary authority to determine eligibility benefits, a deferential standard of review is appropriate. Under the deferential standard, a court may not overturn the administrator's
19 denial of benefits unless its actions are found to be arbitrary and capricious, meaning *19 without reason, unsupported by substantial evidence or erroneous as a matter of law. Where both the plan administrator and a spurned claimant offer rational, though conflicting, interpretations of plan provisions, the administrator's interpretation must be allowed to control. Nevertheless, where the administrator imposes a standard not required by the plan's provisions, or interprets the plan in a manner inconsistent with its plain words, its actions may well be found to be arbitrary and capricious.[84]

84 *McCauley*, 551 F.3d at 132-33. *Cf. Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (2d Cir. 2008) ("A district court abuses its discretion when `(1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision — though not necessarily the product of a legal error or a clearly erroneous factual finding — cannot be located within the range of permissible decisions.'") (quoting *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001)).

"Substantial evidence means `more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[85]

85 *Burgess v. Astrue*, 537 F.3d 117, 127 (2d Cir. 2008) (quoting *Halloran v. Barnhart*, 362 F.3d 28, 31 (2d Cir. 2004)).

This deferential standard remains largely unchanged even when a plan administrator faces a conflict of interest. Under the Supreme Court's recent decision in *Metropolitan Life Insurance Co. v. Glenn*, "a plan under which an administrator both evaluates and pays benefits claims creates the kind of conflict of interest that courts must
20 take into account and weigh as a factor in determining *20 whether there was an abuse of discretion."[86] Consideration of the conflict is given greater or lesser consideration depending on whether the "`the administrator has taken active steps to reduce potential bias and to promote accuracy.'"[87] Such a conflict of interest does not necessitate *de novo* review, "even where the plaintiff shows that the conflict of interest affected the choice of a reasonable interpretation."[88] *De novo* review is available only in two circumstances. *First*, a Court need not defer to a decision based on operation of law, rather than an individual determination by a plan administrator.[89] *Second*, if the challenged benefit determination is made by an unauthorized party, rather than the authorized fiduciary, a court may engage in *de novo* review.[90]

86 *Id.* at 133 (citing *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2348 (2008)).

87 *Id.* (quoting *Glenn*, 128 S. Ct. at 2348).

88 *Id.* (citing *Glenn*, 128 S. Ct. at 2348).

89 *See Nichols v. Prudential Ins. Co. of Am.*, 406 F.3d 98, 109 (2d Cir. 2005).

90 *See Sharkey v. Ultramar Energy Ltd.*, 70 F.3d 226, 229 (2d Cir. 1995).

## D. Interference with Protected Rights

21 Section 1140 of title 29 of the United States Code forbids "any person *21 to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under" a qualifying benefits plan. "An essential element of plaintiff's proof under the statute is to show that an employer was at least in part motivated

by the specific intent to engage in activity prohibited by § [1140]."[91] Thus "`[n]o ERISA cause of action lies where the loss of pension benefits was a mere consequence of, but not a motivating factor behind, a termination of employment.'"[92]

91 *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) (citing *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir. 1987), and *Titsch v. Reliance Group, Inc.*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982), *aff'd*, 742 F.2d 1441 (2d Cir. 1983)).

92 *Id.* (quoting *Titsch*, 548 F. Supp. at 985).

## E. Failure to Provide Requested Documents

Section 1132(c)(1)(B) of title 29 of the United States Code mandates,

> Any administrator . . . who fails or refuses to comply with a request for any information [that] such administrator is required . . . to furnish to a participant or beneficiary . . . may[,] in the court's discretion[,] be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal. . . .

Although the amount of an award is left to the discretion of the district court, the Second Circuit has established
22 five factors that a court should consider when *22 formulating a fee assessment: "`(1) the administrator's bad faith or intentional conduct; (2) the length of the delay; (3) the number of requests made; (4) the extent and importance of the documents withheld; and (5) the existence of any prejudice to the participant or beneficiary.'"[93]

93 *McDonald v. Pension Plan*, 320 F.3d 151, 163 (2d Cir. 2003) (quoting *Austin v. Ford*, No. 95 Civ. 3730, 1998 WL 88744, at *6 (S.D.N.Y. Mar. 2, 1998)).

## F. Attorney's Fees and Costs

In most private enforcement actions under section 1132, "by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."[94] The availability of fees under ERISA is governed by a five-factor test.

94 29 U.S.C. § 1132(g)(1). In some actions brought by a fiduciary or on behalf of a plan, attorney's fees are mandatory. *See id.* § 1132(g)(2)(D).

> (1) the degree of the offending party's culpability or bad faith, (2) the ability of the offending party to satisfy an award of attorney's fees, (3) whether an award of fees would deter other persons from acting similarly under like circumstances, (4) the relative merits of the parties' positions, and (5) whether the action conferred a common benefit on a group of pension plan participants.[95]

23 *23

95 *Chambless v. Masters, Mates Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir. 1987) (citing *Ford v. New York Cent. Teamsters Pension Fund*, 506 F. Supp. 180, 183 (W.D.N.Y. 1980), *aff'd*, 642 F.2d 664 (2d Cir. 1981) (per curiam)). *Accord Krauss*, 517 F.3d at 63 (citing *Chambless* as continuing to provide the governing standard).

# IV. CONCLUSIONS OF LAW

### A. Denial of Benefits Claim

Arnone's principal claim is that Goodman and the CA Severance Plan wrongfully denied him severance benefits to which he is entitled. Because the CA Severance Plan provides the plan administrator with broad latitude to interpret and implement its provisions, this Court cannot engage in *de novo* review.[96] However, because Goodman serves two masters — the CA Severance Plan and CA, Inc. — a perfunctory review for arbitrary and capricious decision-making is also inappropriate. In light of the Supreme Court's recent clarification of the proper standard in *Glenn*, this Court will carefully review Goodman's exercise of his discretion.[97]

96 Neither of the two exceptions under which a court may engage in *de novo* review despite a grant of discretion to a plan administrator are present in this case.

97 This standard could aptly be labeled "abuse of discretion with dentition." *Cf.* Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 Ind. L.J. 779 (1987).

Based on the absence of a prohibition concerning delegation of administration in the plan documents, the broad authority provided to the plan administrator to interpret the plan, and the common law inference that a trust such *24 as the CA Severence Plan confers powers necessary to implement the trust, I find that Goodman did not violate ERISA by delegating to a subordinate the task of fact-finding or the responsibility to respond to requests for documents. However, as delegates of the plan administrator, Buonaiuto and the CA attorneys assumed fiduciary duties to the plan and to Arnone as a plan participant. Thus they held a duty of care and duty of loyalty to all plan participants to insure that the *correct* benefits determination was made, to serve as a judge rather than a prosecutor.

From the moment investigation began, Buonaiuto and CA attorneys acted as Arnone's adversaries, providing false information concerning the incident, setting traps to catch Arnone in inconsistent statements, and thwarting attempts to clear his name. By refusing to allow Arnone to see the complete surveillance video, refusing to turn over a copy of the video, refusing to tell him who had attempted and failed to use the ATM and making false statements concerning the person's gender, refusing to tell him how much money was purportedly taken, and failing to accept his offer to take a polygraph examination administered by an expert nominated by CA, Buonaiuto and CA's attorneys willfully blinded themselves to exculpatory evidence that Arnone could develop. In turn, Goodman's benefits decisions expressly hinged on the absence of new evidence brought to light since Buonaiuto's December 5, 2006 decision to *25 terminate Arnone for theft and dishonesty. Given his delegates' consistent efforts to prevent Arnone from presenting new evidence, the denial of severance was inevitable.

Rather than taking "active steps to reduce potential bias and to promote accuracy,"[98] Goodman acted upon the biased determinations of his subordinates. A decision based on a limited record that omits a panoply of neutral or contrary facts is arbitrary and capricious.[99] Where the absence of evidence is a direct result of a fiduciary acting in violation of a duty of loyalty, by refusing to facilitate the collection and presentation of potentially exculpatory evidence, the abuse of discretion is even more egregious. Thus Goodman abused his discretion when he denied Arnone's severance request and severance appeal.

98 *McCauley*, 551 F.3d at 133.

99 *See Miller*, 72 F.3d at 1072.

Through the use of civil discovery, Arnone has now received the information he repeatedly requested from defendants. Using this information, he has presented additional information in his defense. Nevertheless, defendants maintain that Arnone is not entitled to severance. Therefore, remand for further administrative

26 review is foreclosed as futile. This Court must determine whether *26 the defendants' continued insistence that Arnone is not entitled to severance is arbitrary and capricious.

Upon review of the full evidence relating to the November 30, 2006 incident, the only rational conclusion is that Arnone was wrongfully denied severance. A simple distillation of the facts is warranted:[100]

100 Although defendants' attorney asserted in his opening that money was missing from the ATM after the incident, *see* Tr. at 7:12-8:1 (Brickell), defendants failed to call any witnesses to support this statement. The statement of counsel, of course, is not evidence.

• Although Jason Medina attempted to withdraw $40 using the lobby ATM, no funds were disbursed and his account was not debited. • Bethpage Credit Union records indicate that no funds were improperly disbursed on November 30, 2006. • Although the surveillance camera recorded Arnone touching the ATM, no cash is seen in his hand. • Arnone provided testimony under oath explaining his interaction with the ATM, supported by substantial documentary evidence. • No eyewitness testimony contradicts Arnone's story. Although this Court recognizes the discretion vested in the Plan Administrator to place substantial reliance on Buonaiuto's
27 conclusion that Arnone stole money *27 from the ATM based solely on the grainy and inconclusive video — in the face of a panoply of evidence to the contrary — the final determination was "unsupported by substantial evidence."[101] Simply put, defendants have never shown that there was a theft. Therefore, Arnone could not be terminated for theft. Absent cause for termination, Arnone is entitled to the value of his severance.

Judgment on the claim for improper denial of plan benefits under 29 U.S.C. § 1132(a)(1)(B) is granted in favor of plaintiff, Michael Arnone, in the amount of $38,352.96[102] plus $8,340.38 in interest, [103] against Andrew Goodman and the CA Severance Plan.

102 This is simply the sum of the $33,852.96 Separation Payment and the $4,500 COBRA Assistance payment. Although Arnone also requested reimbursement of his first COBRA payment — necessitated by the immediate cessation of his health benefits as a result of his termination for cause, *see* Tr. at 23:3-23:9 (Arnone) — continuity of health coverage after termination is not addressed by the CA Severance Plan. Therefore this additional sum is not recoverable under ERISA. *See* 29 U.S.C. § 1132(a)(1)(B) (limiting recovery to "benefits due to him under the terms of his plan").

103 This sum equals 9% interest on $38,352.96, from December 5, 2006 to February 13, 2009, compounded monthly.

## B. Interference Claim

Arnone's second claim alleges that CA, Inc., the CA Severance Plan, or Goodman terminated him for cause for
28 the express purpose of interfering with *28 his severance rights. Arnone has not proven this claim. There is no evidence that staffing reductions were contemplated in Arnone's department at the time of his termination. If defendants were not planning to lay off Arnone at some later date, they cannot have terminated him for cause in order to avoid paying severance. Therefore, judgment is rendered in favor of defendants on Arnone's claim under 29 U.S.C. § 1140.

## C. Failure to Produce Documents

Arnone's final claim demands a statutory penalty against Goodman, as plan administrator, as a result of his delegates' refusal to provide documents relied upon in rendering a benefits determination.[104] Although the CA Severance Plan does not expressly require the administrator to furnish any information beyond plan documents, the administrator is required by statute to conduct a "full and fair review."[105] Because "full and fair review"
29 requires access to documents *29 relied upon by the plan administrator, such documents fall within the statutory definition of "information which such administrator is required . . . to furnish to a participant or beneficiary."[106]

104 *See* 29 U.S.C. § 1132(c)(1). The Prayer for Relief in Arnone's complaint named only three ERISA provisions: 29 U.S.C. §§ 1132(a)(1)(B), 1109(a), and 1140. *See* Joint Pretrial Order at 2. However § 1132(a)(1)(B) is a general vehicle for individual enforcement of ERISA rights, *see Gerosa v. Savasta Co., Inc.*, 329 F.3d 317, 325 (2d Cir. 2003), and Arnone has prayed that this Court provide "other and further relief as the Court deems proper." Joint Pretrial Order at 2. Moreover, Arnone noted possible liability for failing to provide documents in the Joint Pre-Trial Order, *see id.* at 10, and defendants raised no objections. Thus any objection to this claim has been waived.

105 29 U.S.C. § 1133.

106 *Id.* § 1132(c)(1).

Goodman had a statutory duty to respond to Arnone's request for documents relied upon in rendering benefits determinations. Despite repeated requests, Goodman and his delegates refused to provide Buonaiuto with a panoply of evidence, including the name of the individual who had failed to receive funds from the ATM and a copy of the surveillance tape. Buonaiuto relied on the Global Safety Asset Protection Group's incident report — which contained the name of the individual who had attempted and failed to use the ATM — and the complete surveillance video in rendering his decision to terminate Arnone for cause. Goodman in turn relied on Buonaiuto's representations when denying Arnone's severance request and appeal. Although Goodman delegated decisions concerning disclosures to Buonaiuto and CA's attorneys, he bears ultimate responsibility for their failures.

An ERISA beneficiary should not be required to instigate litigation in order to receive information necessary to investigate and prove his claim for severance. Nevertheless, Arnone did not receive the requested information
30 until *30 the commencement of discovery in this case. Application of the Second Circuit's five-factor test justifies a substantial penalty. Although this Court has the discretion to award up to $100 for each day that passed between Arnone's request for documents and his receipt thereof — a period of over a year — I find that a penalty of $10,000 is sufficient to deter similar misconduct in the future. This penalty is assessed against Goodman in his capacity as administrator.

## D. Attorney's Fees

The final issue for resolution is whether Arnone is entitled to attorney's fees and costs. Four of the five factors in the Second Circuit's test weigh in favor of an award of fees and costs. *First*, Goodman and his delegates are responsible for this unnecessary litigation. By providing Arnone with false information, refusing to turn over information relevant to the benefits determination, and informing Arnone that his termination for cause would not change even if Arnone worked to prove his innocence, defendants showed remarkable bad faith and disregarded their fiduciary duties. *Second*, CA, Inc., a company with over 13,000 employees is capable of paying Arnone's attorney's fees. *Third*, an award of fees would serve as a general deterrent against conflicted administrators and their delegates acting as prosecutors rather than neutral arbiters. *Fourth*, as outlined above,
31 defendants' position is clearly far less *31 meritorious than Arnone's. The sole factor counseling against an award of fees and costs is the absence of a common benefit conferred upon a group of plan participants. Therefore, I award Arnone the fees and costs of this action.

# V. CONCLUSION

For the foregoing reasons, judgment is rendered in favor of plaintiff, Michael Arnone, in the amount of $46,693.34 against Goodman and the CA Severance Plan and in the amount of $10,000 against Goodman individually. Arnone is ordered to submit records supporting his claim for attorney's fees and costs by February 20, 2009. Defendants may submit any objections by February 27, 2009.

SO ORDERED:

No. 07-4480-cv
United States Court of Appeals, Second Circuit

# Carras v. MGS 728 Lex, Inc.

310 F. App'x 421 (2d Cir. 2008)
Decided Dec 19, 2008

No. 07-4480-cv.

December 19, 2008.

Appeal from a judgment of the United States District Court for the Southern District of New York (Thomas P. Griesa, Judge).

**UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the District Court is hereby **VACATED** and the case is **REMANDED** for further proceedings.

Nathaniel B. Smith, New York, NY, for Appellant.

Umar A. Sheikh (Owen Wincig, on the brief), Law Offices of Wincig Wincig, New York, NY, for Appellees.

PRESENT: WILFRED FEINBERG, PIERRE N. LEVAL and JOSÉ A. CABRANES, Circuit Judges.

## SUMMARY ORDER

Plaintiff George Carras appeals from a judgment of the District Court granting defendants' motion for summary judgment. The defendants are MGS 728 Lex, Inc. ("MGS"), a shoe importer; Stephano Maraolo, the former President of MGS; and Agostino Nastasi, the former Vice President of Marketing at MGS. Plaintiff worked at MGS from March 1999 until his termination in April 2001, serving for his entire tenure as the company's Chief Financial Officer. He brought this suit in September 2002 alleging impermissible it discrimination based on his
422 age in violation of various federal and state statutes. *See* *422 the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*; the New York State Human Rights Law, New York Executive Law § 296; and the New York City Human Rights Law, New York City Admin. Code §§ 8-107, 8-502.[1] On appeal, plaintiff argues that the District Court misapplied both *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (establishing a "burden shifting" analysis for claims brought under Title VII of the Civil Rights Act of 1964), and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (establishing a "mixed motive" analysis for discrimination claims). We assume the parties' familiarity with the facts and procedural history of this case.

[1] We review age discrimination claims brought under the New York State Human Rights Law and the New York City Human Rights Law under the same standards as claims brought under the ADEA. *See Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2d Cir. 2001).

We review a district court's grant of summary judgment *de novo*, construing all facts in favor of the non-moving party. *See Graves v. Finch Pruyn Co.*, 457 F.3d 181, 183 (2d Cir. 2006). Summary judgment is only warranted upon a showing "that there is no genuine issue as to any material fact and that the movant is entitled

to judgment as a matter of law." Fed.R.Civ.P. 56(c).

As applied in the employment context, *McDonnell Douglas Corp.* requires a plaintiff to produce some evidence showing the *prima facie* elements of a discrimination claim, whereupon the "burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the termination." *Patterson v. County of Oneida*, 375 F.3d 206, 221 (2d Cir. 2004) (internal quotation marks omitted). If a defendant produces admissible evidence showing legitimate business reasons for terminating plaintiff, "the burden shifts back to the plaintiff to demonstrate by competent evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* (internal quotation marks omitted). Summary judgment is appropriate where "the plaintiff has failed to show that there is evidence that would permit a rational factfinder to infer that the employer's proffered rationale is pretext." *Id.* Of course, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*

The District Court assumed that plaintiff had established a *prima facie* claim, and therefore did not address any specific elements of his claim. Based on our review of the record, plaintiff has satisfied the elements of a *prima facie* claim under the ADEA by showing that (1) he was in his early 60s, and was therefore within the protected age group; (2) he was qualified to be CFO — a point the parties do not contest; (3) he was terminated; and (4) his termination "occurred under circumstances giving rise to an inference of discrimination." *Terry v. Ashcroft*, 336 F.3d 128, 138 (2d Cir. 2003). The specific circumstances include that he was 62 years old and was replaced by a person 26 years old, that his co-worker Nastasi repeatedly complained to Maraolo that plaintiff was too old, and that while firing plaintiff, Maraolo told him that he (Maraolo) "had enough of [Nastasi]," (Carras Dep. 57:6-8), implying that he no longer wanted to re-buff or listen to Nastasi's oft-repeated objections to plaintiffs age.

Defendants responded with affidavits that plaintiff was fired for cost-cutting reasons, not because of his age.
423 Plaintiff replied that defendants' cost-cutting concerns *423 were pretextual and ultimately would not negate the discriminatory motivation which led defendants to fire plaintiff as opposed to firing someone else, or saving money in other ways. Specifically, Nastasi cited (1) Maraolo's reference to Nastasi while firing plaintiff; (2) Nastasi's prior comment to plaintiff about plaintiff's age; (3) deposition testimony by Winegard, plaintiff's replacement, that Maraolo and Nastasi had openly joked about plaintiff's age on several occasions; (4) plaintiff's offer to work for $60,000 annually — less than Winegard's salary as CFO; and (5) the approximately 40-year age difference between plaintiff and Winegard. Plaintiff argues that this evidence, some of which defendants dispute, could allow a jury to conclude that plaintiff was fired because of his age.

We agree. Although the record shows that MGS was in a difficult financial position and was attempting to cut costs, the District Court's repeated references to the company's financial situation reflect, in our view, an impermissible weighing of the evidence. For example, although the District Court acknowledged' plaintiff's offer to work for a reduced salary, the Court concluded that "even a $60,000 salary would have presented a substantial [financial] issue." (Opinion 14.) However, a jury could have determined, based on plaintiff's offer to work for less than what was paid to Winegard, that the employer's motivation for firing him was not cost cutting but was rather discrimination against his age.

Maraolo's reference to Nastasi while firing plaintiff raises similar concerns. According to plaintiff, Maraolo stated, "I have to let you go because of cost cutting and I have had enough of [Nastasi]." (Carras Dep. 57:6-8.) Plaintiff believes that "I have had enough of [Nastasi]" suggests that Nastasi — who allegedly told plaintiff that he was "too old," (Carras Dep. 81:15) — had complained about plaintiff to Maraolo. Under the circumstances

presented in this case, a jury could reasonably infer from Maraolo's comments that Maraolo was influenced by the opinions of Nastasi, who worked for the Maraolo family since 1982 or 1983. We therefore conclude that plaintiff has come forward with sufficient evidence of pretext and discrimination to foreclose summary judgment.

For substantially similar reasons, summary judgment under *Price Waterhouse* — the District Court's alternative basis for judgment — is not justified. Based on the record before us, plaintiff has "presented evidence sufficient to support an inference of impermissible discrimination." *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 162 (2d Cir. 1998) (applying *Price Waterhouse*). Although defendants argued that plaintiff's termination was inevitable in light of the company's financial situation, their evidence did not exclude a question of material fact on this issue. Defendants failed to show entitlement to summary judgment on the *Price Waterhouse* theory. In remanding this case, we intimate no view on whether defendants may present a *Price Waterhouse* defense to the trier of fact. *See Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 181 (2d Cir. 1992) (stating that, once "plaintiff has carried the burden of persuading the trier that the forbidden animus was a motivating factor in the employment decision . . . the employer has the option of defending on the *Price Waterhouse* ground that it would have made the same decision even in the absence of a discriminatory motive").

For the foregoing reasons, we **VACATE** the judgment of the District Court and **REMAND** the cause for further proceedings consistent with this order.

424 *424

Civil Action No. 04-7133 (DCP) (KNF)
United States District Court, S.D. New York

# Elizabeth Parks v. Lebhar-Friedman, Inc.

Decided Oct 2, 2008

Civil Action No. 04-7133 (DCP)(KNF).

October 2, 2008

Nathaniel B. Smith, for Elizabeth Parks, Plaintiff, Thelan Reid Brown Raysman Millstein, (Catherine McGrath) for Lebhar-Friedman, Inc., Defendant.

[Defendant's motion for summary judgment denied.]

## OPINION

DONALD POGUE, District Judge

**POGUE,** Judge:[1] In this action, Plaintiff Elizabeth Parks ("Parks"), a senior magazine editor and writer, alleges that Defendant Lebhar-Friedman, Inc. ("Lebhar-Friedman") terminated her employment because of her age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 ("ADEA") and corresponding New York state laws, § 296 of the New York State Human Rights Law and § 8-107 of the New York City Human Rights Law. Lebhar-Friedman seeks summary judgment prior to trial, asserting *2 that, despite extensive discovery, Parks has failed to make an evidentiary showing sufficient to establish her prima facie case. In the alternative, Lebhar-Friedman asserts that summary judgment should be granted because it has articulated a legally sufficient, non-discriminatory reason for terminating Parks's employment, and Parks failed to make an evidentiary showing sufficient to establish that Lebhar-Friedman's reason for her termination was pretextual.

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[1] Honorable Donald Pogue, Judge, United States Court of International Trade, sitting by designation.

The court has jurisdiction over Parks's federal cause of action pursuant to 28 U.S.C. § 1331, among other provisions, and supplemental jurisdiction of the state law claims pursuant to 28 U.S.C. § 1367.

For the reasons explained below, the court finds that Parks has presented sufficient evidence to survive summary judgment and thus denies Lebhar-Friedman's motion.

## BACKGROUND

Trade journal publisher Lebhar-Friedman is a family-owned and closely-held corporation primarily run by Roger Friedman, its president and principle shareholder. Parks worked for Lebhar-Friedman for twenty-seven years: from July 11, 1976 to June 23, 2003. When she was terminated at age sixty-two, Parks held the position of senior editor and writer, and, since January, 2002, had authored the "Beauty" column in Drug Store News, a Lebhar-Friedman publication.

3 Parks claims she was terminated because of her age, in that *3 Lebhar-Friedman developed a focus on beauty and health images in its stories and preferred young editors and writers. If female editors and writers no longer possessed the image that Lebhar-Friedman sought to present, Park asserts, such women were no longer considered company assets.

It is undisputed that, shortly after Parks's March 2002 assignment to the Beauty column, Kevin Kennedy — Lebhar-Friedman's senior manager — directed the human resources department to "set in motion" a "scenario" to terminate Parks.

That scenario played out. On March 19, human resources staff member Marvlieu Hall forwarded an e-mail to her subordinate, Stacy Smith, directing Smith to prepare for Parks's termination. Smith responded five days later, concerned that firing Parks because of a reduction in force could subject the company to a lawsuit. On March 26, Smith confirmed in an e-mail that "it was agreed" that Lebhar-Friedman would not fire Parks as part of a reduction in force; instead, Smith emphasized, "this is a performance issue." Smith also stated in the e-mail that Tony Lisanti, another member of Lebhar-Friedman's senior management, would speak to Mark Tosh, Drug Store News' executive editor, about putting Parks on a thirty-day performance plan. Following Lisanti's and Tosh's discussion of Parks, Tosh wrote in an April 4 memorandum to Lisanti and Smith that "[his] sense on
4 [Parks] is that she currently is not producing the quality of work that [Lebhar-Friedman] expects of senior *4 editors, certainly not on a par with other Drug Store News and [its] senior editors."[2]

> 2 After he enumerated purported examples of Parks's sub-par job performance, Tosh concluded that he "[did not] know if this . . . is the kind of things . . . [Lisanti and Smith] were looking for, but this is what [he] could put together late Thursday."

For the next fifteen months, Parks's supervisors documented what they allege to be her performance weaknesses. Meanwhile, Parks continued to write columns for Drug Store News. Despite the established practice of printing the author's photograph along with each column, Parks's photograph did not appear in the Drug Store News Beauty column for the February 18th, March 4th, March 25th and April 9th issues. When Parks's photograph did appear, the publication had already re-assigned her off the Beauty column. Approximately one year after Kennedy's first e-mail, and after issuing Parks a number of warnings, Lebhar-Friedman fired Parks for "business reasons" in June 2003.

## APPLICABLE STANDARD

A trial court must grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for
5 discovery and upon motion, against a party who fails to make a showing *5 sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be `no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is `entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Accordingly, the party with the burden of proof must establish the necessary elements of her case by producing sufficient evidence for a rational jury to find in her favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 250-51 (1986). The moving party, however, has "the burden of showing that no genuine factual dispute exists." Carlton v. Mystic Transp., 202 F.3d 129, 133 (2d Cir. 2000). When determining whether a genuine issue of material fact exists, the court must "resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." Patterson v. County of Oneida, 375 F.3d 206, 219 (2d Cir. 2004); see also LaFond v. Gen. Physics Serv. Corp., 50 F.3d 165, 171 (2d Cir. 1995). If the movant does not demonstrate the absence of a genuine factual dispute, summary judgment must be denied.

## DISCUSSION

### I. Elements of a Claim under the Age Discrimination in Employment Act

6 Under the ADEA, it is "unlawful for an employer . . . to *6 discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). To analyze an ADEA claim, the court applies the familiar three-step burden-shifting framework as articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Jetter v. Knothe Corp., 324 F.3d 73, 75 (2d Cir. 2003).

Thus, Parks must first provide sufficient evidence to establish a prima facie case of discrimination. Jetter, 324 F.3d at 75 (citing McDonnell Douglas, 411 U.S. at 802). To establish a prima facie case for age discrimination, Parks must show that 1) she was within the protected age group, 2) she performed her duties satisfactorily, 3) she was discharged, and 4) the discharge occurred under circumstances giving rise to an inference of discrimination. See Hernandez v. Kellwood Co., No. 99 Civ. 10015, 2003 WL 22309326, at *12 (S.D.N.Y. Oct. 8, 2003) (Swain, J.) (citing McGuiness v. Lincoln Hall, 263 F.3d 49, 53 (2d Cir. 2001)). If Parks succeeds in establishing her case, the court presumes "discriminatory animus" and Lebhar-Friedman has the burden to "articulate a legitimate non-discriminatory reason for the employment decision". Jetter, 324 F.3d at 75 (citingMcDonnell Douglas, 411 U.S. at 802-03); Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 142 (2000) ("The burden . . . shifted to respondent to produce evidence that the plaintiff was rejected, or someone
7 else *7 was preferred, for a legitimate, nondiscriminatory reason. This burden is one of production, not persuasion; it `can involve no credibility assessment.'") (internal citations omitted). Finally, if Lebhar-Friedman can articulate such a reason, Parks then must show that this reason is in reality a "pretext" for discrimination. Jetter, 324 F.3d at 75-76 (citing McDonnell Douglas, 411 U.S. at 804-05).

> [T]he plaintiff — once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision — must be afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence."

Reeves, 530 U.S. at 143 (internal citation omitted). "[O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision". Id. at 147-48. As a result, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Id. at 147-48; see also Chapkines v. N.Y. Univ., No. 02CIV6355, 2005 WL 167603, at *9 (S.D.N.Y Jan. 25, 2005) ("An employer may be entitled to
8 judgment as a matter of law if `the record conclusively revealed some other, nondiscriminatory reason *8 for

the employer's decision' or `if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.'"). "Although intermediate evidentiary burdens shift back and forth under this framework, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Reeves, 530 U.S. at 143 (internal citation omitted).

## II. Grounds for Lebhar-Friedmans's Motion for Summary Judgment

### A. Lebhar-Friedman's Argument that Parks has Failed to Make Out a Prima Facie Case of Age Discrimination

Lebhar-Friedman does not dispute that it discharged Parks, or more specifically, that it discharged her when she was sixty-two years old and thus in the ADEA-protected age group. However, in support of its request for summary judgment, Lebhar-Friedman instead claimed, in its briefs, that Parks has failed to provide summary judgment evidence regarding the other two elements of her prima facie case, namely, that she performed her duties satisfactorily to meet Lebhar-Friedman's expectations and that the circumstances of her discharge give rise to an inference of discrimination.

**1. Parks Made a Sufficient Showing that She was Adequately Performing Her Position at the Time of Termination.** *9

At oral argument, counsel for Lebhar-Frieman, with commendable frankness, acknowledged that Parks has provided sufficient evidence to show that she met the qualifications of a senior editor position at the time of her termination. See Def.'s Mem. at 27-33; see also Pl.'s Mem. at 23-24. See Schering Corp. v. Home Ins. Co., 712 F.2d 4, 9-10 (2d. Cir. 1983) (The Court should deny a motion for summary judgment if plaintiff "propounds a reasonable conflicting interpretation of a material disputed fact."). Lebar-Friedman's acknowledgement is well founded. It is the law of this Circuit that, in order to raise a material fact on job performance, "all that is required is that the plaintiff establish basic eligibility for the position at issue, and not the greater showing that he satisfied the employer." Slattery v. Swiss Reinsurance, 248 F.3d 87, 92 (2d. Cir. 2001). Moreover, it is error for a trial court to hold as a matter of law that a plaintiff lacked the "minimal qualification for a job whose duties he has been performing for seven years." Id. Here, Parks worked at the firm for more than twenty years and acted as a senior editor for a number of years. Accordingly, Parks has provided sufficient evidence to establish her qualifications for the job.

## 2. Parks Made a Sufficient Showing that the Circumstances of Her Discharge Establish Grounds for a Discriminatory Inference.

Lebhar-Friedman also argues that Parks failed to establish the fourth element of her ADEA claim, i.e., that the circumstances *10 under which she was terminated give rise to an inference of discrimination. This inference may be established if Parks can demonstrate that she was fired and replaced by a substantially younger worker. See O'Conner v. Consol. Coin Caterers Corp., 517 U.S. 308, 313 (1996). Lebhar-Friedman points out that not only did the company not replace Parks after her termination, it subsequently eliminated her position entirely in its organizational restructuring. See Def.'s Mem. at 11. To Lebhar-Friedman, Parks interpretation of events ignores the economic realities of the industry and the context in which the termination took place.

Parks, however, raises a genuine issue of material fact as to whether she was replaced by a substantially younger employee. According to Parks, Lebhar-Friedman initially transferred her duties to twenty-three year old Molly Prior. Parks has also submitted evidence that can reasonably be interpreted to support her claim that, three months later, Parks's work responsibilities were again transferred, this time to a newly-hired thirty-three

year old, Michelle Kirsche, who Parks alleges to be less-qualified for the position than herself. As evidence, Parks notes an e-mail from Smith to Kenlon on April 23, 2002 stating "[w]e will replace [Parks's] position with someone else," suggesting that Lebhar-Friedman planned to replace Parks's position rather than eliminate it. See Opp. Exh. 9 at 26. In addition, Parks points to Kennedy's first e-mail discussing Parks's termination, which
11 stated "[w]e *11 need to set the [Parks] scenario in immediate motion . . . please outline a rationale as to why [Prior's] services would be preferred over [Parks's]", suggesting that Parks would be replaced by twenty-three year old Prior. Third, Parks directs the court's attention to the following year's organizational chart dated October 24, 2003, that shows her name was replaced with Kirsche's name.

Considering these three pieces of evidence, Parks has demonstrated the existence of a genuine issue of material fact that she was replaced by someone substantially younger, giving rise to an inference of discrimination and adequately supporting the fourth element of her prima facie case. See Carlton v. Mystic Transp., Inc., 202 F.3d 129, 135 (2d Cir. 2000) ("[A] plaintiff has demonstrated an inference of age discrimination and thus established a prima facie case . . . where the majority of plaintiff's responsibilities were transferred to a younger co-worker, and shortly thereafter some of plaintiff's other duties were transferred to a newly hired younger employee.").

To be sure, Lebhar-Friedman's personnel communications and organizational charts may be subject to alternative interpretations. Drawing inferences in Parks' favor, however, in sum, Parks has introduced sufficient evidence show that there is a genuine issue of material fact concerning her prima facie case.

**B. Parks Provided Evidence that Lebhar-Friedman's Purported Reasons for Parks's Termination Was a**
12 **Pretext and that Age was a Motivating Factor in the Decision.** *12

As noted above, once the plaintiff puts forth a prima facie case based on circumstantial evidence, the burden shifts to the defendant. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The defendant must offer a legitimate, non-discriminatory reason for the termination. Woodman v. WWOR-TV, Inc., 411 F.3d 69, 76 (2d Cir. 2005). Once the defendant has articulated a legitimate reason, the plaintiff must "prove by the preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination". Weeks v. N.Y. State Div. of Parole, No. 00 CV 5865 SJ, 2002 WL 32096593, at *4 (E.D.N.Y. Nov. 25, 2002).

Lebhar-Friedman has articulated legitimate, non-discriminatory reasons for terminating Parks's employment and argues that Parks has no evidence that age discrimination was the reason behind her discharge. See Def.'s Mem. at 15. Lebhar-Friedman identifies Parks's level of performance as the reason for her termination, referring to her documented weaknesses such as "the quality of her writing, types of stories she was doing, her tendency to overwrite, and the need for heavy editing" cited by her superiors. See Def.'s Mem. at 17. In response, Parks argues that Lebhar-Friedman has propounded general and subjective reasons which "failed to produce a clear and specific explanation" for her termination. Nonetheless, Lebhar-Friedman has met its burden
13 of production because it is only required to produce "evidence *(whether* *13 *ultimately persuasive or not)* of nondiscriminatory reasons." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993) (emphasis added). Since Lebhar-Friedman has met the minimal burden of production, regardless of ultimate persuasiveness, the burden shifts to Parks to show that the proffered reasons were a mere pretext for discrimination.

Parks, however, has provided sufficient evidence to satisfy her burden. See Pl.'s Mem. at 30-34.

> In Reeves, the Supreme Court . . . instruct[ed] that evidence of pretext, without more, may permit the trier of fact to reasonably infer that the employer "is dissembling to cover up a discriminatory purpose," so as to defeat summary judgment. Such an inference, the Supreme Court reasoned, is consistent with the principle that evidence of dishonesty may show "affirmative evidence of guilt," as well as with the rationale that "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation.

Chapkines v. N.Y. Univ., No. 02CIV6355, 2005 WL 167603, at *9 (S.D.N.Y Jan. 25, 2005) (quoting Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 147 (2000); Schnabel v. Abramson, 232 F.3d 83, 90 (2d Cir. 2000)).

Lisanti's employment evaluation, presented one week before the termination, can reasonably be read to indicate that Parks by-and-large may have met company standards, even though the evaluation may also be subject to alternative interpretations.See Opp. Exh. 16. In addition, two weeks before the termination, Forbes wrote an
14 apparently favorable memorandum to Parks's superior, indicating *14 that "the account absolutely loved [Parks's column on clip-on sunglasses] and couldn't stop raving about the accuracy of the interview". See id. Exh. 15. Further, the very letter advising Parks of her termination cited "business reasons", rather than job performance reasons, as the deciding factors. See Opp. Exh. 17. Finally on this issue, Parks provided e-mails from the human resources department that allegedly instruct "supervisors to `look for' performance issues, to `re-read' published articles, and to `come up' with documentation to justify" Parks's termination. See Pl.'s Mem. at 33. This evidence could be read to suggest that the quality of Parks's work performance was not genuinely at issue and casts doubt upon the legitimacy of Lebhar-Friedman's purported reason for her termination.

Parks also provides circumstantial evidence indicating that age may have been the motivating factor in her termination. She suggests that Lebhar-Friedman preferred young faces to accompany its new focus on beauty and youth and, for that reason, it terminated Parks because she no longer possessed those qualities. Parks emphasizes the fact that Lebhar-Friedman omitted her photograph from the beauty column — a departure from the publication's customary practice of having a photograph appear with each column. When her photograph ultimately appeared in the issue, it appeared along with Molly Prior's photograph after Parks was reassigned off
15 the beauty column. Parks also points to the fact *15 that Lebhar-Friedman hired only young women to fill the ranks of its reporters and editors from at least 2000 through 2003: Diane West (31), Molly Prior (23); Antoinette Alexander (26), Alicia Zappier (mid-20s) and Michelle Kirsche (33). See Parks Decl. ¶ 5. This evidence could reasonably be read to support the theory that Lebhar-Friedman started to prefer young women.

In sum, Parks provides evidence from which a reasonable jury could infer that Lebhar-Friedman intentionally discriminated against her based on her age. Accordingly, Lebhar-Friedman's motion for summary judgment is denied. The parties are directed to consult and, by November 4, 2008, to file a proposed order governing preparation for trial.[3]

> 3 An appropriate form may be found on this chambers' website.

It is SO ORDERED.

No. 04 Civ. 7598
United States District Court, S.D. New York

# Falchenberg v. New York State Department of Education

642 F. Supp. 2d 156 (S.D.N.Y. 2008)
Decided Jul 10, 2008

No. 04 Civ. 7598.

157 July 10, 2008. *157

Nathaniel B Smith, Esq., Kristian Karl Larsen, Esq., New York, NY, for Plaintiff.

Rogers Hardin LLP, by: Phillip S. McKinney, Esq., Atlanta, GA, Morgan, Lewis Bockius, LLP, by: Debra S. Morway, Esq., Melissa C. Rodriguez, New York, NY, for Defendant National Evaluation Systems, Inc.

Andrew M. Cuomo, Attorney General of the State of New York, by: Antoinette W. Blanchette, Assistant Attorney General, New York, NY, for Defendants State of New York and New York State Education Department (s/h/a New York State Department of Education).

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## AMENDED OPINION

SWEET, District Judge.Page 2

## I. INTRODUCTION

Defendant National Evaluation Systems, Inc., a business of NCS Pearson, Inc. ("NES"), the State of New York (the "State") and New York State Education Department ("SED") (s/h/a New York State Department of Education) (State of New York and SED, collectively, "State Defendants") (NES and State Defendants, collectively, "Defendants") have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure against plaintiff Marsha Falchenberg ("Falchenberg" or the "Plaintiff").

Falchenberg has cross-moved under the same rule to dismiss the fifth through twelfth affirmative defense of NES and the fifth, seventh and eighth defense of the State and SED. Falchenberg has also moved to amend her complaint to add a state official as an individual defendant. For the reasons set forth below, the Defendants' motion is granted and Falchenberg's motions are denied.

3 In this hard fought and well-litigated action, Falchenberg, disabled by dyslexia, has sought to establish that *3 Defendants have denied her accommodations which might have permitted her to continue as a New York City public school teacher. Sad to say, her efforts, like those of many test takers, have been defeated by the requirement to spell and punctuate.

## II. PRIOR PROCEEDINGS

Falchenberg filed a complaint (the "Original Complaint") against the New York City Department of Education ("DOE"), the City of New York (the "City"), and Defendants on September 24, 2004, alleging that all the named entities discriminated against her in violation of the Americans with Disabilities Act, 42 U.S.C. 12101 et seq. ("ADA"), the Rehabilitation Act, 29 U.S.C. 794 ("Rehab Act"), the New York State Human Rights Law, New York Executive Law § 296 ("SHRL"), and the New York City Human Rights Law, New York Administrative Code § 8-107 ("CHRL"), or were liable for aiding and abetting a violation of the aforementioned statutes.

The DOE and the City (collectively, the "City Defendants") moved to dismiss the Original Complaint against them, and by opinion of July 1, 2005, Falchenberg v. *159 New York City Dep't of Educ., 375 F. Supp. 2d 344 (S.D.N.Y. 2005) (the *4 "July 1 Opinion"), the motion was granted and all claims against the City Defendants were dismissed.

In her amended complaint (the "Amended Complaint"), filed on July 26, 2005, Falchenberg reasserted against the remaining Defendants all but one of the claims brought in the Original Complaint. The single claim that was not included in the Amended Complaint was an employment discrimination claim pursuant to Title I of the ADA.

Discovery has been completed. The cross-motions for summary judgment were heard and marked fully submitted on December 5, 2007, and the motion to amend on January 16, 2008.

## III. FACTS

The facts are set forth in the parties' Rule 56.1 Statements, the Defendants' Counterstatement, attached affidavits and memoranda of law, and are not in dispute except as noted below.

Falchenberg was born and raised in New York City and had undiagnosed reading problems in elementary school and high school. *5

In 1986, 12 years after graduating from high school, Falchenberg started attending college classes at the University of Oslo in Norway. In 1992, she was diagnosed as dyslexic. In 1998, after taking college courses for over 10 years, Falchenberg graduated from the University of Oslo with a B.A. in English and History. After graduating, she continued her studies with post-graduate courses for one year in Education.

In 2000 Falchenberg returned to the United States. For the academic year of September 2001 to June 2002, she taught science to all grades at P.S. 106, a public school in Brooklyn. For the academic year of September 2002 to June 2003, she was the regular classroom teacher for a third grade class at P.S. 384, another Brooklyn Public School, providing instruction in English, Math, Science, and Social Studies. For both positions Falchenberg received satisfactory performance reviews.

SED is a statutory agency of the State of New York created pursuant to New York Education Law § 101 charged with the general management and supervision of all public schools and all of the educational work in the State of New York, including "the examination and certification of teachers employed in all public schools of the state." N.Y. Educ. Law § 3004(1). *6

NES develops and administers customized teacher certification testing programs under contracts with a number of state education agencies and departments, including SED. NES receives no federal financial assistance and is not a public entity.

Under a contract with SED, NES developed, administers and scores the New York State Teacher Certification Examinations ("NYSTCE"), which include approximately 58 different tests. The Liberal Arts and Sciences Test ("LAST") is one of those tests. Candidates for public school teacher certification in the State of New York are required by New York law to pass the LAST (among other examinations and certification requirements) in order to become certified teachers. The explicit purpose of the NYSTCE tests (including the LAST) is to help identify for certification those candidates who have demonstrated the appropriate level of knowledge and skills that New York educators have determined to be important for performing the responsibilities of a teacher in
160 New York State public schools. *160

The LAST is a multi-faceted examination designed to test primarily in five areas of knowledge and skills: (1)
7 scientific, mathematical, and technological processes; (2) *7 historical and social scientific awareness; (3) artistic expression and the humanities; (4) communication and research skills; and (5) written analysis and expression. Each test form for the LAST contains approximately 80 multiple-choice test questions and one constructed response (written) assignment.

The fifth part of the LAST, entitled "Written Analysis and Expression," requires the examinee to "prepare an organized, developed composition in edited American English in response to instructions regarding audience, purpose, and content." Affidavit of Melissa C. Rodriguez ("Rodriguez Aff."), Ex. 6 at 15. The written assignment is expected to be about 300-600 words in length, and represents approximately 20% of the test score on LAST.

The examinee's response to the written assignment is evaluated on the basis of several criteria, among them the following:

> STRUCTURE AND CONVENTIONS: Express oneself clearly and without distractions caused by inattention to sentence and paragraph structure, choice and use of words, and mechanics (i.e., spelling, punctuation, capitalization).

8 Rodriguez Aff., Ex. 6 at 58. *8

The examinee's response is required to conform to the conventions of edited American English. It is required to be the examinee's original work, written in his or her own words, and not copied or paraphrased from some other work. The examinee is directed to write about the assigned topic, and to use multiple paragraphs.

The LAST written assignment is evaluated and scored on a 4-point scale, with 4 being the highest score and 1 being the lowest. Each of the four possible scores is based on consideration of a number of factors, including spelling, punctuation, capitalization, and paragraphing. For example, a "4" response is described in the LAST scoring scale in pertinent part as follows:

> The response is free of distracting flaws in sentence structure (e.g., subject-verb disagreements, run-on sentences) and paragraph structure (e.g., lack of paragraph breaks to coincide with thought transitions), shows proficient use and choice of words, and avoids disruptive mechanical errors (e.g., inappropriate capitalization, misspellings of common words).

Rodriguez Aff., Ex. 6 at 69.

Proper construction of paragraphs and sentences, proper use of grammar and punctuation, spelling,
9 capitalization and reading comprehension are set forth as scoring criteria in *9 the LAST Preparation Guide and Registration Bulletins as well as other publicly available documents on SED's and NES's respective websites.

On May 6, 2002, Falchenberg registered with NES to take the LAST which was scheduled to be given on July 20, 2002. She submitted an "alternative arrangement request" form to NES, identifying herself as dyslexic and asking for a "dictionary, extra time, frequent breaks, [and an] oral exam." Five weeks later, NES denied Falchenberg's requests.

NES told Falchenberg that a July 8, 1998 report and evaluation of her dyslexia by the Learning Disabilities Unit of the State University of New York's College of Optometry (the "SUNY Report") was too old. According to Falchenberg, the SUNY Report was timely.

In October and December 2002, Falchenberg underwent a complete neuropsychological evaluation at the
161 Derner Institute *161 of Advanced Psychological Studies at Adelphi University in New York. The following month, on January 31, 2003, the Derner Institute issued its report (the "Derner Report") confirming the SUNY Report's diagnosis of dyslexia with a reading disability, and recommending oral administration of tests. On
10 March 8, *10 2003, Falchenberg submitted the Derner Report to NES for the next administration of the LAST, scheduled for May 10, 2003. Falchenberg renewed her prior request, seeking additional accommodations including added time and frequent breaks, and submitted a follow-up letter by the doctor who prepared the Derner Report.

NES rejected Falchenberg's request for accommodation, stating that a dictionary would "fundamentally alter the measurement of the skills the examination is intended to test." Declaration of Nathaniel B. Smith in Support of Plaintiff's Cross-Motion for Summary Judgment, Ex. 3. A "reader" (not an oral examination) was also rejected because the "[d]ocumentation submitted does not support the requested accommodation." Id.

The NES outside consultant, Dr. Tom E.C. Smith ("Dr. Smith") testified that the SUNY Report supported Falchenberg's request for a reader and that if he had seen the SUNY Report at the time his recommendation to deny the reader would not have been the same.

Falchenberg did not take the May 10, 2003 administration of the LAST. Falchenberg registered for the next
11 administration date, July 19, 2003, and appealed the denial of *11 her accommodation requests. According to Falchenberg, the personnel of NES and SED who denied her appeal were unqualified. Upon a request for reconsideration, NES granted Falchenberg a reader and extra time but again denied her request for an oral examination.

On August 16, 2003, Falchenberg again registered for the next administration of the LAST on October 18, 2003 and specifically requested a reader, a scribe, extra time and an oral examination.

Falchenberg also sought a temporary exemption or waiver from SED, NES or Falchenberg's employer, the DOE, [1] from the requirement that Falchenberg pass the LAST in order to keep her job. Those efforts failed, and on September 2, 2003, the DOE terminated Falchenberg because she had not passed the LAST.

[1] This Court's original opinion of June 19, 2008, incorrectly stated that Falchenberg was employed by SED. The record is clear, and both parties agree, that Falchenberg's employee was the New York City Department of Education. See Letter from Antoinette W. Blanchette, Assistant Attorney General, State of New York, to Court (June 27, 2008).

On September 2, 2003, the transcriber request was approved. On September 16, 2003, NES notified
12 Falchenberg that she would be provided with the following accommodations: *12

(1) a test administrator would read each question to her;

(2) a test administrator would transcribe her responses to the written portion of the LAST, but Plaintiff would be responsible for indicating spelling, punctuation, capitalization, and paragraphing;

(3) Plaintiff would be allowed to bring a lunch and take breaks as needed;

(4) Plaintiff would be provided with a separate room; and

(5) Plaintiff would be allowed a full testing day to complete the test (a total of 9 hours, rather than the standard 4 hour session).

Rodriguez Aff., Ex. 7.

162 Falchenberg did not appear for, and did not take, the LAST on October 18, 2003, *162 nor has she sought to take the test since that date. She contends that the Defendants' accommodations, which require that she "dictate spelling and grammar," do not amount to a reasonable accommodation of her disability.

## IV. SUMMARY JUDGMENT STANDARD

Summary judgment is granted only if there is no genuine issue of material fact and the moving party is entitled
13 to judgment as a matter of law. Fed.R.Civ.P. 56(c); see *13 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); SCS Commc'ns, Inc. v. Herrick Co., 360 F.3d 329, 338 (2d Cir. 2004). The courts do not try issues of fact on a motion for summary judgment, but, rather, determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

"The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish [its] right to judgment as a matter of law." Rodriguez v. City of New York, 72 F.3d 1051, 1060-61 (2d Cir. 1995). Summary judgment is appropriate where the moving party has shown that "little or no evidence may be found in support of the nonmoving party's case. When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." Gallo v. Prudential Resid. Servs., L.P., 22 F.3d 1219, 1223-24 (2d Cir. 1994) (citations omitted).

In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all
14 *14 reasonable inferences against the moving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Gibbs-Alfano v. Burton, 281 F.3d 12, 18 (2d Cir. 2002). However, "the non-moving party may not rely simply on conclusory allegations or speculation to avoid summary judgment, but instead must offer evidence to show that its version of the events is not wholly fanciful." Morris v. Lindau, 196 F.3d 102, 109 (2d Cir. 1999) (quotation omitted).

## V. DISCUSSION A. Discrimination on Basis of Disability Has Not Been Established

The standards adopted by Titles II and III of the ADA and the Rehabilitation Act are, in most cases, the same, and the courts routinely consider the merits of such claims together. See Powell v. Nat'l Bd. Of Med. Exam'rs, 364 F.3d 79, 85 (2d Cir. 2004);Henrietta D. v. Bloomberg, 331 F.3d 261, 273 (2d Cir. 2003). In order to establish a prima facie case under the Acts, Falchenberg must show: (1) she is an individual with a disability within the meaning of the statute; (2) Defendants had notice of her disability; (3) she was otherwise qualified to
15 meet the program requirements; and (4) Defendants refused to *15 make reasonable accommodations. Hartnett

v. Fielding Graduate Inst., 400 F. Supp. 2d 570, 576 (S.D.N.Y. 2005) aff'd in part and rev'd in part, 198 Fed. Appx. 89 (2d Cir. 2006). The only element at issue on this motion is whether Defendants refused to make reasonable accommodations for Falchenberg's disability.

Disabled individuals are entitled to "reasonable accommodations" that permit them to have access to and take a
163 meaningful part in public services and public accommodations,Powell, 364 F.3d at 85, *163 but "a defendant need not make an accommodation at all if the requested accommodation `would fundamentally alter the nature of the service, program, or activity.'" Id. at 88 (quoting 28 C.F.R. § 35.130(b)(7)). Specifically as to testing, 28 C.F.R. § 36.309(b)(1)(i) requires that examinations be

> selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure). . . .

Where an examinee seeks an accommodation that would preclude accurate evaluation of abilities measured by
16 the test, *16 denial of the requested accommodation is not unlawful. Powell, 364 F.3d at 89; 28 C.F.R. § 36.309(b)(3) (accommodations need not be made if they would "fundamentally alter the measurement of the skills or knowledge the examination is intended to test"). See also Florida Bd. of Bar Exam'rs re S.G., 707 So.2d 323, 325 (Fl. 1998) ("A modification in the scoring of an exam is, by its very nature, a modification which `fundamentally alters the measurement of the skills or knowledge the examination is intended to test' . . . [and] is not required under the ADA." (quoting 28 C.F.R. § 36.309(b)(3)).

In Jacobson v. Tillman, 17 F. Supp. 2d 1018 (D. Minn. 1998), the plaintiff claimed the Minnesota Board of Teaching had discriminated against her on the basis of her disabilities, dyslexia and dyscalculia, by refusing to award her a license to teach after she failed the math requirement of the Minnesota Teacher Qualification Test numerous times. The District Court found that the plaintiff's request for waiver of the math portion of the test sought an "unreasonable modification that would fundamentally alter the nature of Minnesota's certification of qualified individuals . . . to teach the children of the State."Id. at 1026. The Court noted that the State, which must publicly validate the competency of teachers by issuing a license, is "entitled to demand and receive an
17 *17 objective demonstration of competence" and the plaintiff was "simply unable to objectively demonstrate math competence by passing a properly chosen and administered test." Id. at 1025.

Demonstration of the examinee's ability to spell, punctuate, capitalize and paragraph is an inherent part of the LAST. Falchenberg seeks an accommodation that would permit her to avoid having to demonstrate these skills. Falchenberg's request thus seeks a modification that would fundamentally alter the nature of the LAST.

> The relevant statutes . . . mandate reasonable accommodation of people with disabilities in order to put them on an even playing field with the non-disabled; it does not authorize a preference for disabled people generally. . . . The obligation to make reasonable accommodation . . . does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability.

Hartnett, 400 F. Supp. 2d at 576 (quotations and alterations omitted). All candidates for teacher certification who take the LAST in New York, disabled or non-disabled, are evaluated according to the same standards, including spelling, punctuation, capitalization, and paragraphing. Exempting Plaintiff from demonstrating the

same level of competency in these skills as all *164 other examinees would not "put [her] on an even playing field with the non-disabled." Id. *18

Falchenberg disputes the proposition that her requested accommodation would conflict with the goals of the LAST, but fails to rebut the evidence offered by Defendants that the LAST measures every candidate's spelling, punctuation, capitalization, and paragraphing. Contrary to Falchenberg's contentions, the LAST essay represents approximately 20% of the LAST score. The scoring scale for the essay appears in the Preparation Guide and each of the four possible scores for a candidate's essay expressly includes consideration of the candidate's "mechanical skills," the definition of which includes "misspellings of common words." If a skill is measured, it is fundamental to the examination at issue, and a requested accommodation that would waive measurement of the skill need not be granted as a matter of law. See 28 C.F.R. § 36.309(b)(1)(i).

Falchenberg seeks to rebut the evidence that the LAST evaluates examinees' spelling, punctuation, capitalization and paragraphing, contending that "not one witness had knowledge" as to whether these skills are fundamental to the LAST. Plaintiff's Memorandum of Law Opposition to Defendant's Motion for Summary Judgment ("Pl. Opp.") 4. She seeks to rely on the deposition testimony of NES's designated corporate deponent, who, in response to a question seeking information on "how NES *19 scores or treats spelling, punctuation, capitalization, or other mechanics of the writing process," stated that she had no such knowledge. Id. at 5. However, Plaintiff's 30(b)(6) Notice did not identify the particulars of scoring as a topic of the examination. "[I]f a party opts to employ the procedures of Rule 30(b)(6), F.R.Civ.P., to depose the representative of a corporation, that party must confine the examination to the matters stated `with reasonable particularity' which are contained in the Notice of Deposition." Paparelli v. Prudential Ins. Co. of Am., 108 F.R.D. 727, 730 (D. Mass. 1985) (quoting Fed.R.Civ.P. 30(b)(6)). Questions and answers exceeding the scope of the 30(b)(6) notice will not bind the corporation, but are merely treated as the answers of the individual deponent. See Detoy v. City County of San Francisco, 196 F.R.D. 362, 367 (N.D. Cal. 2000); accord King v. Pratt Whitney, 161 F.R.D. 475, 467 (S.D. Fla. 1995) aff'd, 213 F.3d 646 (11th Cir. 2000). As these courts noted, "if the [30(b)(6)] deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party's problem." Detoy, 196 F.R.D. at 367; King, 161 F.R.D. at 467.

Falchenberg also challenges the proposition that the ability to "dictate" or "memorize" the spelling of words is fundamental to the LAST. Disputing Defendants' assertion that *20 "[i]t is simply not possible to test Plaintiff's spelling skills without requiring that she spell," Pl. Opp. 9, Falchenberg contends that she should only have to demonstrate that she can use external spelling aids such as dictionaries or spell checkers.

Falchenberg never requested the use of a spell checker as an accommodation for the LAST. Her challenge to Defendants' prohibition of the use of a spell checker relies on the argument that "all of the other 49 States in the nation" allow a spell checker as an accommodation for teacher certification tests. Id. at 10. There is no evidence in the record that any of the tests alluded to by Falchenberg evaluate examinees on the basis of their spelling. Obviously, the use of a spell checker on an examination that does not test spelling would not fundamentally alter the measurement *165 of the skills or knowledge the examination is intended to test. Without evidence that such tests actually test spelling, Plaintiff's attempt to analogize them to the LAST fails.

Falchenberg has also challenged the proposition that the skills measured by the LAST are "justified by anything that a teacher actually does in the classroom." Pl. Opp. 12. It has already been held that "the certification examination is not *21 an issue in this case. There is no allegation that the certification test itself is discriminatory. . . ." July 1 Opinion, at 348-49.

Furthermore, Falchenberg herself has admitted in deposition that spelling, punctuation, capitalization, and paragraphing are important skills that students should learn, that teachers must be able to teach these fundamental skills, and that teachers must be able to demonstrate they possess, and are capable of teaching, these skills.

Finally, Plaintiff's challenge to the basis, objectives, or grading criteria of the LAST fails in light of the academic deference doctrine. The professional judgment of educators making academic decisions is afforded "great deference." Powell, 364 F.3d at 88; see also Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985). Where a program is designed to "achieve definite pedagogical objectives," this Court will not "substitute its judgment for that of experienced education administrators and professionals in assessing whether the program does in fact meet its pedagogical objectives." Maczaczyj v. New York, 956 F. Supp. 403, 409 (W.D.N.Y. 1997).

22 ## B. The Aiding and Abetting Claims Are Dismissed *22

Because aiding and abetting is a viable theory only where an underlying violation has been shown, see United States v. Reifler, 446 F.3d 65, 96 (2d Cir. 2006) (government must prove commission of underlying crime to sustain aiding and abetting conviction), Falchenberg's aiding and abetting claim is dismissed as well.

## C. NES is Not Subject to the Rehabilitation Act or Title II of the ADA

The Rehabilitation Act prohibits discrimination by any "program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794(a); see also Powell, 364 F.3d at 85 ("[T]he focus of the Rehabilitation Act is narrower than the ADA's in that its provisions apply only to programs receiving federal financial assistance."). Defendant NES does not receive federal financial assistance for the LAST or for any other purpose.

Title II of the ADA (Plaintiff's Second Claim for Relief) only applies to "public entities," defined as "(A) any state or local government; (B) any department, agency, special purpose district, or other instrumentality of a
23 State or States *23 or local government. . . ." 42 U.S.C. § 12131(1). NES is not a public entity as defined by the ADA.

## C. The State Defendants Are not Subject to Title III

Falchenberg, by her third claim for relief, asserts claims against State Defendants pursuant to Title III of the ADA. Am. Compl. ¶ 33. However, "ADA Title III expressly does not apply to public entities, including local governments."Bloom v. Bexar County, 130 F.3d 722, 726 (5th Cir. 1997). A claim under Title III of the ADA can only be asserted against a private entity engaged in the provision of public accommodations, such as an inn, hotel or restaurant. See 42 U.S.C. §§ 12181(7), 12182. Title III is not applicable to public entities. See Bloom,
166 130 F.3d at 726 *166 (dismissing ADA Title III claim asserted against public entity); DeBord v. Board of Educ. of the Ferguson-Florissant Sch. Dist., 126 F.3d 1102, 1106 (8th Cir. 1997) (same), cert. denied, 523 U.S. 1073 (1998); Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026, 1036 (6th Cir. 1995) (same).

## D. The Eleventh Amendment Bars the Title II and State Claims Against the
24 State Defendants *24

The Eleventh Amendment of the Constitution bars federal suits against a State absent the State's waiver of its sovereign immunity or an abrogation of that immunity by Congress. See Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989) (Eleventh Amendment bars suits against State "unless the State has waived its

immunity . . . or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity"). This bars applies to suits that seek money damages,see Edelman v. Jordan, 415 U.S. 651, 663 (1974) or injunctive relief, see Cory v. White, 457 U.S. 85, 90-91 (1982).

Eleventh Amendment immunity "extends . . . not only to a state, but also to entities considered arms of the state." McGinty v. New York, 251 F.3d 84, 95 (2d Cir. 2001) (quotation omitted). SED is an arm of the State of New York, and thus enjoys Eleventh Amendment immunity. See United States v. City of Yonkers, 96 F.3d 600, 619 (2d Cir. 1996) (dismissing § 1983 claims against SED on Eleventh Amendment grounds). Consequently, both the State of New York and SED are entitled to Eleventh Amendment immunity from Plaintiff's claims,
25 absent a waiver or abrogation thereof. *25

The State Defendants have moved to dismiss Falchenberg's Title II claim as barred by the Eleventh Amendment. In United States v. Georgia, 546 U.S. 151, 154 (2006), the Supreme Court directed that in evaluating the proper application of the Eleventh Amendment to Title II claims, the courts should determine, on a claim-by-claim basis:

> (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

546 U.S. at 159. This Court has already determined that the State Defendants are entitled to summary judgment on the question of whether their conduct violated Title II. That holding obviates the need for a full Eleventh Amendment analysis.

Falchenberg's fourth, fifth and sixth claims for relief assert claims against State Defendants under the NYSHRL and NYCHRL. Am. Compl. ¶¶ 35, 37, 40. However, there is no valid waiver or abrogation of immunity with respect to these claims. See Tuckett v. N.Y. State Dep't of Taxation and Fin., No. 99 Civ. 0679, 2000 WL
26 1028662, at *2 (S.D.N.Y. Jul. 26, 2000) ("[N]othing in the text of the [NYS]HRL constitutes a *26 waiver of immunity or consent to be sued."); Leiman v. State of New York, 2000 WL 1364365, at *7 (S.D.N.Y. Sept. 21, 2000) ("[E]ven if it were possible for New York City to waive New York State's immunity, plaintiff could not demonstrate that the Administrative Code contains the explicit language needed to do so."), aff'd, 2001 WL
167 363520 (2d Cir. Apr. 11, 2001). *167

## E. Falchenberg's Motion to Amend Is Denied

After being served with a responsive pleading, a party may amend its pleading "only with the opposing party's written consent or the court's leave." Fed.R.Civ.P. 15(a)(2). Leave to amend a complaint pursuant to Rule 15 should not be denied unless there is evidence of undue delay, futility, bad faith, or undue prejudice to the non-movant. See Foman v. Davis, 371 U.S. 178, 182 (1962); Milanese v. Rust-Oleum Corp, 244 F.3d 104, 110 (2d Cir. 2001).

Where a cross-motion to amend the complaint is brought in response to a motion for summary judgment,

> even if the amended complaint would state a valid claim on its face, the court may deny the amendment as futile when the evidence in support of the plaintiff's proposed new claim creates no triable issue of fact and the defendant would be entitled to judgment as a matter of law under Fed.R.Civ.P. 56(c).

27 *27 Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001);see also Azurite Corp. Ltd. v. Amster Co., 844 F. Supp. 929, 939 (S.D.N.Y. 1994), aff'd 52 F.3d 15 (2d Cir. 1995).

The claims that Falchenberg would add against Commissioner Mills rely on the same factual and legal predicates as her claims against the Defendants, upon which they are entitled to summary judgment. Falchenberg's proposed amendments of the Complaint thus do not create triable issues of fact and her motion to amend is denied as futile.

## Conclusion

For the foregoing reasons, Defendants' Motion for Summary Judgment is granted and Falchenberg's motions are denied.

Enter judgment on notice.

It is so ordered.

No. 04 Civ. 7598
United States District Court, S.D. New York

# Falchenberg v. New York State Department of Education

567 F. Supp. 2d 513 (S.D.N.Y. 2008)
Decided Jun 26, 2008

No. 04 Civ. 7598.

514 June 26, 2008. *514

Nathaniel B. Smith, Esq., Kristian Karl Larsen, Esq., New York, NY, for Plaintiff.

Rogers Hardin LLP, by: Phillip S. McKinney, Esq., Atlanta, GA, Morgan, Lewis Bockius, LLP, by: Debra S. Morway, Esq., Melissa C. Rodriguez, New York, NY, for Defendant National Evaluation Systems, Inc.

Andrew M. Cuomo, Attorney General of the State of New York, by: Antoinette W. Blanchette, Assistant Attorney General, New York, NY, for Defendants State of New York and New York State Education Department (slhla New York State Department of Education).

515 *515

## OPINION

SWEET, District Judge.Page 1 Page 2

## I. INTRODUCTION

Defendant National Evaluation Systems, Inc., a business of NCS Pearson, Inc. ("NES"), the State of New York (the "State") and New York State Education Department ("SED") (s/h/a New York State Department of Education) (State of New York and SED, collectively, "State Defendants") (NES and State Defendants, collectively, "Defendants") have moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure against plaintiff Marsha Falchenberg ("Falchenberg" or the "Plaintiff").

Falchenberg has cross-moved under the same rule to dismiss the fifth through twelfth affirmative defense of NES and the fifth, seventh and eighth defense of the State and SED. Falchenberg has also moved to amend her complaint to add a state official as an individual defendant. For the reasons set forth below, the Defendants' motion is granted and Falchenberg's motions are denied.

3 In this hard fought and well-litigated action, Falchenberg, disabled by dyslexia, has sought to establish that *3 Defendants have denied her accommodations which might have permitted her to continue as a New York City public school teacher. Sad to say, her efforts, like those of many test takers, have been defeated by the requirement to spell and punctuate.

## II. PRIOR PROCEEDINGS

516 Falchenberg filed a complaint (the "Original Complaint") against the New *516 York City Department of Education ("DOE"), the City of New York (the "City"), and Defendants on September 24, 2004, alleging that all the named entities discriminated against her in violation of the Americans with Disabilities Act, 42 U.S.C. 12101 et seq. ("ADA"), the Rehabilitation Act, 29 U.S.C. 794 ("Rehab Act"), the New York State Human Rights Law, New York Executive Law § 296 ("SHRL"), and the New York City Human Rights Law, New York Administrative Code § 8-107 ("CHRL"), or were liable for aiding and abetting a violation of the aforementioned statutes.

The DOE and the City (collectively, the "City Defendants") moved to dismiss the Original Complaint against them, and by opinion of July 1, 2005, Falchenberg v. New York City Dep't of Educ., 375 F. Supp. 2d 344
4 (S.D.N.Y. 2005) (the *4 "July 1 Opinion"), the motion was granted and all claims against the City Defendants were dismissed.

In her amended complaint (the "Amended Complaint"), filed on July 26, 2005, Falchenberg reasserted against the remaining Defendants all but one of the claims brought in the Original Complaint. The single claim that was not included in the Amended Complaint was an employment discrimination claim pursuant to Title I of the ADA.

Discovery has been completed. The cross-motions for summary judgment were heard and marked fully submitted on December 5, 2007, and the motion to amend on January 16, 2008.

## III. FACTS

The facts are set forth in the parties' Rule 56.1 Statements, the Defendants' Counterstatement, attached affidavits and memoranda of law, and are not in dispute except as noted below.

Falchenberg was born and raised in New York City and had undiagnosed reading problems in elementary
5 school and high school. *5

In 1986, 12 years after graduating from high school, Falchenberg started attending college classes at the University of Oslo in Norway. In 1992, she was diagnosed as dyslexic. In 1998, after taking college courses for over 10 years, Falchenberg graduated from the University of Oslo with a B.A. in English and History. After graduating, she continued her studies with post-graduate courses for one year in Education.

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SED is a statutory agency of the State of New York created pursuant to New York Education Law § 101 charged with the general management and supervision of all public schools and all of the educational work in the State of New York, including "the examination and certification of teachers employed in all public schools
6 of the state." N.Y. Educ. Law § 3004(1). *6

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Under a contract with SED, NES developed, administers and scores the New York State Teacher Certification Examinations ("NYSTCE"), which include approximately 58 different tests. The Liberal Arts and Sciences Test ("LAST") is one of those tests. Candidates for public school teacher certification in the State of New York are required by New York law to pass the LAST (among other examinations and certification requirements) in order to become certified teachers. The explicit purpose of the NYSTCE tests (including the LAST) is to help identify for certification those candidates who have demonstrated the appropriate level of knowledge and skills that New York educators have determined to be important for performing the responsibilities of a teacher in New York State public schools.

The LAST is a multi-faceted examination designed to test primarily in five areas of knowledge and skills: (1)
7 scientific, mathematical, and technological processes; (2) *7 historical and social scientific awareness; (3) artistic expression and the humanities; (4) communication and research skills; and (5) written analysis and expression. Each test form for the LAST contains approximately 80 multiple-choice test questions and one constructed response (written) assignment.

The fifth part of the LAST, entitled "Written Analysis and Expression," requires the examinee to "prepare an organized, developed composition in edited American English in response to instructions regarding audience, purpose, and content." Affidavit of Melissa C. Rodriguez ("Rodriguez Aff."), Ex. 6 at 15. The written assignment is expected to be about 300-600 words in length, and represents approximately 20% of the test score on LAST.

The examinee's response to the written assignment is evaluated on the basis of several criteria, among them the following:

> STRUCTURE AND CONVENTIONS: Express oneself clearly and without distractions caused by inattention to sentence and paragraph structure, choice and use of words, and mechanics (i.e., spelling, punctuation, capitalization).

8 Rodriguez Aff., Ex. 6 at 58. *8

The examinee's response is required to conform to the conventions of edited American English. It is required to be the examinee's original work, written in his or her own words, and not copied or paraphrased from some other work. The examinee is directed to write about the assigned topic, and to use multiple paragraphs.

The LAST written assignment is evaluated and scored on a 4-point scale, with 4 being the highest score and 1 being the lowest. Each of the four possible scores is based on consideration of a number of factors, including spelling, punctuation, capitalization, and paragraphing. For example, a "4" response is described in the LAST scoring scale in pertinent part as follows:

> The response is free of distracting flaws in sentence structure (e.g., subject-verb disagreements, run-on sentences) and paragraph structure (e.g., lack of paragraph breaks to coincide with thought transitions), shows proficient use and choice of words, and avoids disruptive mechanical errors (e.g., inappropriate capitalization, misspellings of common words).

Rodriguez Aff., Ex. 6 at 69.

Proper construction of paragraphs and sentences, proper use of grammar and punctuation, spelling,
518 capitalization and reading comprehension are set forth as scoring criteria in *9 the LAST Preparation *518 Guide and Registration Bulletins as well as other publicly available documents on SED's and NES's respective websites.

On May 6, 2002, Falchenberg registered with NES to take the LAST which was scheduled to be given on July 20, 2002. She submitted an "alternative arrangement request" form to NES, identifying herself as dyslexic and asking for a "dictionary, extra time, frequent breaks, [and an] oral exam." Five weeks later, NES denied Falchenberg's requests.

NES told Falchenberg that a July 8, 1998 report and evaluation of her dyslexia by the Learning Disabilities Unit of the State University of New York's College of Optometry (the "SUNY Report") was too old. According to Falchenberg, the SUNY Report was timely.

In October and December 2002, Falchenberg underwent a complete neuropsychological evaluation at the Derner Institute of Advanced Psychological Studies at Adelphi University in New York. The following month, on January 31, 2003, the Derner Institute issued its report (the "Derner Report") confirming the SUNY Report's
10 diagnosis of dyslexia with a reading disability, and recommending oral administration of tests. On March 8, *10
2003, Falchenberg submitted the Derner Report to NES for the next administration of the LAST, scheduled for May 10, 2003. Falchenberg renewed her prior request, seeking additional accommodations including added time and frequent breaks, and submitted a follow-up letter by the doctor who prepared the Derner Report.

NES rejected Falchenberg's request for accommodation, stating that a dictionary would "fundamentally alter the measurement of the skills the examination is intended to test." Declaration of Nathaniel B. Smith in Support of Plaintiff's Cross-Motion for Summary Judgment, Ex. 3. A "reader" (not an oral examination) was also rejected because the "[d]ocumentation submitted does not support the requested accommodation." Id.

The NES outside consultant, Dr. Tom E.C. Smith ("Dr. Smith") testified that the SUNY Report supported Falchenberg's request for a reader and that if he had seen the SUNY Report at the time his recommendation to deny the reader would not have been the same.

Falchenberg did not take the May 10, 2003 administration of the LAST. Falchenberg registered for the next
11 administration date, July 19, 2003, and appealed the denial of *11 her accommodation requests. According to Falchenberg, the personnel of NES and SED who denied her appeal were unqualified. Upon a request for reconsideration, NES granted Falchenberg a reader and extra time but again denied her request for an oral examination.

On August 16, 2003, Falchenberg again registered for the next administration of the LAST on October 18, 2003 and specifically requested a reader, a scribe, extra time and an oral examination.

Falchenberg also sought a temporary exemption or waiver from DOE, NES or Falchenberg's employer, SED, from the requirement that Falchenberg pass the LAST in order to keep her job. Those efforts failed, and on September 2, 2003, the SED terminated Falchenberg because she had not passed the LAST.

On September 2, 2003, the transcriber request was approved. On September 16, 2003, NES notified Falchenberg that she would be provided with the following accommodations:

(1) a test administrator would read each question to her;

(2) a test administrator would transcribe her responses to the written portion of the LAST, but Plaintiff
12 *519 would be responsible for indicating *12 spelling, punctuation, capitalization, and paragraphing;

(3) Plaintiff would be allowed to bring a lunch and take breaks as needed;

(4) Plaintiff would be provided with a separate room; and

(5) Plaintiff would be allowed a full testing day to complete the test (a total of 9 hours, rather than the standard 4 hour session).

Rodriguez Aff., Ex. 7.

Falchenberg did not appear for, and did not take, the LAST on October 18, 2003, nor has she sought to take the test since that date. She contends that the Defendants' accommodations, which require that she "dictate spelling and grammar," do not amount to a reasonable accommodation of her disability.

## IV. SUMMARY JUDGMENT STANDARD

Summary judgment is granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); SCS Commc'ns, Inc. v. Herrick Co., 360 F.3d 329, 338 (2d Cir. 2004). The courts do not try issues of fact on a
13 motion for summary *13 judgment, but, rather, determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

"The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish [its] right to judgment as a matter of law." Rodriguez v. City of New York, 72 F.3d 1051, 1060-61 (2d Cir. 1995). Summary judgment is appropriate where the moving party has shown that "little or no evidence may be found in support of the nonmoving party's case. When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." Gallo v. Prudential Resid. Servs., L.P., 22 F.3d 1219, 1223-24 (2d Cir. 1994) (citations omitted).

In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,
14 475 U.S. 574, 587 (1986);Gibbs-Alfano v. Burton, 281 F.3d 12, 18 (2d Cir. 2002). *14 However, "the non-moving party may not rely simply on conclusory allegations or speculation to avoid summary judgment, but instead must offer evidence to show that its version of the events is not wholly fanciful." Morris v. Lindau, 196 F.3d 102, 109 (2d Cir. 1999) (quotation omitted).

## V. DISCUSSION A. Discrimination on Basis of Disability Has Not Been Established

The standards adopted by Titles II and III of the ADA and the Rehabilitation Act are, in most cases, the same, and the courts routinely consider the merits of such claims together.See Powell v. Nat'l Bd. Of Med. Exam'rs, 364 F.3d 79, 85 (2d Cir. 2004);Henrietta D. v. Bloomberg, 331 F.3d 261, 273 (2d Cir. 2003). In order to establish a prima facie case under the Acts, Falchenberg must show: (1) she is an individual with a disability
520 within the meaning of the statute; (2) Defendants had notice of her disability; (3) she was *520 otherwise qualified to meet the program requirements; and (4) Defendants refused to make reasonable accommodations.Hartnett v. Fielding Graduate Inst., 400 F. Supp. 2d 570, 576 (S.D.N.Y. 2005) aff'd in part and
15 rev'd in part, 198 Fed. Appx. 89 (2d Cir. 2006). The only *15 element at issue on this motion is whether Defendants refused to make reasonable accommodations for Falchenberg's disability.

Disabled individuals are entitled to "reasonable accommodations" that permit them to have access to and take a meaningful part in public services and public accommodations,Powell, 364 F.3d at 85, but "a defendant need not make an accommodation at all if the requested accommodation `would fundamentally alter the nature of the

service, program, or activity.'" Id. at 88 (quoting 28 C.F.R. § 35.130(b)(7)). Specifically as to testing, 28 C.F.R. § 36.309(b)(1)(i) requires that examinations be

> selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure). . . .

Where an examinee seeks an accommodation that would preclude accurate evaluation of abilities measured by the test, denial of the requested accommodation is not unlawful. Powell, 364 F.3d at 89; 28 C.F.R. § 36.309(b)(3) (accommodations need not be made if they would "fundamentally alter the *16 measurement of the skills or knowledge the examination is intended to test"). See also Florida Bd. of Bar Exam'rs re S.G., 707 So.2d 323, 325 (Fl. 1998) ("A modification in the scoring of an exam is, by its very nature, a modification which `fundamentally alters the measurement of the skills or knowledge the examination is intended to test' . . . [and] is not required under the ADA." (quoting 28 C.F.R. § 36.309(b)(3)).

In Jacobson v. Tillman, 17 F. Supp. 2d 1018 (D. Minn. 1998), the plaintiff claimed the Minnesota Board of Teaching had discriminated against her on the basis of her disabilities, dyslexia and dyscalculia, by refusing to award her a license to teach after she failed the math requirement of the Minnesota Teacher Qualification Test numerous times. The District Court found that the plaintiff's request for waiver of the math portion of the test sought an "unreasonable modification that would fundamentally alter the nature of Minnesota's certification of qualified individuals . . . to teach the children of the State."Id. at 1026. The Court noted that the State, which must publicly validate the competency of teachers by issuing a license, is "entitled to demand and receive an objective demonstration of competence" and the plaintiff was "simply unable to objectively demonstrate math competence by passing a properly chosen and administered test." Id. at 1025. *17

Demonstration of the examinee's ability to spell, punctuate, capitalize and paragraph is an inherent part of the LAST. Falchenberg seeks an accommodation that would permit her to avoid having to demonstrate these skills. Falchenberg's request thus seeks a modification that would fundamentally alter the nature of the LAST.

> The relevant statutes . . . mandate reasonable accommodation of people with disabilities in order to put them on an even playing field with the non-disabled; it does not authorize a preference for *521 disabled people generally. . . . The obligation to make reasonable accommodation . . . does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability.

Hartnett, 400 F. Supp. 2d at 576 (quotations and alterations omitted). All candidates for teacher certification who take the LAST in New York, disabled or non-disabled, are evaluated according to the same standards, including spelling, punctuation, capitalization, and paragraphing. Exempting Plaintiff from demonstrating the same level of competency in these skills as all other examinees would not "put [her] on an even playing field with the non-disabled." Id.

Falchenberg disputes the proposition that her requested accommodation would conflict with the goals of the LAST, but fails to rebut the evidence offered by Defendants that *18 the LAST measures every candidate's spelling, punctuation, capitalization, and paragraphing. Contrary to Falchenberg's contentions, the LAST essay represents approximately 20% of the LAST score. The scoring scale for the essay appears in the Preparation Guide and each of the four possible scores for a candidate's essay expressly includes consideration of the

candidate's "mechanical skills," the definition of which includes "misspellings of common words." If a skill is measured, it is fundamental to the examination at issue, and a requested accommodation that would waive measurement of the skill need not be granted as a matter of law. See 28 C.F.R. § 36.309(b)(1)(i).

Falchenberg seeks to rebut the evidence that the LAST evaluates examinees' spelling, punctuation, capitalization and paragraphing, contending that "not one witness had knowledge" as to whether these skills are fundamental to the LAST. Plaintiff's Memorandum of Law Opposition to Defendant's Motion for Summary Judgment ("Pl. Opp.") 4. She seeks to rely on the deposition testimony of NES's designated corporate deponent, who, in response to a question seeking information on "how NES scores or treats spelling, punctuation, capitalization, or other mechanics of the writing process," stated that she had no such knowledge.Id. at 5.
19 However, Plaintiff's 30(b)(6) Notice did *19 not identify the particulars of scoring as a topic of the examination. "[I]f a party opts to employ the procedures of Rule 30(b)(6), F.R.Civ.P., to depose the representative of a corporation, that party must confine the examination to the matters stated `with reasonable particularity' which are contained in the Notice of Deposition." Paparelli v. Prudential Ins. Co. of Am., 108 F.R.D. 727, 730 (D. Mass. 1985) (quoting Fed.R.Civ.P. 30(b)(6)). Questions and answers exceeding the scope of the 30(b)(6) notice will not bind the corporation, but are merely treated as the answers of the individual deponent. See Detoy v. City County of San Francisco, 196 F.R.D. 362, 367 (N.D. Cal. 2000); accord King v. Pratt Whitney, 161 F.R.D. 475, 467 (S.D. Fla. 1995) aff'd, 213 F.3d 646 (11th Cir. 2000). As these courts noted, "if the [30(b)(6)] deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party's problem." Detoy, 196 F.R.D. at 367; King, 161 F.R.D. at 467.

Falchenberg also challenges the proposition that the ability to "dictate" or "memorize" the spelling of words is fundamental to the LAST. Disputing Defendants' assertion that "[i]t is simply not possible to test Plaintiff's spelling skills without requiring that she spell," Pl. Opp. 9, Falchenberg contends that she should only have to
522 demonstrate that she can *20 use external *522 spelling aids such as dictionaries or spell checkers.

Falchenberg never requested the use of a spell checker as an accommodation for the LAST. Her challenge to Defendants' prohibition of the use of a spell checker relies on the argument that "all of the other 49 States in the nation" allow a spell checker as an accommodation for teacher certification tests. Id. at 10. There is no evidence in the record that any of the tests alluded to by Falchenberg evaluate examinees on the basis of their spelling. Obviously, the use of a spell checker on an examination that does not test spelling would not fundamentally alter the measurement of the skills or knowledge the examination is intended to test. Without evidence that such tests actually test spelling, Plaintiff's attempt to analogize them to the LAST fails.

Falchenberg has also challenged the proposition that the skills measured by the LAST are "justified by anything that a teacher actually does in the classroom." Pl. Opp. 12. It has already been held that "the certification examination is not an issue in this case. There is no allegation that the certification test itself is
21 discriminatory. . . ." July 1 Opinion, at 348-49. *21

Furthermore, Falchenberg herself has admitted in deposition that spelling, punctuation, capitalization, and paragraphing are important skills that students should learn, that teachers must be able to teach these fundamental skills, and that teachers must be able to demonstrate they possess, and are capable of teaching, these skills.

Finally, Plaintiff's challenge to the basis, objectives, or grading criteria of the LAST fails in light of the academic deference doctrine. The professional judgment of educators making academic decisions is afforded "great deference." Powell, 364 F.3d at 88; see also Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985). Where a program is designed to "achieve definite pedagogical objectives," this Court will not

"substitute its judgment for that of experienced education administrators and professionals in assessing whether the program does in fact meet its pedagogical objectives." Maczaczyj v. New York, 956 F. Supp. 403, 409 (W.D.N.Y. 1997).

## B. The Aiding and Abetting Claims Are Dismissed

Because aiding and abetting is a viable theory only where an underlying violation has been shown, see United
22 States *22 v. Reifler, 446 F.3d 65, 96 (2d Cir. 2006) (government must prove commission of underlying crime to sustain aiding and abetting conviction), Falchenberg's aiding and abetting claim is dismissed as well.

## C. NES is Not Subject to the Rehabilitation Act or Title II of the ADA

The Rehabilitation Act prohibits discrimination by any "program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794(a); see also Powell, 364 F.3d at 85 ("[T]he focus of the Rehabilitation Act is narrower than the ADA's in that its provisions apply only to programs receiving federal financial assistance."). Defendant NES does not receive federal financial assistance for the LAST or for any other purpose.

Title II of the ADA (Plaintiff's Second Claim for Relief) only applies to "public entities," defined as "(A) any state or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government. . . ." 42 U.S.C. § 12131(1). NES is not a public entity as defined by the
52… ADA. *52323

## C. The State Defendants Are not Subject to Title III

Falchenberg, by her third claim for relief, asserts claims against State Defendants pursuant to Title III of the ADA. Am. Compl. ¶ 33. However, "ADA Title III expressly does not apply to public entities, including local governments." Bloom v. Bexar County, 130 F.3d 722, 726 (5th Cir. 1997). A claim under Title III of the ADA can only be asserted against a private entity engaged in the provision of public accommodations, such as an inn, hotel or restaurant. See 42 U.S.C. §§ 12181(7), 12182. Title III is not applicable to public entities. See Bloom, 130 F.3d at 726 (dismissing ADA Title III claim asserted against public entity); DeBord v. Board of Educ. of the Ferguson-Florissant Sch. Dist., 126 F.3d 1102, 1106 (8th Cir. 1997) (same), cert. denied, 523 U.S. 1073 (1998); Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026, 1036 (6th Cir. 1995) (same).

## D. The Eleventh Amendment Bars the Title II and State Claims Against the State Defendants

The Eleventh Amendment of the Constitution bars federal suits against a State absent the State's waiver of its
24 sovereign immunity or an abrogation of that immunity by *24 Congress. See Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989) (Eleventh Amendment bars suits against State "unless the State has waived its immunity . . . or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity"). This bars applies to suits that seek money damages, see Edelman v. Jordan, 415 U.S. 651, 663 (1974) or injunctive relief, see Cory v. White, 457 U.S. 85, 90-91 (1982).

Eleventh Amendment immunity "extends . . . not only to a state, but also to entities considered arms of the state." McGinty v. New York, 251 F.3d 84, 95 (2d Cir. 2001) (quotation omitted). SED is an arm of the State of New York, and thus enjoys Eleventh Amendment immunity. See United States v. City of Yonkers, 96 F.3d 600, 619 (2d Cir. 1996) (dismissing § 1983 claims against SED on Eleventh Amendment grounds). Consequently, both the State of New York and SED are entitled to Eleventh Amendment immunity from Plaintiff's claims, absent a waiver or abrogation thereof.

The State Defendants have moved to dismiss Falchenberg's Title II claim as barred by the Eleventh Amendment. In United States v. Georgia, 546 U.S. 151, 154 (2006), the Supreme Court directed that in
25 evaluating the proper *25 application of the Eleventh Amendment to Title II claims, the courts should determine, on a claim-by-claim basis:

> (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

546 U.S. at 159. This Court has already determined that the State Defendants are entitled to summary judgment on the question of whether their conduct violated Title II. That holding obviates the need for a full Eleventh Amendment analysis.

524 Falchenberg's fourth, fifth and sixth claims for relief assert claims against State *524 Defendants under the NYSHRL and NYCHRL. Am. Compl. ¶¶ 35, 37, 40. However, there is no valid waiver or abrogation of immunity with respect to these claims. See Tuckett v. N.Y. State Dep't of Taxation and Fin., No. 99 Civ. 0679, 2000 WL 1028662, at *2 (S.D.N.Y. Jul. 26, 2000) ("[N]othing in the text of the [NYS]HRL constitutes a waiver of immunity or consent to be sued."); Leiman v. State of New York, 2000 WL 1364365, at *7 (S.D.N.Y. Sept. 21, 2000) ("[E]ven if it were possible for New York City to waive New York State's immunity, plaintiff
26 could not demonstrate that the *26 Administrative Code contains the explicit language needed to do so."), aff'd, 2001 WL 363520 (2d Cir. Apr. 11, 2001).

## E. Falchenberg's Motion to Amend Is Denied

After being served with a responsive pleading, a party may amend its pleading "only with the opposing party's written consent or the court's leave." Fed.R.Civ.P. 15(a)(2). Leave to amend a complaint pursuant to Rule 15 should not be denied unless there is evidence of undue delay, futility, bad faith, or undue prejudice to the non-movant. See Foman v. Davis, 371 U.S. 178, 182 (1962); Milanese v. Rust-Oleum Corp, 244 F.3d 104, 110 (2d Cir. 2001).

Where a cross-motion to amend the complaint is brought in response to a motion for summary judgment,

> even if the amended complaint would state a valid claim on its face, the court may deny the amendment as futile when the evidence in support of the plaintiff's proposed new claim creates no triable issue of fact and the defendant would be entitled to judgment as a matter of law under Fed.R.Civ.P. 56(c).

Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001);see also Azurite Corp. Ltd. v. Amster Co., 844
27 F. Supp. 929, 939 (S.D.N.Y. 1994), aff'd 52 F.3d 15 (2d Cir. 1995). *27

The claims that Falchenberg would add against Commissioner Mills rely on the same factual and legal predicates as her claims against the Defendants, upon which they are entitled to summary judgment. Falchenberg's proposed amendments of the Complaint thus do not create triable issues of fact and her motion to amend is denied as futile.

## Conclusion

For the foregoing reasons, Defendants' Motion for Summary Judgment is granted and Falchenberg's motions are denied.

Enter judgment on notice.

It is so ordered.

1 *1

No. 2417
Appellate Division of the Supreme Court of New York, First Department

# Jones v. Saint

847 N.Y.S.2d 584 (N.Y. App. Div. 2007) · 46 A.D.3d 467 · 2007 N.Y. Slip Op. 10470
Decided Dec 27, 2007

No. 2417.

December 27, 2007.

Order, Supreme Court, New York County (Rosalyn Richter, J.), entered September 26, 2006, which, in an action for employment discrimination due to a disability, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Nathaniel B. Smith, New York, for appellant.

Seyfarth Shaw, LLP, New York (James R. Cho of counsel), for respondents.

Before: Mazzarelli, J.P., Andrias, Buckley, Sweeny and McGuire, JJ.

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Plaintiff, the sole, full-time corporate recruiter for defendant college, was terminated after injuries she sustained in a car accident rendered her unable to make recruiting trips to Staten Island. Dismissal of the complaint, which alleges violations of the New York State Human Rights Law ( *see* Executive Law § 292; § 296 [1] [a]), and the New York City Human Rights Law (see Administrative Code of City of NY § 8-107 [1] [a]), was appropriate where the record evidence established that recruiting trips to Staten Island were an essential function of plaintiffs position (see *Simeone v County of Suffolk*, 36 AD3d 890; *Pimentel v Citibank, N.A.*, 29 AD3d 141, *lv denied* 7 NY3d 707), and plaintiffs proposed accommodation of assigning Staten Island recruiting trips to other employees was unreasonable ( *seePembroke v New York State Off. of Ct. Admin.*, 306 AD2d 185).

We have considered plaintiffs remaining contentions, including that defendants' motion for terminating her employment was based on animus, and find them unavailing.

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No. 04-1003-cv
United States Court of Appeals, Second Circuit

# Guilbert v. Gardner

480 F.3d 140 (2d Cir. 2007)
Decided Mar 7, 2007

No. 04-1003-cv.

Argued: February 3, 2005.

Decided: March 7, 2007.

141 Appeal from the United States District Court for the Southern District of New York, Jones, J. *141

Nathaniel B. Smith, New York, NY, for Plaintiff-Appellant, Charles B. Gardner.

Becker Ross Stone DeStefano Klein, LLP (Howard Justvig, of counsel) for Defendants-Appellees, Charles B. Gardner, III, Douglas Gardner and Marianne Gardner.

Before WALKER, HALL and GIBSON,– Circuit Judges.

– The Honorable John R. Gibson, United States Court of Appeals for the Eighth Circuit, sitting by designation.

143 *143

HALL, Circuit Judge.

Plaintiff-Appellant Thomas R. Guilbert ("plaintiff) appeals from an order of the district court (Jones, *J.*) granting the summary judgment motion of Defendants-Appellees Charles Gardner III, Douglas Gardner, and Marianne Gardner ("moving defendants") on plaintiffs claims under the Employee Retirement Income Security Act ("ERISA" or "the Act"), 29 U.S.C.A. §§ 1001- 1461 (West 1999 Supp. 2004) as well as his claims for breach of contract, promissory estoppel, and fraud. Plaintiff also appeals that portion of the district court's order denying his motion for default judgment against Defendants Charles Gardner Jr., Charles B. Gardner Associates, Inc., and Charles B. Gardner Associates ("non-moving defendants") and dismissing plaintiffs remaining state law claims without prejudice.

For the reasons set forth below, we affirm in part, vacate in part, and remand.

## BACKGROUND

For purposes of this appeal from summary judgment, we accept as true the following facts and allegations. In December 1991, Charles Gardner Jr. ("Charles Jr.") and his sons Douglas Gardner ("Douglas") and Charles Gardner III ("Charles III")[1] approached plaintiff, a former co-worker and family friend, about joining their new print brokerage business. Plaintiff later met with defendants to discuss the details of plaintiffs prospective employment. Plaintiff informed defendants that he had accumulated approximately $39,000 in pension funds at

his present job. Charles Jr. allegedly told plaintiff that if he joined the company, in addition to his salary, defendants would establish a pension fund for him with an initial deposit of $39,000 and subsequent annual deposits of $10,000.

[1] For convenience, Charles Jr., Douglas, and Charles III will be referred to collectively as "defendants."

Plaintiff accepted the terms of the agreement ("the employment agreement") and began work in January of 1992. He worked for the company until it collapsed in 2000. In early 1992, plaintiff alleges that Charles Jr. wrote down the terms of the pension on a legal writing pad. This document has not been produced in discovery. In the summer of 1992, and on a number of occasions thereafter, plaintiff requested documentation of his pension, but none was provided. Plaintiff alleges that defendants orally assured him on numerous occasions that they had "taken care of his pension benefits.

On August 24, 2000, August 31, 2000, and September 7, 2000, defendants tendered three checks, each in the
144 amount of $1,178.98, to plaintiff as part of his salary. *144 In addition, on August 28, 2000, defendants tendered a check for $9,131.00 as reimbursement for plaintiffs car lease. Each of these checks bounced. In September 2000, it became clear to plaintiff that defendants were not going to pay his past salary and had not established pension benefits for him.

Plaintiff brought this action in August of 2002. Plaintiffs amended complaint set forth nine causes of action. Plaintiffs first cause of action alleged that defendants were liable to him for his pension benefits under ERISA, 29 U.S.C.A. § 1132(a). The second cause of action alleged that defendants failed to comply with plaintiffs request for information pursuant to § 1132(c)(1) and failed to meet the notice requirements of § 1132(c)(3). As a result, plaintiff claimed that defendants were liable to him in such an amount as the court determined, up to $100 per day beginning on the date of each violation. Plaintiffs third, fourth, and fifth causes of action alleged breach of contract, promissory estoppel and fraud respectively. Pursuant to New York Labor Law § 198, plaintiffs sixth claim sought $3,536.94 in unpaid wages, $9,131 as reimbursement for a loan payment, as well as unpaid pension benefits. The seventh and eight causes of action alleged, *inter alia*, that Charles, Jr. transferred funds to Charles III, Douglas, and Marianne Gardner in order to defraud and defeat creditors' claims and hide defendants' assets. Plaintiff urged that these funds be set aside and held for seizure by plaintiff in satisfaction of his claims pursuant to New York Debtor and Creditor Law §§ 273-a and 276. The ninth cause of action set forth a claim for wages, expenses, and pension benefits under New York Business Corporation Law § 630.

Moving defendants filed for summary judgment. Plaintiff sought default judgment against non-moving defendants due to those defendants' failure to appear. In an opinion entered February 9, 2004, the district court granted summary judgment to all defendants. First, the district court rejected Plaintiffs ERISA claims. The court found there were "no surrounding circumstances other than defendants' alleged oral assurances from which a reasonable person could ascertain that defendants intended to set up the pension fund for Plaintiff." The district court held that oral assurances of a plan's existence are unenforceable and that therefore defendants had not "established or maintained" a pension program within the meaning of 29 U.S.C.A. § 1003(a).

The district court next dismissed plaintiffs breach of contract claim as untimely. Because of its determination that no ERISA plan existed, the court applied New York law to the breach of contract claim and held that the statute of limitations was six years pursuant to N.Y. C.P.L.R. § 213(2). The court also held that under New York law, when a contract does not specify a time for performance, the law implies a reasonable time for

performance. The district court found that a reasonable time for performance would have been within a year of plaintiffs January 1992 start date and that therefore defendants breached and the cause of action accrued in January of 1993.

The court rejected plaintiff's argument that the cause of action accrued in September 2000 when Plaintiff became aware defendants were not going to provide him pension benefits. The court held that Defendants' alleged assurances about the pension were insufficient to restart the statute of limitations because, under New York law, a promise to perform a previously breached contract must be in writing in order to start the statute of limitations running anew.

145 The district court next granted summary judgment on the promissory estoppel *145 claim. The court determined' that under New York law promissory estoppel is not a valid cause of action in the employment context. The district court further granted summary judgment on the fraud claim. The court held that under N.Y. C.P.L.R. § 203(f), a claim for fraud must be commenced within six years from the commission of the fraud or within two years from the date that the fraud was discovered, or could have reasonably been discovered, whichever is longer. The court concluded that Plaintiff reasonably could have discovered the alleged fraud before 1999 and his action was therefore time-barred. In a footnote, the district court rejected Plaintiffs assertion that the statute of limitations for the breach of contract and fraud claims should be equitably tolled.

Finally, the district court held that there was no legally cognizable claim under which the non-moving defendants could be held liable and therefore granted summary judgment to nonmoving defendants *sua sponte.* The court dismissed plaintiff's motion for default judgment against non-moving defendants ass moot. The district court held that plaintiff's remaining state law claims failed to meet the amount in controversy requirement of 28 U.S.C.A. § 1332 and declined to exercise supplemental jurisdiction.[2] The court therefore dismissed those claims without prejudice. Plaintiff timely appealed.

[2] The district court failed to address plaintiff's ninth claim in the February 11, 2004 order. In a follow-up order entered February 20, 2004, the district court declined to exercise supplemental jurisdiction for failure to meet the amount in controversy requirement.

## STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo. Harlen Assoc, v. Incorp. Vill. of Mineola*, 273 F.3d 494, 498-499 (2d Cir.2001). Summary judgment must be granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A "genuine issue" exists for summary judgment purposes where the evidence, viewed in the light most favorable to the nonmoving party, is such that a reasonable jury could decide in that party's favor. *Harlen Assoc.*, 273 F.3d at 499; *Nabisco, Inc. v. Warner-Lambert Co.*, 220 F.3d 43, 45 (2d Cir.2000). "Although all inferences must be drawn in favor of the nonmoving party, mere speculation and conjecture is insufficient to preclude the granting of the motion." *Harlen Assoc.*, 273 F.3d at 499 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Western World Ins. Co. v. Stack Oil*, 922 F.2d 118, 121 (2d Cir.1990)).

## DISCUSSION

I. *ERISA Claims*

Plaintiff first contends the district court erred in granting summary judgment on his ERISA claims. We are unpersuaded. ERISA covers "any employee benefit plan if it is established or maintained — (1) by any employer engaged in commerce or in any industry or activity affecting commerce." 29 U.S.C.A. § 1003(a)(1)
146 (West 1999 Supp. 2004).[3] In a case involving an alleged employee *146 welfare benefit plan, this Court held that a plan, fund, or program under ERISA "`is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.'" *Grimo v. Blue Cross/Blue Shield of Vermont*, 34 F.3d 148, 151 (2d Cir.1994) (quoting *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir.1982) (in banc)). A plan "need not be a formal written document," however. *Id.* (citing *Donovan*, 688 F.2d at 1372-73); *see also* 29 U.S.C.A. § 1003(a) (ERISA covers " *any* employee benefit plan" (emphasis added)).

[3] An "employee benefit plan" is defined as an "employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U.S.C.A. § 1002(3). An "employee pension benefit plan" is defined in turn as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program — (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating, the benefits under the plan or the method of distributing benefits from the plan.

*Id.* § 1002(2)(A).

In *Donovan*, the Eleventh Circuit rejected the proposition that the term "`establish' means no more than an ultimate decision by an employer . . . to provide the type of benefits described in ERISA." *Donovan*, 688 F.2d at 1372-73. The court held that "[a] decision to extend benefits is not the establishment of a plan or program." *Id.* at 1373. Instead, "[a]cts or events that record, exemplify or implement the decision" can be introduced as "direct or circumstantial evidence that the decision has become reality." *Id.* The court emphasized that "it is the reality of a plan, fund or program and not the decision to extend certain benefits that is determinative." *Id.; see also Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir.1985) ("We . . . agree with *Donovan* . . . that a mere allegation that an employer or employee organization ultimately decided to provide an employee welfare benefit is not enough to invoke ERISA's coverage. Such an allegation fails to allege the `establishment' of a plan. Something more is needed." (internal citation omitted)). Although neither *Donovan* nor *Scott* is binding on this Court, their logic is persuasive. We therefore look to whether there is a genuine issue of material fact as to "the reality" of an employee pension benefit plan.

In support of his claim that defendants established an employee pension benefit plan covered by ERISA, plaintiff presented his own deposition testimony to the following effect. Charles Jr. promised him a pension fund with an initial deposit of $39,000 and annual contributions of $10,000 thereafter. In early 1992, Charles Jr. wrote the terms of the pension plan on a legal pad and told plaintiff it would be filed in the company's records. On numerous occasions defendants assured him that the pension plan was established. Plaintiff also submitted deposition testimony from two other employees stating that plaintiff was owed money other than his salary. Finally, plaintiff submitted the company's tax returns indicating the company took certain tax deductions for "employee benefit programs." Viewing, as we must, this evidence in the light most favorable to plaintiff, we

conclude that no reasonable fact finder could find that defendants "established or maintained" a pension plan under ERISA. Accordingly, the district court's grant of summary judgment on the ERISA claims is affirmed.[4]

147 *147

[4] Plaintiff also contends that defendants should be equitably estopped from asserting that he lacks evidence that a pension plan had been established. As this argument appears to have been raised for the first time on appeal, we do not consider it. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *Merrill Lynch Co. v. C.I.R.*, 386 F.3d 464, 473 (2d Cir.2004).

II. *Fraud*

Plaintiff further contends that the district court erred in holding that his fraud claim was time-barred because (1) there are material issues of fact as to when plaintiff could have reasonably discovered the alleged fraud and (2) to the extent plaintiffs claim arises from misrepresentations occurring within six years of commencement of the action, the claim is timely. We affirm for substantially the same reasons set forth by the district court.

Under New York law, a claim for fraud[5] must be commenced either within six years from the commission of the fraud or within two years from the date that the fraud was discovered, or could reasonably have been discovered, whichever is later. N.Y. C.P.L.R. §§ 203(g), 213(8); *see also Siler v. Lutheran Soc. Serv.*, 10 A.D.3d 646, 782 N.Y.S.2d 93, 95 (App.Div. 2004); *Julian v. Carroll*, 270 A.D.2d 457, 704 N.Y.S.2d 654, 655 (App.Div. 2000); *Hillman v. City of New York*, 263 A.D.2d 529, 693 N.Y.S.2d 224, 225 (App.Div. 1999). The plaintiff bears the burden of establishing that the fraud could not have been discovered before the two-year period prior to the commencement of the action. *E.g., Siler*, 782 N.Y.S.2d at 95; *Julian*, 704 N.Y.S.2d at 655; *Hillman*, 693 N.Y.S.2d at 225. "`[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him.'" *Armstrong v. McAlpin*, 699 F.2d 79, 88 (2d Cir.1983) (quoting *Higgins v. Crouse*, 147 N.Y. 411, 42 N.E. 6 (1895)).

[5] (1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury. *Jablonski v. Rapalje*, 14 A.D.3d 484, 788 N.Y.S.2d 158, 162 (App.Div. 2005).

In his amended complaint, plaintiff alleged that "[a]s an inducement to leave his job" defendants promised "they would provide him with an annual pension benefit of $10,000 and that they would fund the pension with an initial deposit of $39,000" if he joined their company. Although he requested documentation of his pension plan "in the summer of 1992, and on occasions thereafter," defendants never provided this information. Defendants, however, "continuously acknowledge[d] . . . their pension obligation" to plaintiff and assured him that the pension "had been and would be taken care of." Thus, plaintiff's amended complaint alleged that defendants made misrepresentations more than six years before he commenced this action in August of 2001. To the extent his fraud claim rests on alleged misrepresentations occurring prior to August 1995, the claim is time-barred unless plaintiff can establish that he reasonably could not have discovered the fraud before the two-year period prior to August 2001. *See* N.Y. C.P.L.R. §§ 203(g), 213(8); *Siler*, 782 N.Y.S.2d at 95; *Julian*, 704 N.Y.S.2d at 655; *Hillman*, 693 N.Y.S.2d at 225. Aside from the now-missing legal pad, plaintiff does not claim to have seen any documentation of his pension plan whatsoever. Given the number of years he worked for the company, this dearth of documents alone should have suggested to him that something was awry. Moreover,

each of plaintiffs repeated requests for documentary evidence of the plan was fruitless. This too should have
148 raised suspicion. Under these circumstances, *148 we conclude that plaintiff reasonably could have discovered the fraud sometime before the two-year time period prior to August 2001.

Yet plaintiff's amended complaint also alleged that "[t]hroughout the period of [his] employment" plaintiff "received assurances that he had received, and was on an ongoing basis receiving, the pension benefits that were promised to him." According to plaintiff, defendants told him "on numerous occasions" that the pension had been "taken care of when, in fact, defendants knew this to be false. We construe these portions of the amended complaint to allege that defendants made misrepresentations after 1995. To the extent that plaintiffs fraud claim rests on these later misrepresentations, the claim would be timely under N.Y. C.P.L.R. § 213(8). The amended complaint, however, fails to support a claim of fraud under New York law because it is duplicative of the breach of contract claim. *See Bridgestone/Firestone v. Recovery Credit Serv. Inc.*, 98 F.3d 13, 20 (2d Cir.1996) (holding that plaintiff did not maintain a claim for fraud because plaintiff failed to "(i) demonstrate a legal duty separate from the duty to perform under the contract, or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract, or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages" (internal citations omitted)); *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 521 N.Y.S.2d 653, 516 N.E.2d 190, 194 (1987) (affirming dismissal of negligence claims where "plaintiff has not alleged the violation of a legal duty independent of the contract"); *Brown v. Brown*, 12 A.D.3d 176, 785 N.Y.S.2d 417, 419 (App.Div. 2004) (holding that plaintiffs fraud claim is "precluded by the fact that a simple breach of contract claim may not be considered a tort unless a legal duty independent of the contract — i.e., one arising out of circumstances extraneous to, and not constituting elements of, the contract itself — has been violated"); *McKernin v. Fanny Farmer Candy Shops, Inc.*, 176 A.D.2d 233, 574 N.Y.S.2d 58, 59 (App.Div. 1991) (holding that a fraud claim does not lie where it "is premised upon an alleged breach of contractual duties and the supporting allegations do not concern representations which are collateral or extraneous to the terms of the parties' agreement"). We therefore affirm the district court's grant of summary judgment on the fraud claim.

III. *Breach of Contract*

1. Statute of Limitations

Plaintiff argues that the district court erred when it determined that the breach of contract claim accrued when Defendants failed to establish the plan within the imputed one-year timeframe. According to Plaintiff, the claim instead accrued when Defendants rejected his claim for benefits. Plaintiff maintains that "[i]n a pension case, `the limitation period begins to run when there has been repudiation by the fiduciary which is clear and made known to the beneficiaries.'"

Plaintiff asserts that *Miles v. New York State Teamsters*, 698 F.2d 593, 598 (2d Cir.1983) supports this proposition. Not so. In *Miles*, plaintiffs brought an action under ERISA to determine their eligibility for pension benefits. *Miles*, 698 F.2d at 595. This Court held there was no statute of limitations under the applicable ERISA provision and therefore applied the most applicable state limitations statute: the six-year limitations period prescribed by N.Y. C.P.L.R. § 213. *Id.* at 598. We then held that a plaintiffs ERISA cause of action accrues, and the six-year limitations period begins to run, "when there has been `a repudiation by the
149 fiduciary which is *149 clear and made known to the beneficiaries.'" *Id.* (quoting *Valle v. Joint Plumbing Indus. Bd.*, 623 F.2d 196, 202 n. 10 (2d Cir.1980)). In a federal question case, such as Miles, when a federal court determines the limitations period by applying an analogous state statute of limitations, the court nevertheless looks to federal common law to determine the time at which the plaintiffs federal claim accrues. *See Union*

*Pac. R. Co. v. Beckham*, 138 F.3d 325, 330 (8th Cir.1998) (holding that in the absence of a statute of limitations under ERISA, the court applies the most analogous state statute of limitations but looks to federal common law to determine when the federal cause of action accrues); *Daill v. Sheet Metal Workers' Local 73 Pension Fund*, 100 F.3d 62, 65 (7th Cir.1996) (same).

A federal court generally employs the "discovery rule," under which "a plaintiffs cause of action accrues when he discovers, or with due diligence should have discovered, the injury that is the basis of the litigation." *Beckham*, 138 F.3d at 330. "Consistent with the discovery rule, the general rule in an ERISA cause of action is that a cause of action accrues after a claim for benefits has been made and has been formally denied." *Id.; accord Daill*, 100 F.3d at 66 (cause of action accrued when pension claim was denied); *see also Carey v. Int'l Bhd. of Elec. Workers Local 363 Pension Plan*, 201 F.3d 44, 48 (2d Cir.1999) ("an ERISA claim accrues upon a clear repudiation by the plan that is known, or should be known, to the plaintiff-regardless of whether the plaintiff has filed a formal application for benefits"); *Miles*, 698 F.2d at 598.

In this case, the district court held that there was no cause of action under ERISA because Defendants had not "established or maintained" a program for purposes of the Act. Thus, unlike the above-cited cases, there was no underlying federal claim; the district court could not have looked to federal common law to determine when Plaintiff's breach of contract claim accrued. Miles is inapposite and the district court was correct to apply New York state law.

In the alternative, Plaintiff maintains the district court misapplied New York law. Plaintiff argues that because the pension plan required annual payments of $10,000, his claims for those payments could not have accrued in 1993. Plaintiff contends that under New York law, where there is a continuing breach of contract, the six-year statute of limitations bars only those claims for breaches occurring more than six years before the action was commenced. Thus, his claims for the annual $10,000 pension payments from 1995 until the 2001 are not barred.

In New York, the Statute of Limitations on a claim for breach of contract is six years. N.Y. C.P.L.R. § 213(2). In general, the limitations period begins to run when the cause of action accrues. N.Y. C.P.L.R. § 203(a). A cause of action for breach of contract ordinarily accrues and the limitations period begins to run upon breach. *See Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 599 N.Y.S.2d 501, 615 N.E.2d 985, 986 (1993). The plaintiff need not be aware of the breach or wrong to start the period running. *See id.* 599 N.Y.S.2d 501, 615 N.E.2d at 987. Where a contract does not specify a date or time for performance, New York law implies a reasonable time period. *See Schmidt v. McKay*, 555 F.2d 30, 35 (2d Cir.1977); *Lituchy v. Guinan Lithographic Co.*, 60 A.D.2d 622, 400 N.Y.S.2d 158, 159 (App.Div. 1977). An acknowledgment or promise to perform a
150 previously defaulted contract must be in writing to restart the statute of limitations. *150 *See* N.Y. Gen. Oblig. Law § 17-101 [6]; *Lew Morris Demolition Co. v. Bd. of Ed.*, 40 N.Y.2d 516, 387 N.Y.S.2d 409, 355 N.E.2d 369, 371 (1976); *Perez v. Bangkok Bank, Ltd.*, No. 87 CIV. 1753, 1989 WL 13749, at *1 (S.D.N.Y. Feb. 10, 1989).

6 Section 17-101 states as follows:

> An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property. This section does not alter the effect of a payment of principal or interest.

N.Y. Gen. Oblig. Law § 17-101.

If, however, a contract requires continuing performance over a period of time, each successive breach may begin the statute of limitations running anew. *See Bulova Watch Co. v. Celotex Corp.*, 46 N.Y.2d 606, 415 N.Y.S.2d 817, 389 N.E.2d 130, 132 (1979); *Stalis v. Sugar Creek Stores, Inc.*, 295 A.D.2d 939, 744 N.Y.S.2d 586, 587-88 (App.Div. 2002); *Orville v. Newski Inc.*, 155 A.D.2d 799, 547 N.Y.S.2d 913, 914 (App.Div. 1989); *Airco Alloys Div. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 430 N.Y.S.2d 179, 186 (App.Div. 1980). Because Defendants' obligation to contribute $10,000 per year to Plaintiffs pension fund was a continuing one, Plaintiffs claim that Defendants breached that obligation within six years of the commencement of this action is timely. *See Orville*, 547 N.Y.S.2d at 914 (holding that a contractual obligation to make minimum annual debt payments was a continuing obligation and a breach of contract occurred each year defendant failed to make minimum payment).[7]

7 Plaintiff's additional argument that the limitations period on his state law claims should be equitably tolled is without merit and was properly rejected by the district court.

2. Statute of Frauds

As an alternative basis for upholding the district court's dismissal of the contract action, moving Defendants assert that Plaintiffs breach of contract claim is barred by the Statute of Frauds. Although raised below, the district court did not address the Statute of Frauds argument in light of its determination that Plaintiffs action was time-barred. Moving Defendants argue that the employment agreement was either a contract to work for the projected twenty-year life of the company or a contract to work for one year commencing in January 1992 and that, in either case, the contract could not be performed in one year.

In his declaration in opposition to the summary judgment motion, Plaintiff testified as follows:

> Contrary to what the Gardners suggest in their motion papers, I was not hired for a fixed term of years. While it is true that Charles III told me that the new company was going to exist for 20 years and that he was going to run it with me after his father's expected departure in a few years, I did not believe, nor do I now contend, that the Gardners were promising me a 20-year employment contract or any other fixed-term contract. I expected that as I continued to work I would be entitled to a *pro rata* portion of my annual salary and a *pro rata* share of the pension credit for that same work period. It was my understanding that my working with the Gardners was "at will" and that I could quit working for them at any time and that they could terminate me at the time, owing me my unpaid wages and my accumulated pension credits.

151 *151

Although Plaintiffs testimony as to the content of the employment agreement is not ultimately dispositive, in the context of a motion for summary judgment, we must view all evidence in the light most favorable to the non-moving party, in this case Plaintiff. *Harlen Assoc.*, 273 F.3d at 499. In this context, we therefore assume that the employment agreement was at-will and not for a fixed term of years.

New York law provides that an agreement will not be recognized or enforceable if it is not in writing and "subscribed by the party to be charged there-with" and if the agreement "[b]y its terms is not to be performed within one year from the making thereof." N.Y. Gen. Oblig. Law § 5-701[a][1]. This provision of the Statute of Frauds encompasses "only those contracts which, by their terms, `have absolutely no possibility in fact and law

of full performance within one year.'" *Cron v. Hargro Fabrics, Inc.*, 91 N.Y.2d 362, 670 N.Y.S.2d 973, 694 N.E.2d 56, 58 (1998) (quoting *D N Boening v. Kitsch Beverages*, 63 N.Y.2d 449, 483 N.Y.S.2d 164, 472 N.E.2d 992, 993 (1984)). The Court of Appeals has concluded that, "under a plain reading" of the statutory language, "the provision relates to the performance of the *contract* and not just of one party thereto." *Id.* 670 N.Y.S.2d 973, 694 N.E.2d at 59 (emphasis in original). Thus, "full performance by all parties must be possible within a year to satisfy the Statute of Frauds." *Id.* If an agreement may be fairly and reasonably interpreted to permit performance within a year, the Statute of Frauds will not bar a breach of contract action no matter how improbable it may be that performance will actually occur within that time frame. *Id.* 670 N.Y.S.2d 973, 694 N.E.2d at 58 (collecting cases).

With certain exceptions, an at-will employment relationship can be terminated by either party for any reason or without reason. *Id.; Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86, 89 (1983). An at-will employment relationship may therefore usually be completed within a year. *Id.* 670 N.Y.S.2d 973, 694 N.E.2d at 59. Accordingly, the Court of Appeals has "typically held that employment agreements of this type are without the proscription of the Statute of Frauds concerning one-year performance." *Id.; see also Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 457 N.Y.S.2d 193, 443 N.E.2d 441, 444 (1982) (holding that an employment agreement "whether terminable at will or only for just cause, is not one which, `by its terms', could not be performed within one year and, therefore, is not one which is barred").

Moving Defendants nevertheless contend that because the employment agreement required annual $10,000 contributions to Plaintiffs pension fund, performance within one year was impossible. We disagree. In *Cron*, the Court of Appeals considered whether an alleged oral agreement to pay an employee an annual salary plus an annual bonus equal to 20% of the company's annual pretax profits was within the Statute of Frauds and therefore unenforceable unless in writing. *Cron*, 670 N.Y.S.2d 973, 694 N.E.2d at 57. Although the plaintiff alleged that the oral employment agreement was terminable at-will, the defendant company argued that because the bonus could not be calculated until after the calendar year expired, the agreement imposed an obligation on the company that could not be fulfilled within the year. *Id.* 670 N.Y.S.2d 973, 694 N.E.2d at 58. Resolving a split among New York courts, the Court of Appeals rejected this argument and held that "when the employment
152 relationship is *152 terminable within a year and the measure of compensation has become fixed and earned during the same period, the sole obligation to calculate such compensation will not bring the contract within the one-year proscription of the Statute of Frauds." *Id.* 670 N.Y.S.2d 973, 694 N.E.2d at 60. Mindful that this rule "may represent a slight modification of language in previous case law concerning the necessity of full performance by all parties within a year to satisfy the Statute of Frauds," the Court observed that the original purpose of the Statute was to prevent "fraud in the proving of certain legal transactions particularly susceptible to deception, mistake and perjury but not to afford persons a means of evading just obligations." *Id.* 670 N.Y.S.2d 973, 694 N.E.2d at 61 (internal quotation marks and citations omitted). The Court of Appeals concluded that because "the measure of defendant's obligation to compensate its employee is fixed within a year, the dangers envisioned by the Statute of Frauds do not come into play." *Id.*

The measure of defendants' alleged obligation to contribute $10,000 annually to plaintiffs pension fund is likewise fixed within a year. Moreover, in contrast to the agreement at issue in *Cron*, the alleged plan in this case called for an annual $10,000 contribution to plaintiffs pension fund and did not depend on the calculation of an entire year's profits. Thus, unlike defendants in *Cron*, defendants here would not have been obliged to wait until the end of the year to calculate a *pro rata* share of plaintiffs pension benefits in the event that his employment was terminated. Plaintiffs breach of contract claim is not barred by the Statute of Frauds.

## CONCLUSION

For the foregoing reasons, we affirm the district court's grant of summary judgment on plaintiff's ERISA claims as well as his fraud claim, but vacate the district court's grant of summary judgment on Plaintiff's breach of contract claim to the extent that claim encompasses alleged breaches occurring within six years of August 2001. In light of this latter holding, we also vacate: (1) the district court's *sua sponte* grant of summary judgment to non-moving defendants; (2) the court's determination that diversity jurisdiction was lacking; and (3) the court's dismissal of plaintiffs sixth, seventh, eighth, and ninth causes of action. We remand for further proceedings consistent with this opinion.

No. 04 Civ. 7598 (RWS)
United States District Court, S.D. New York

# Falchenberg v. New York City Dept. of Educ

457 F. Supp. 2d 490 (S.D.N.Y. 2006)
Decided Oct 20, 2006

No. 04 Civ. 7598 (RWS).

491 October 20, 2006. *491

Kristian Karl Larsen, Esq., Nathaniel B. Smith, Esq., New York, NY, for Plaintiff.

Honorable Michael A. Cardozo, Corporation Counsel of the City of New York Attorney, by Chad I. Rosenthal, Assistant Corporation Counsel of Counsel, New York, NY, for Defendants New York City Department of Education and the City of New York.

Honorable Eliot Spitzer, Attorney General of the State of New York Attorney, by Antoinette W. Blanchette, Assistant Attorney General of Counsel, New York, NY, for State of New York and New York State Department of Education.

Morgan, Lewis Bockius, New York, NY (Christopher P. Reynolds, Melissa C. Rodriguez, of Counsel), for Defendant National Evaluation Systems, Inc.

## 2 OPINION *2

SWEET, District Judge.

Defendants National Evaluation Systems, Inc. ("NES"), the New York State Department of Education ("NYSED"), and the State of New York (the "State") (collectively, the "Defendants") have moved pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings to dismiss the amended complaint of the plaintiff Marsha Falchenberg ("Falchenberg" or the "Plaintiff"). For the reasons set forth below, the motion is denied.

**Prior Proceedings**

Falchenberg filed a complaint (the "Original Complaint") against the Defendants and the New York City Department of Education ("DOE"), and the City of New York (the "City") on September 24, 2004, alleging that all the named entities discriminated against her in violation of the Americans with Disabilities Act, 42 U.S.C. 12111 et seq. ("ADA"), the Rehabilitation Act, 29 U.S.C. § 794a ("Rehab Act"), the New York State Human Rights Law, N.Y. Exec. Law § 296(1) ("SHRL"), and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107 ("CHRL"), or were liable for aiding and abetting a violation of the aforementioned statutes.

The DOE and the City (collectively, the "City Defendants") moved to dismiss the Original Complaint against
3 them, and by opinion of July 5, 2005, Falchenberg v. N.Y.C. Dep't of Educ., *3 375 F. Supp. 2d 344 (S.D.N.Y. 2005) (the "July 5 Opinion"), the motion was granted and all claims against the City Defendants were

dismissed.

In her amended complaint (the "Amended Complaint"), filed on July 26, 2005, Falchenberg reasserted against the remaining Defendants all but one of the claims brought in the Original Complaint. The single claim that was not included in the Amended Complaint was an employment discrimination claim pursuant to Title I of the
492 ADA. The Amended Complaint *492 seeks, inter alia, damages and injunctive relief.

**The Facts**

The Amended Complaint alleges that Falchenberg worked for the DOE from September 2001 until September 2003 as a public school teacher. (Am. Compl. ¶¶ 8 17). During her employment, Falchenberg was told that in order to maintain her employment she had to pass a certification examination mandated by the NYSED and administered by NES. (Id. ¶¶ 9-10).

Since Falchenberg has a learning disability (dyslexia), she requested from NES accessible study materials and
4 an oral examination. (Id. ¶¶ 11-12). The State and NES initially refused her requests. (Id. ¶ 13). *4

The City terminated Falchenberg in September 2003 because she had not passed the examination by the deadline. (Id. ¶ 17). On October 1, 2003, the State and NES then offered Falchenberg a "reader" and a "transcriber" as an accommodation (Id. ¶ 18), but advised Falchenberg that in her oral answers to the questions she would have to dictate spelling, punctuation, capitalization and paragraphing. (Id. ¶ 18). According to Falchenberg, this was "an illusory `accommodation' because it was not reasonable or appropriate to require plaintiff to dictate spelling, punctuation, capitalization and paragraphing." (Id. ¶ 19).

The instant motion was heard and marked fully submitted on April 19, 2006.

**The Rule 12(c) Standard**

"The standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b) (6) motion for failure to state a claim." Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir. 2001) (citing Irish Lesbian Gay Org. v. Giuliani, 143 F.3d 638, 644 (2d Cir. 1998); Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994);Ad-Hoc Comm. of Baruch Black Hispanic Alumni Ass'n v. Bernard M. Baruch Coll., 835 F.2d 980, 982 (2d Cir. 1987)). For purposes of a Rule 12(c) motion, all allegations in the
5 complaint are accepted as true, and all reasonable inferences are drawn in favor of the non-moving *5 party. D'Allesio v. New York Stock Exchange, Inc., 258 F.3d 93, 99 (2d Cir. 2001). The court will not dismiss the case unless it is satisfied that the complaint cannot state any set of facts that would entitle plaintiff to relief. See Sheppard, 18 F.3d at 150.

**Discussion**

In their motion for judgment on the pleadings, Defendants rely heavily on a single paragraph of the July 5 Opinion. Specifically, they contend that the July 5 Opinion dismissing the Original Complaint against the City Defendants held "that Plaintiff is not a qualified individual with a disability for purposes of her discrimination claims," and that this finding, as the "law of the case," bars Falchenberg's disability claims against the remaining Defendants. (Defs.' Mem. in Supp. at 1.) This argument reads too much into the July 5 Opinion, and ignores the statutory language relevant to Plaintiff's allegation that Defendants failed to provide reasonable accommodations for her disability. Because Falchenberg has alleged the essential elements of the disability claims set forth in the Amended Complaint, Defendants' motion to dismiss must be denied.

In the Original Complaint, Falchenberg alleged two distinct types of disability claims against the City
6 Defendants: (1) an employment discrimination claim pursuant to, inter alia, *6 Title I of the ADA (Original Compl. ¶¶ 25-27), and (2) a public accommodations claim pursuant to, inter alia, Title II of the ADA (Id. ¶¶ 28-
493 29). *493

Although the July 5 Opinion perhaps did not express the point as clearly as could be desired, the Court's statement that Falchenberg "is not a qualified individual because she did not take the examination," Falchenberg, 375 F. Supp. 2d at 348, applied only to Falchenberg's employment discrimination claim, not to her public accommodations claims. In the context of that discussion, the Court cited to 42 U.S.C. § 12111(8), which defines a "qualified individual with a disability," for purposes of Title I employment discrimination claims, as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires." Having acknowledged that courts must give consideration to an employer's determination of the essential qualifications for a job, the Court ruled that Falchenberg's failure to take (and, implicitly, to pass) the examination that the State has set as a requirement for certification rendered her not a qualified individual for the purposes of a Title I employment discrimination claim. Falchenberg, 375 F. Supp. 2d at 348.

Falchenberg's public accommodations claim against the City Defendants was separately dismissed by the July 5
7 Opinion because the requested accommodations could only be provided by NES *7 and NYSDE, "two entities over which DOE has no control," and "there is no indication that the City Defendants had anything to do with any of Plaintiff's accommodation requests." Id. at 348-49. In other words, because the examination is not a service, program, or activity of the City Defendants, they could not be liable under Title II for any discrimination in its administration. See 42 U.S.C. § 12132.

The Amended Complaint does not contain a Title I employment discrimination claim. It does maintain public accommodations claims pursuant to Title II and Title III of the ADA, as well as the Rehab Act, the SHRL, and the CHRL. (Am. Compl. ¶¶ 24-40.) The essence of the Amended Complaint is Falchenberg's allegation that the Defendants refused to provide reasonable accommodations for her disability in the administration of the certification examination. Because the statement in the July 5 Opinion that Falchenberg "is not a qualified individual" applies only to the dismissed employment discrimination claim under Title I, it does not serve as law of the case to bar Plaintiff's public accommodations claims against Defendants under Title II and Title III.

Indeed, it could not be otherwise. As the relevant statutory provisions make clear, the phrase "qualified
8 individual" does not have the same meaning in the employment context as it does *8 when used in other sections of the ADA. For the purposes of Title II,

> [t]he term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2). Defendants have not disputed that Falchenberg is an individual with a disability, nor that, as a teacher employed by the DOE, Falchenberg was eligible (in fact, required) to take the examination at issue. Thus, she must be considered a qualified individual for the purposes of Title II.

The phrase "qualified individual" does not appear in the relevant sections of ADA Title III, which governs
494 public accommodations claims against private entities such as NES.See, e.g., 42 U.S.C. § 12182(a) *494 ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."). Therefore, the
9 conclusion of the July 5 Opinion that Falchenberg is not a qualified individual for the purposes of a *9 Title I claim has no relevance to the Title III claim at issue here.

The Second Circuit has noted that in the context of challenges regarding accommodations for certification examinations, Title II and Title III of the ADA, as well as the Rehab Act, "impose largely the same requirements." Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69, 78 n. 2 (2d Cir. 2000). In short, the purpose of these statutes is to "place those with disabilities on an equal footing and not to give them an unfair advantage."D'Amico v. N.Y. State Bd. of Law Exam'rs, 813 F. Supp. 217, 221 (W.D.N.Y. 1993). Accordingly, the Defendants have a responsibility to make a "reasonable accommodation of the plaintiff's disability." Fink v. N.Y.C. Dep't of Pers., 53 F.3d 565, 567 (2d Cir. 1995).

> [These statues do] not require the perfect elimination of all disadvantage that may flow from the disability; [they do] not require a lowering of standards, nor that the [Defendants] make fundamental or substantial modifications in order to eliminate the disadvantages flowing from the disability. [They do] not require the [Defendants] to provide every accommodation the disabled [Plaintiff] may request, so long as the accommodation provided is reasonable.

Id. (internal quotation marks and citations omitted).

Particularly in the context of examinations and testing procedures, the determination whether a given set of
10 accommodations is reasonable is necessarily "a fact-specific, case-by-case inquiry *10 that considers, among other factors, the effectiveness of the modification in light of the disability in question and the cost to the organization that would implement it." Staron v. McDonald's Corp., 51 F.3d 353, 356 (2d Cir. 1995). Such a fact-specific inquiry cannot be conducted on the record before the Court on the instant motion for judgment on the pleadings, and must be reserved for later proceedings.

Defendants also have moved to dismiss the sixth claim of the Amended Complaint, which alleges that Defendants are liable pursuant to federal law, the SHRL, and the CHRL for aiding and abetting the failure to reasonably accommodate Falchenberg's disability. Defendants argue that neither the Rehab Act nor the ADA provide for liability on the basis of an aiding and abetting theory, but have not presented Second Circuit authority on point. It appears that neither the Supreme Court nor the Second Circuit has addressed the issue directly. Since Defendants concede that aiding and abetting claims are expressly authorized by the SHRL and CHRL, the Court declines at this time to resolve the unsettled question with respect to the ADA and Rehab Act.
11 *11 **Conclusion**

The motion of the Defendants for judgment on the pleadings is denied.

It is so ordered.

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No. 03 Civ. 4399 (RJH)
United States District Court, S.D. New York.

# Attenborough v. Const. and General Bldg. Laborers' Local 79

238 F.R.D. 82 (S.D.N.Y. 2006)
Decided Sep 5, 2006

84 *83 [Copyrighted Material Omitted] *84 [Copyrighted Material Omitted]

Nathaniel B. Smith, New York, NY, for Plaintiffs.

Joseph John Vitale, Cohen, Weiss and Simon LLP, New York, NY, for Defendant.

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***MEMORANDUM OPINION AND ORDER***

HOLWELL, District Judge.

Plaintiffs, twenty-one individual former or current members of defendant, Construction and General Laborers' Local 79 (" Local 79" or the " Union" ), bring this putative class action on behalf of themselves, and all other minority members of Local 79, alleging class-wide causes of action under Title VII of the Civil Rights Act of 1964 (2000) (" Title VII" ), 42 U.S.C. § 2000e et seq., the Civil Rights Act of 1866, 42 U.S.C. § 1981 (2000) ( " Section 1981" ), New York Human Rights Law, N.Y. Exec. Law § 296 (McKinney 2005), Title 8 of the Administrative Code and Charter of the City of New York, N.Y.C. Admin. Code § 8-107 et seq., and New York State Civil Rights Law, N.Y. Civ. Rights Law § 43. Individual plaintiffs James Bynum, Cecil Bell, Thomas Flowers, and Alex Wright additionally allege claims of retaliation due to their filing of charges of discrimination with the Equal Employment Opportunity Commission (" EEOC" ), in further violation of Title VII, New York Human Rights Law, N.Y. Exec. Law § 296, and Title 8 of the Administrative Code and Charter of the City of New York, N.Y.C. Admin. Code § 8-107 et seq. All plaintiffs seek declaratory and injunctive relief, declaring that Local 79 has violated their civil rights and those of the putative class, and enjoining defendant from continuing the discriminatory conduct alleged in the Third Amended Complaint. In addition, plaintiffs seek equitable and monetary relief in the form of back pay, punitive damages, nominal damages, and incidental monetary relief, as well as attorney's fees and costs.

This opinion follows the Court's March 29, 2006 order denying plaintiffs' motion for certification of a class without prejudice to renew.

**BACKGROUND**

Except as otherwise indicated, the following facts are taken from plaintiffs' Third Amended Complaint (" TAC" ) and exhibits attached to their class certification motion, and are assumed to be true for purposes of this motion. In this motion, plaintiffs seek certification of a class of

> [a]ll minority members of Local 79 who at any time relevant to this action were or are listed on the Local 79 Out-of-Work List, or who have informed Local 79 of the fact that they were out of work and requested to be placed on the Out-of-Work List, and all minority members of Local 79 who at any time relevant to this action had a shop steward certification from Local 79 or were eligible to obtain a shop steward certification from Local 79.

(TAC ¶ 28.)

Plaintiffs allege intentional discrimination as part of a pattern-or-practice of intentional discrimination ( *id.* ¶ 107), and discriminatory impact claims under federal and state law ( *id.* ¶ 105). According to plaintiffs, Local 79 union officials regularly bypass the union's otherwise fair and objective referral rules and practices (the maintenance of an " out-of-work list" ) and instead refer the best jobs to friends and relatives through an informal " behind-the-scenes operation." ( *Id.* ¶ ¶ 38, 69-73, 99.)

1. *The Union*

Defendant in this action, Local 79, is a local trade union of construction and general laborers in the New York Metropolitan area, with approximately 7500 active members working in the construction and demolition business in New York City. ( *Id.* ¶ ¶ 31-32.) Local 79 is a member union of the Mason Tenders District Council of Greater New York (the " MTDC" ), an umbrella organization for six affiliated local unions in the building and construction industry. ( *Id.* ¶ 33; John Delgado Declaration Sept. 22, 2005 (" Delgado Decl." ) ¶ 3.) Both
86 the MTDC and *86 Local 79 are governed by the Laborers' International Union of North America (" LIUNA" ), the governing body for all local unions of general labors in the country. (TAC ¶ 34.) In 1995, LIUNA and the United States Attorney General entered into a Consent Decree, [1] pursuant to which LIUNA agreed to adopt specific job referral rules to be followed by all its locals, and to be supervised by the General Executive Board Attorney and an independent monitor. ( *Id.* ¶ ¶ 40, 43.) Also pursuant to the Consent Decree, all the general laborers' local unions in the New York City area were consolidated into Local 79, and as a result Local 79 became the central union hall for all general laborers in the New York City area. ( *Id.* ¶ 45.)

[1] The Consent Decree, signed on February 13, 1995, arose out of a matter captioned United States v. Laborers' International Union of North America, AFL-CIO, filed in the United States District Court of the Northern District of Illinois, Eastern Division. This suit sought to end the influence of organized crime in the union. A copy is attached to plaintiffs' class certification motion as Exhibit 4.

From the time Local 79 was consolidated to present, the Union's Hiring Hall has had two Directors: William Schmidt from April 1996 through May 2004, and Denise Echevarria from May 2004 to Present. (Delgado Decl. ¶ 10.) The Hiring Hall has also had a number of Business Managers: Joseph Speziale from around July 2000 through October 2001, Keith Localzo from November 2001 to November 2004, Kenneth Brancaccio from December 2004 through May 2005, and John Delgado from June 2005 to present. ( *Id.* )

Following the 1996 consolidation, Local 79 began to implement a system for referring out work. (TAC ¶ 46.) Initially, the referral system simply comprised a list whereby Local 79 members would call the Union looking for work, the Union would record the member's name on a list and as referral opportunities arose, the members on the list would be sent out on a first-come, first-served basis. ( *Id.* ¶ 47.) Eventually the rules governing the out-of-work list became more elaborate, and included different tiers of priority based on an individual's hours of experience, and various means by which an individual on the out-of-work list might retain or lose their position on the list. ( *See* James Gerald Bynum Deposition, June 23, 2005 (" Bynum Dep." ) 29:06-

29:23, 68:05-68:18, Pls.' Ex. 5; Construction and General Building Laborers, Local 79 Hiring Hall Rules (" Hiring Hall Rules" ), Delgado Decl. Ex. 2; *see also infra* (discussing the out-of-work list as currently maintained under Local 79's Hiring Hall Rules).)

In New York City, collective bargaining agreements (" CBAs" ) require that all laborers must be (or soon become) members of Local 79. (TAC ¶ 49.) The standard CBA between the union and local contractors gives the contractor the right to select fifty percent of the general laborers, and gives Local 79 the right to select the remaining 50 percent. ( *Id.* ¶ 50; *see also* Delgado Decl. ¶ 5.) On each new job, Local 79 also has the right to send out one general laborer who will be designated as the union's shop steward, who is always the first or second laborer assigned to the job, the first entitled to overtime, and the last or second to last to be laid off. (TAC ¶ ¶ 49-50; *see also* Delgado Decl. ¶ 5.) The role of the shop steward is to report to a union " Business Agent" [2] any information relevant to the protection of union members' rights while on the job. (TAC ¶ 51.)

[2] Local 79 employs twenty to twenty-five Business Agents, who are typically assigned to specific geographic areas within New York City. (TAC ¶ 52.) A shop steward, therefore, would report to the Business Agent responsible for the geographic area in which the job is located. ( Id. ¶ 51.) Business Agents report to the union's Business Manager or Assistant Business Manager. ( Id. ¶ 52.)

2. *The Out-of Work List* [3]

[3] Where indicated, this Opinion's description of the out-of-work list is drawn from defendant's submissions. Primarily the description is drawn from the Local 79 Hiring Halls Rules. (Construction and General Building Laborers, Local 79 Hiring Hall Rules (" Hiring Hall Rules" ), Delgado Decl. Ex. 2.) According to John Delgado, Local 79's current Business Manager, the Hiring Hall Rules have been approved by the General Executive Board Attorney and by the local membership. (Delgado Decl. ¶ 7; see also Union Const. Job Referral Guidelines § 1 at 87, Delgado Decl. Ex. 3 (stating guidelines for obtaining approval for any local deviations from the LIUNA referral guidelines).) Plaintiffs have not contested the legitimacy of the Hiring Hall Rules submitted by defendant. Indeed, plaintiffs' allegations in this action do not arise out of the rules governing the maintenance of the out-of-work list, but instead out of defendant's alleged practice of bypassing the Hiring Hall Rules in order to provide the best jobs to friends and relatives. ( See, e.g., TAC ¶ ¶ 38, 53-57, 69-73, 99.)

87 According to plaintiffs, the initial and fair first-come, first-served referral system established *87 in 1996 ( *id.* ¶ 47) quickly gave way to the alleged nepotistic and cronyistic referral system that forms the basis of this action (Bynum Dep. 171:20-74:21).

The official referral system involves the maintenance of an " out-of-work list" that is posted on a weekly basis on a bulletin board at the hiring hall. (TAC ¶ 53.) The out-of-work list, as currently maintained, lists the members, their preferences, qualifications, and certifications. ( *Id.* ¶ ¶ 53-57; *see also* TAC, Exs. 1-4.) In order to gain a slot on the list, out-of-work members (" applicants" ) must complete a signed and dated referral form stating, *inter alia,* " skills the applicant possesses and jobs the applicant is able to perform, including any relevant licenses or certifications, and the locations within the five boroughs of New York City to which the applicant is willing to be referred." (Hiring Hall Rules § 1.A.) Once registered on the list, applicants are referred to jobs on a first-in, first-out basis, subject to various exceptions and restrictions.

The first limitation on the first-in, first-out practice is an individual applicant's own skills and/or preferences. This is because an applicant will not be referred to a job that requires qualifications or experience the applicant does not have, nor will an applicant be referred to a job of a type he is unwilling to perform or in a location to which he is unwilling to travel. (Hiring Hall Rules § 2.A.) Later applicants may also receive job referrals before earlier applicants based on hours of experience. The list is divided into four sub-categories, or

tiers, of priority (Lists A through D) based on the amount of laborers' lifetime hours of work at the trade. (Hiring Hall Rules § 7.A.) Requests by employers for workers are filled first from the " A List" ; therefore until there are no more applicants on List A within a given work and geographic category, no workers from the B, C, or D Lists seeking the same work in the same borough will be called, even if those workers applied to the list before a worker on the A List. ( *Id.* § 7.B.) A later applicant may also be called ahead of earlier applicants on the list if, within sixty calendar days of being referred to an employer, that employer specifically requests the later applicant, provided that worker's preferences as stated on his most recent referral form comply with the criteria of the job at issue. ( *Id.* § 2.B.) In addition, a later applicant may receive a referral before an earlier applicant when the referral comes in from an employer who has terminated the earlier applicant for cause, or previously rejected and deemed the earlier applicant unsatisfactory for work in writing. ( *Id.* §§ 2.H-2.I.)

An applicant can lose his position on the list for various reasons. For example, once a laborer is referred to a job from the list, or has obtained a job directly from the employer, he will remain in the same position on the list, until he has been employed, by one or more employers, for fifteen cumulative days. ( *Id.* §§ 1.C, 2.C.) However, after fifteen cumulative days of employment, the applicant is placed back at the bottom of the applicable out-of-work list. ( *Id.* ) An applicant who refuses or is unavailable (without notifying the union in writing) for three consecutive referrals is also moved to the bottom of the applicable list. ( *Id.* § 2.E.) If an applicant gives written notice of a period of unavailability, he can maintain his position on the list, until his cumulative period of unavailability has exceeded thirty calendar days, at which point he will be moved to the bottom of the applicable list. ( *Id.* ) An applicant may also lose his position on the list if he fails to inform Local 79 of any jobs obtained at the trade within twenty-four hours of obtaining such job. ( *Id.* § 1.C.) In addition to being dropped to the bottom of the list, an applicant who fails to inform Local 79 of work received outside the list, will be removed from the list for a fourteen-day period during which the applicant would have otherwise been registered and eligible for referral. ( *Id.* ) Finally, an applicant's registration on the list is effective on a
88 quarterly basis, and failure to re-register availability for referrals *88 within the first five business days of a quarter will result in the loss of the applicant's position on the list from the prior quarter. ( *Id.* § 1.F.)

3. *Shop Steward Appointments*

As discussed above, a shop steward is one of the first laborers sent out by the union on any new job. Plaintiffs allege that " [r]eceiving a shop steward assignment is ... attractive because the shop steward has the most job security, is the first hired and the last fired, has the first option on overtime, tends to accumulate more overtime pay, is generally required to do less demanding physical work, and often does not have to be on the job site in order to be paid." (TAC ¶ 63.)

According to the Hiring Hall Rules, the Business Manager's responsibility to appoint and supervise stewards is governed solely by the LIUNA Uniform Local Constitution. (Hiring Hall Rules § 2.K; Uniform Local Union Constitution of the Laborers' International Union of North America Art. IV § E(3) (2001) ( " Union Const." ), Delgado Decl. Ex. 3.) As such, shop stewards are not referred to a job according to the date they register on the out-of-work list, but rather are appointed to the job by the Business Manager, apparently according to his discretion. ( *See* Union Const. Art. IV § E(3).) Local 79's Business Manager proffers that the decision to appoint someone as shop steward is " based on their qualifications and the needs of a particular job." (Delgado Decl. ¶ 8(c).) [4] Plaintiffs, however, claim that shop steward appointments are the result of insider connections, as opposed to merit or some assessment of qualifications. ( *See, e.g.,* Bynum Dep. 234:19-235:17 (identifying, as an example of defendant's unfair appointment practice, the husband of Kenny

Brancaccio's [5] secretary, who received repeated appointments to shop steward positions despite being new to the business and, according to Bynum, a " moron" ); *see also infra* (discussing plaintiffs' apparent allegations of discrimination with respect to shop steward appointments in further detail).)

4 Paragraph 8 of John Delgado's declaration contains two (c) subparts. The citation herein is to the first.

5 Based on the transcript from Bynum's deposition, Kenny Brancaccio appears to have been employed by the Union as both a business agent and the assistant to the Business Manager. (Bynum Dep. 154:21-154:25.)

In order to be eligible to serve as shop steward, a laborer must complete courses provided by the MTDC Training Fund and obtain certification. (Delgado Decl. ¶ 8(c).) Certification does not guarantee a laborer work as a shop steward, and the decision of whom to appoint shop steward is made by the Business Manager. ( *Id.* )

4. *Plaintiffs' Allegations of Discriminatory Hiring Hall Abuses*

Although plaintiffs do not specifically identify claims arising out of separate practices, the allegations in the complaint and the scope of the proposed class logically ought to comprise of *two* distinct practices that plaintiffs believe constitute intentionally discriminatory treatment and/or have a disparate impact on minority union members. The first is the alleged practice of bypassing the out-of-work list. Essentially this claim alleges that instead of adhering to the Hiring Hall Rules which govern job referrals [6] and the maintenance of the out-of-work list, union officials pass out the best job referrals to favored " cronies." The second is the undisputed, discretionary method by which shop stewards are assigned.

6 The " most attractive type of job" is identified in the complaint as " shop steward for a general contractor." (TAC ¶ 58.) As discussed in further detail elsewhere in this opinion, shop stewards are not appointed from the out-of-work list. Of the jobs that are referred from the out-of-work list, plaintiffs identify general contracting work to be the least physically demanding available to Local 79 laborers, while mason tender, scaffolding, and demolition are all physically demanding and dangerous. ( Id. ¶ ¶ 59-62.) As one would expect, long-term jobs are considered more attractive than short-term jobs. ( See id. ¶ ¶ 65-66.)

*a. Bypassing the Out-of-Work List*

Plaintiffs contend that Local 79 union officials have a practice of bypassing the out-of-work list,[7] and
89 alleges this practice constitutes *89 intentional discrimination as part of an established pattern or practice of disparate treatment, as well has having a disparate impact on the union's minority membership. (TAC ¶ 100; *see generally* Bynum Dep.) According to plaintiffs, this practice of bypassing the out-of-work list occurs by " numerous means whereby a disfavored member can be denied the fair treatment that the job referral rules are designed to protect." (TAC ¶ 70.) Plaintiffs allege that union officials can ignore a member's ranking and send out a " favored member" in his place ( *id.* ¶ 71), or union officials can find out from a contractor that a job opening will become available, and send a favored member without ever reporting the referral opportunity to the Hiring Hall ( *id.* ¶ 72). There is one example of this practice proffered in the third amended complaint. Plaintiff Beverly Colon received a call in the Fall of 2001 from Denise Echevarria, then the Assistant to the Director of the Hiring Hall, and was told Colon was being referred as the first person on the out-of-work list to a " good, long-term" job. ( *Id.* ¶ 77.) However, Colon could hear the Director of the Hiring Hall, William Schmidt, speaking to Echevarria in the background, and telling her to call Colon back. ( *Id.* ) Later that day, Colon was told that the long-term job went to " someone else" and was referred instead to a two-week job, after which she was unemployed. ( *Id.* )

7 Plaintiffs have not brought a breach of duty of fair representation claim against Local 79 for this alleged deviation from the Hiring Hall Rules. See Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 75-76, 110 S.Ct. 424, 107 L.Ed.2d 388 (1989) (holding that an individual union member may bring a claim in federal court for breach of duty of fair representation against union for breach of hiring hall rules under the National Labor Relations Act (" NLRA" ), 29 U.S.C. §§ 151 et. seq.).

The only deposition testimony submitted in support of plaintiffs' motion is that of named plaintiff James Bynum, a black male who has been a member of Local 79 since its inception. ( *Id.* ¶ 4.) From 1996 to 2000, Bynum worked for Local 79 in various capacities including as Business Agent, Assistant to the Hiring Hall Director, and Director of the Grievance Department. ( *Id.* ) From 2000 to 2003, Bynum worked as a Local 79 shop steward on various jobs. ( *Id.* ) At his deposition, Bynum was unable to identify any *specific* examples when the Union bypassed the out-of-work list and referred work to an applicant out of turn.[8] However, Bynum did testify generally that Local 79 Business Agents had bypassed the out-of-work list by giving jobs to union members who came into the office looking for an assignment. There is no evidence in the record whether a disproportionate number of white union members sought job assignments in this manner.[9] Again without describing specific examples, he also testified that most or all Local 79 Business Agents " at one point in time
90 or another" obtained a favor and had a friend referred to a job.[10] *90 *b. Shop Steward Appointment Practice*

8 Q: Are you aware of any situation in which the Union ignored the list and skipped someone on the list who had made themselves available for a demo B in Staten Island or any location, and decided to assign it people lower on the list?

9 When asked about the alleged practice, Bynum answered as follows:

10 Q: [W]as there ever a time where you are in [William Schmidt's (former Director of the Hiring Hall) ] office and you see him skip someone on the list to offer a good job to someone beneath that person on the list?

Neither the complaint nor the memoranda submitted by plaintiffs in support of their motion to certify the proposed class specifically identify the Business Manager's subjective ability to appoint shop stewards as a basis for a disparate treatment and/or disparate impact claims. However, plaintiffs' allegations in the complaint purporting to identify instances of the alleged practice of bypassing the out-of-work list predominantly complain that union " cronies" receive a disproportionate amount of available shop steward assignments, even though plaintiffs are eligible for shop steward appointments (or easily could be) and have informed the union that they are looking for work.[11] ( *See, e.g.,* TAC ¶ ¶ 82-89 (alleging that Joseph Franco (a favored member) was a late applicant to the out-of-work list, and then " bypassed [named plaintiffs] Harrison, Mitchell, Flowers, Colon, Ingram, Hairston and Attenborough on the list" and was sent to a long-term general contractor's job as a shop steward, where he earned over $125,000 per year at that job); *id.* ¶ ¶ 90-91 (alleging that Peter Dinuzzo (an alleged union crony) applied to the out-of-work list after named plaintiffs Colon, Flowers, Lewis, Harrison, and Hairston [12] but was assigned as shop steward on a job ahead of aforementioned plaintiffs " because they were not members of the nepotistic system" ); *id.* ¶ ¶ 92-93 (alleging that Joseph Chiappetti applied to the out-of-work list after named plaintiffs Colon, Harrison, Bell, Mitchell, Flowers, Hairston [13] but was assigned as shop steward on a job in January 2002).) While the foregoing allegations appear to have been offered in support of plaintiffs' bypass claim, because a union member's position on the out-of-work list has no bearing on his eligibility to be appointed to shop steward, these allegations do not in fact support the plaintiffs' position that there is a practice of bypassing the list. However, it does appear that plaintiffs dispute the fairness of the shop steward appointments procedure and that the disparate impact of which they complain may stem at least in part, if not entirely, from this practice.

11 Based on these allegations, and assuming the accuracy and legitimacy of the Hiring Hall Rules, which we have every reason to do, it appears plaintiffs misapprehend what would in fact constitute bypassing the list. On the face of the Hiring Hall Rules, appointment of a later applicant on the out-of-work list to a shop steward position does not in fact constitute a violation of the official hiring hall referral practices, but the vast majority of specific allegations in the complaint identify appointments of " cronies" to shop steward positions as examples of " bypassing" the out-of-work list.

12 According to the October 29, 2002 out-of-work list annexed to the TAC as Exhibit 2, Colon, Flowers, Lewis, Harrison, and Hairston were on the out-of-work list as numbers 2, 22, 107, 113, and 609 respectively. Peter Dinuzzo was number 238 on the list, and had placed his name on the list on September 30, 2002, after all the aforementioned plaintiffs. Dinuzzo's position at 238 ahead of Hairston at 609 is the result of Dinuzzo's eligibility for the A List. List B begins at position 551 on the list. (TAC Ex. 2.)

13 According to the January 2, 2002 out-of-work list annexed to the TAC as Exhibit 3, Colon, Harrison, Bell, Mitchell, Flowers, and Hairston, were on the out-of-work list as numbers 22, 155, 250, 313, 394, and 854 respectively. Joseph Chiappetti was number 454 on the list, and had placed his name on the list on December 28, 2001, after all aforementioned plaintiffs. Chiappetti's position at 454 ahead of Hairston's position at 854 is attributable to Chiappetti's eligibility for the A List. List B begins at position 478 on the list. (TAC Ex. 3.)

Bynum testified in his deposition that the decision to appoint someone to the shop steward position has little to do with merit, and everything to do with " who you know." For example, Bynum attributes union member Mike Brennan's consistent employment to his perpetual assignment to shop steward positions by virtue of his friendship with John Brosnan (a business agent). (Bynum Dep. 217:08-218:14.) When asked how he knew Brennan's appointments were not the result of an assessment of the quality of his work, Bynum answered, " Well, one, I know Mike is a little wino. So definitely won't be nothing about the quality of his work. You got friends in high places, people overlook things of that nature." ( *Id.* at 218:14-218:22.) Bynum also testified that
91 Joe Giardino, *91 Jr. benefited from his connections, and that he was consistently placed in steward positions. ( *Id.* at 220:06-220:17.) When asked what information he had that would lead him to believe that Giardino was not appointed to shop steward positions because of the quality of his work, Bynum responded:

> You know, it's funny when you ask that question, about what other information would I have other than this knowledge of his work. I think it's-if we all take the same shop course, right, why would he be going out to work more than anybody else, if we all got the same certificate? So that means we all took the same course, the same class, took the same little test. Obviously in order for me to get a certificate, I had to pass. For you to get one, you have to pass. So what would make him such a super shop steward that he is never out of work other than having a chronie [sic]?

( *Id.* at 220:24-221:11.) Furthermore, Bynum stated that Giardino did not even regularly show up at his shop steward jobs: " Joey was not there every day. Joey got paid when Joey wasn't around. You got to remember, his uncle is one of the-I would say a real mobster. Those are mobsters." ( *Id.* at 222:08-222:11.) Bynum also testified that union members Joe Mastrione, Robert Sporano, and Nicholas Turel all have received steady work as shop stewards and have a disproportionate amount of hours despite being relative newcomers without prior experience in the industry, not on the basis of merit, but simply because they all have family connections to union officials. ( *See id.* at 224:13-225:18 (Mastrione), 230:19-232:22 (Sporano), 234:21-235:24 (Turel).)

*c. Alleged Discriminatory Result of Defendant's Referral Practices*

Plaintiffs allege that defendant's referral practices result in a dramatic salary disparity among minority versus nonminority union members. Specifically, plaintiffs assert that as a result of defendant's " nepotistic and cronyistic referral system," a significant percentage of minority Local 79 members struggle to earn $20,000 to $30,000 a year, while " favored members" who are beneficiaries of behind-the-scenes referrals can make between $125,000 and $150,000 a year. (TAC ¶ 65.) Furthermore, plaintiffs allege that union officials refer friends, neighbors and relatives to the most desirable jobs (long-term and less dangerous), while minorities are left with short-term, dangerous, and otherwise unattractive jobs. ( *See id.* ¶ ¶ 37, 59-63, 99.) However, as previously noted, the TAC does not contain any specific allegations demonstrating that a later applicant had been given a referral opportunity from the out-of-work list ahead of plaintiffs. Instead, plaintiffs identify circumstances where later (or non) applicants on the out-of-work list, alleged to be " insiders" or relatives of union officials, were sent to job sites by the Business Manager to act as shop steward. ( *Id.* ¶ ¶ 84-85, 91-95, 97-98.) As also previously noted, an applicant's position on the out-of-work list has no bearing on the selection of shop stewards.

*d. Evidence Submitted in Support of Plaintiffs' Motion*

In addition to the above-cited allegations in the Third Amended Complaint and the deposition testimony of James Bynum, plaintiffs submit the following evidence to support their motion: (1) a 1993 report entitled " Building Barriers, Discrimination in New York City's Construction Trades," issued by the New York City Commission on Human Rights (" NYCCHR Report" ) (Pls.' Ex. 2), (2) an Agreement and Consent Decree dated February 13, 1995 between LIUNA and the United States Department of Justice (" LIUNA-DOJ Consent Decree" ) (Pls.' Ex. 3); (3) excerpts from New York State Organized Crime Task Force, *Corruption and Racketeering in the New York City Construction Industry: Final Report to Governor Mario M. Cuomo* (1990) (" NYSOCTF Report" ) (Pls.' Ex. 4); (4) the transcript from a September 7, 2004 supervisory hearing in *In the Matter of Local Union 79,* before an independent hearing officer (" Supervisory Hearing Transcript" ) (Pls.' Ex. 7); (5) the voluntary supervision agreement entered into between LIUNA and Local 79 on July 20, 2004 (" LIUNA-Local 79 Supervision Agreement" ) (Pls.' Ex. 7); (6) a report of an interview of Daniel Kearney (" Kearney Interview" ) (Pls.' Ex. 7); (7) the transcript *92 from the June 22, 2004 plea allocution in the matter *United States v. Kearney,* 04 Cr. 322(JES)(RLE) (S.D.N.Y., filed Apr. 7, 2004) (" Kearny Plea" ) (Pls.' Ex. 7); (8) an information filed in the matter *United States v. Garafola,* 04 Cr. 732(S-2)(DGT) (E.D.N.Y.) (" Garafola Information" ) (Pls.' Ex. 8); (9) a plea sheet for Junior Campbell (" Campbell Plea" ) (Pls.' Ex. 8); (10) excerpts of defendant's Form LM-2 Labor Organization Annual Reports submitted to the United States Department of Labor, Employment Standards Administration (Pls.' Ex. 8); and (11) an article discussing the Campbell and Garafola matters, John Marzulli, *Say Mob Bilked MTA of $10M,* Daily News, Sept. 16, 2004 (Pls.' Ex. 8). With the exception of the NYCCHR Report, which does address the issue of discrimination, all of the foregoing exhibits are submitted in support of plaintiffs' argument that discrimination against minorities may be inferred from corrupt conduct practiced by individual Local 79 officials, the union and its predecessors, and the New York City construction industry as a whole. ( *See* Pls.' Supp. Mem. 3-6.)

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**DISCUSSION**

1. *Standard*

A district court's analysis of a motion for class certification generally proceeds in two steps, both of which are governed by Rule 23. Fed.R.Civ.P. 23. In *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), the Supreme Court stated that a " Title VII class action, like any other class

action, may only be certified if the trial court is satisfied after a *rigorous analysis,* that the prerequisites of [Federal Rule of Civil Procedure] 23(a) have been satisfied." *Id.* at 161, 102 S.Ct. 2364 (emphasis added). Rule 23(a) provides:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). These requirements are frequently referred to as numerosity, commonality, typicality, and adequacy of representation, respectively. *See Falcon,* 457 U.S. at 156, 102 S.Ct. 2364.

If a court determines that the Rule 23(a) requirements have been met, it must then decide whether the class is maintainable pursuant to one of the subsections of Rule 23(b), which govern, *inter alia,* the form of available relief and the rights of absent class members. In this case, plaintiffs urge the Court to certify a class under either subsection (2) or (3) of Rule 23(b), which provides, in part:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> ...
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed.R.Civ.P. 23(b).

District courts are " afforded substantial leeway in deciding issues of class certification," *Robinson v. Metro-North Commuter R.R. Co.,* 267 F.3d 147, 162 (2d Cir.2001), and it is proper " to view a class action liberally in the early stages of litigation, since the class can always be modified or subdivided as issues are
93 refined for trial," *Woe v. Cuomo,* 729 F.2d 96, 107 (2d Cir.1984); *see* Fed.R.Civ.P. 23(c)(1); [14] *93 *Falcon,* 457 U.S. at 160, 102 S.Ct. 2364 (" Even after a certification order is entered, the judge remains free to modify it in light of subsequent developments in the litigation." ). When considering the propriety of certification, a court assumes the truth of the allegations in the pleadings. *Shelter Realty Corp. v. Allied Maint. Corp.,* 574 F.2d 656, 661 n. 15 (2d Cir.1978); *DeAllaume v. Perales,* 110 F.R.D. 299, 305 (S.D.N.Y.1986) (" [F]or purposes of determining class certification issues, the allegations are taken as true and the merits of the complaint are not examined." ).

[14] Federal Rule 23(c)(1) provides in relevant part: " An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." Fed.R.Civ.P. 23(c)(1).

Although plaintiffs are not required to make an extensive evidentiary showing, *Follette v. Vitanza,* 658 F.Supp. 492, 505 (N.D.N.Y.1987), *vacated in part on other grounds,* 671 F.Supp. 1362 (N.D.N.Y.1987), they do carry the ultimate burden of establishing that the requirements of Rule 23 have been met, *Caridad v. Metro-*

*North Commuter R.R.,* 191 F.3d 283, 291 (2d Cir.1999). The decision to certify a class is not an " occasion for examination of the merits of the case," *In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 135 (2d Cir.2001); *see also Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177-78, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), but district courts are required to look past the pleadings for the limited purpose of deciding if the Rule 23 requirements have been met, although that determination neither requires nor invites resolution of disputed issues of fact, *see, e.g., Heerwagen v. Clear Channel Commc'ns,* 435 F.3d 219, 231 (2d Cir.2006) (" ' [I]n making a certification decision, a judge must look somewhere ' between the pleadings and the fruits of discovery.... Enough must be laid bare to let the judge survey the factual scene on a kind of sketchy relief map, leaving for later view the myriad of details that cover the terrain.' " ) (quoting *Sirota v. Solitron Devices, Inc.,* 673 F.2d 566, 571-72 (2d Cir.1982)); *Johnston v. HBO Film Mgmt., Inc.,* 265 F.3d 178, 186-89 (3d Cir.2001) (holding that it is " not only ... appropriate, but also necessary" to look past the pleadings when deciding whether to certify a class). *But see Caridad,* 191 F.3d at 292 (noting that class plaintiffs " need not demonstrate at [the class certification] stage that they will prevail on the merits" ).

With these principles in mind, the Court turns to the Rule 23 analysis.

2. *Numerosity*

The purpose of the numerosity requirement is to promote judicial economy by avoiding a multiplicity of actions. *See, e.g., Robidoux v. Celani,* 987 F.2d 931, 935-36 (2d Cir.1993). Rule 23(a)(1) requires that the proposed class be " so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). " Impracticability means difficulty or inconvenience of joinder [not] ... impossibility of joinder," *In re Blech Sec. Litig.,* 187 F.R.D. 97, 103 (S.D.N.Y.1999) (citation omitted), and the Second Circuit has observed that " numerosity is presumed at a level of 40 members." *Consolidated Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir.), *cert. denied,* 515 U.S. 1122, 115 S.Ct. 2277, 132 L.Ed.2d 281 (1995) (citing 1 *Newberg on Class Actions 2d* § 3.05 (1985)); *see also Presbyterian Church v. Talisman Energy, Inc.,* 226 F.R.D. 456, 466 (S.D.N.Y.2005) (" Numerosity is presumed when a class consists of forty or more members." ). Plaintiffs are not obligated to identify the exact number of class plaintiffs, *see Robidoux v. Celani,* 987 F.2d 931, 935 (2d Cir.1993), and " courts may ' make common sense assumptions' to support a finding of numerosity," *Weissman v. ABC Fin. Servs., Inc.,* 203 F.R.D. 81, 84 (E.D.N.Y.2001) (quoting *Pecere v. Empire Blue Cross & Blue Shield,* 194 F.R.D. 66, 69 (E.D.N.Y.2000)).

Here, the proposed class is defined as all minority members of Local 79 who maintained their name on the out-of-work list, and all minority members of Local 79 who had shop steward certification or were eligible to obtain such certification. Plaintiffs allege, and defendant does not dispute, that Local 79 has a membership of approximately 7500, and that the majority of that membership are Black or Hispanic. (TAC ¶ ¶ 31-32; Delgado
94 Dep. ¶ ¶ 3, 11.) The out-of-work lists appended *94 to the Third Amended Complaint show that the number of members on the list are consistently well over 1000, and the Court can safely presume that more than forty of the persons on the list are minorities. ( *See* TAC Exs. 1-4.)

According to the allegations in the third amended complaint, twelve of the named plaintiffs maintained shop steward certification, and defendant submitted the declarations of eighteen minority union members who state that they have received appointments to the shop steward position. ( *See* Declarations of Twenty Putative Class Members in Opp'n to Pls.' Motion for Class Certification 1-13, 15-16.) Furthermore, any union member is *eligible* at any time to obtain shop steward certification.

While plaintiffs do not submit evidence indicating the precise number of minority union members who have maintained their name on the out-of-work list, or who maintain shop steward certification, in light of the foregoing the Court may presume that, should the other requirements of Rule 23(a) be met, the numerosity requirement will be met with respect to both groups comprising the proposed class.

3. *Commonality and Typicality*

" ‘ The commonality requirement is met if plaintiffs' grievances share a common question of law or of fact.’ " *Robinson,* 267 F.3d at 155 (quoting *Marisol A. v. Giuliani,* 126 F.3d 372, 376 (2d Cir.1997) (per curiam)). This requirement is not quantitative in nature; that is, it is possible to satisfy Rule 23(a)(2) where only a single issue is common to the members of the proposed class, as long as resolution of that issue will advance the litigation. *Savino v. Computer Credit, Inc.,* 173 F.R.D. 346, 352 (E.D.N.Y.1997), *aff'd,* 164 F.3d 81 (2d Cir.1998). In discrimination cases commonality does not mandate that all class members make identical claims and arguments, but requires that " the gravamen of the [c]omplaint is that defendants discriminated against class members in the same general fashion." *Open Hous. Ctr., Inc. v. Samson Mgmt. Corp.,* 152 F.R.D. 472, 476 (S.D.N.Y.1993).

Rule 23(a)(3) " requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A.,* 126 F.3d at 376. The typicality criterion does *not* require that the " factual predicate of each claim be identical to that of all class members" ; rather, it " requires that the disputed issue of law or fact ‘ occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class.’ " *Caridad,* 191 F.3d at 293 (quoting *Krueger v. New York Telephone Co.,* 163 F.R.D. 433, 442 (S.D.N.Y.1995)).

As noted by the Supreme Court in *Falcon,*

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

457 U.S. at 157 n. 13, 102 S.Ct. 2364. Therefore the Court will consider whether plaintiffs have met the commonality and typicality requirements here in tandem.

A threshold issue in this case is what evidentiary showing is necessary in a pattern-or-practice or disparate impact case to support a finding of commonality or typicality. In *Falcon,* the Supreme Court addressed the necessity of proving the existence of an aggrieved class in order to satisfy Rule 23(a)'s requirements:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or
> 95 fact that the individual's claim will be typical of the class claims. For [a plaintiff] to bridge *95 that gap, he must prove much more than the validity of his own claim.

*Id.* at 157-58, 102 S.Ct. 2364. While the *Falcon* Court held that individualized allegations of specific discriminatory treatment would not be sufficient to support a showing of a class-wide claim, it did indicate that " [s]ignificant proof that an employer operated under a general policy of discrimination conceivably could

justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Id.* at 159 n. 15, 102 S.Ct. 2364; *see also Caridad,* 191 F.3d at 292 (affirming certification of a company-wide class where role of subjective assessment was difficult to assess but plaintiffs had shown " significant statistical disparities" " sufficient to demonstrate common questions of fact regarding the discriminatory implementation and effects of Metro-North's company-wide policies regarding promotion and discipline" ).

Following *Falcon,* courts in this and other Circuits have required that plaintiffs produce some quantum of evidence to satisfy the commonality and typicality requirements, usually in the form of affidavits, statistical evidence, or both, tending to show the existence of a class of persons affected by a company-wide policy or practice of discrimination. In *Caridad,* the Second Circuit stated: " Of course, class certification would not be warranted absent *some showing* that the challenged practice is causally related to a pattern of disparate treatment or has a disparate impact on African-American employees at Metro-North." 191 F.3d at 292 (emphasis added) (finding commonality and typicality requirements met based on plaintiffs' proffered statistical report and anecdotal evidence, although without any inquiry into the ultimate persuasiveness of plaintiffs' evidence). *See, e.g., Sheehan v. Purolator, Inc.,* 839 F.2d 99, 102 (2d Cir.1988) (affirming district court's " denial of class certification on the ground of lack of class-wide proof of an aggrieved class," where plaintiffs' one affidavit and statistics on (1) the number of employees who complained of discrimination, (2) the relative number of men and women at various job titles, and (3) the salaries/fringe benefits received by male and female employees were insufficient evidence of an aggrieved class); *Rossini v. Ogilvy & Mather, Inc.,* 798 F.2d 590, 596 (2d Cir.1986) (affirming district court's holding that plaintiff had " failed to prove the existence of any class of employees suffering from such discrimination" ); *Hnot v. Willis Group Holdings Ltd.,* 228 F.R.D. 476, 484 (S.D.N.Y.2005) (noting that " [c]lass certification may be based on statistical evidence alone," and that courts, in their discretion, may " require or rely on anecdotal evidence, but they commonly do so where the statistical evidence is weak" ); *Cokely v. N.Y. Convention Ctr. Operating Corp. (" Cokely I" ),* 2003 WL 1751738, at *2-*3 (S.D.N.Y. Apr.2, 2003) (denying without prejudice plaintiffs' motion to certify class because of failure to meet evidentiary burden necessary to conduct " rigorous analysis" required under *Falcon,* where plaintiffs submitted a single affidavit and no statistical data); *Ross v. Nikko Secs. Co. Int'l, Inc.,* 1990 WL 121678, *6 (S.D.N.Y. Aug.10, 1990) (finding that plaintiffs' deposition testimony and non-class members' affidavits offered as " evidence of disparate treatment to be insufficiently probative of the existence of an aggrieved class to permit certification" ); *Reap v. Cont'l Cas. Co.,* 199 F.R.D. 536, 544 (D.N.J.2001) (noting that a plaintiff is required to produce evidence in form of affidavits and/or statistical evidence that tends to show the individual claims share questions of law or fact with the class claims and that the individual claims are typical of those brought on behalf of the class) (citing *Churchill v. IBM,* 759 F.Supp. 1089, 1101 (D.N.J.1991); *Zapata v. IBP, Inc.,* 167 F.R.D. 147, 158 (D.Kan.1996)); *Reid v. Lockheed Martin Aeronautics Co.,* 205 F.R.D. 655 (D.Ga.2001) (denying certification of class where plaintiffs failed to present evidence tending to show that class members were subject to uniform employment practices affecting all the employer's facilities in the same way).

*a. Plaintiffs' Showing of Commonality and Typicality with Respect to Claims Arising Out of Defendant's Alleged Practice of Bypassing the Out-of-Work List is Insufficient*

96 As discussed earlier, plaintiffs' first contention in this case is that defendant *96 routinely ignores the rules governing the Hiring Hall and fails to refer jobs on the first in, first out basis as required under the Hiring Hall Rules (subject to the exceptions described *supra* ). Instead, plaintiffs allege, as the best jobs come into the Hiring Hall, union officials pass them along to " favored member[s]." ( *See* TAC ¶ 71.) Such an alleged practice

may indeed form the basis for pattern-or-practice discrimination claim,[15] or a disparate impact claim, [16] *Caridad,* 191 F.3d at 292, and in either case, in order to certify a class plaintiffs must make " *some showing* that the challenged practice is *causally related* to a pattern of disparate treatment or has a disparate impact" on the putative class, *id.* (emphasis added).

15 " In a pattern or practice class action, the initial focus is in proving an [employer]-wide intentional discriminatory practice or policy, not individual incidents of discrimination. In consequence, ' statistical evidence constitutes the core of plaintiffs' prima facie case.' Once plaintiffs in such a case succeed in proving the alleged discriminatory practice or policy, the class obtains injunctive relief, and individual class members who seek individualized relief enjoy a presumption that employment actions of which they complain were affected, thus shifting the burden of proof to the defense." Latino Officers Ass'n, Inc. v. City of New York, 2006 WL 238989, at *1 (S.D.N.Y. Jan.31, 2006) (citing Robinson, 267 F.3d at 158 n. 5). Cases involving the types of wrongdoing implicitly alleged in this action have been found to make a prima facie case of intentional pattern-or-practice discrimination. See, e.g., Pennsylvania v. Local Union 542, Int'l Union of Operating Engineers, 469 F.Supp. 329 (E.D.Pa.1978), decision supplemented, 502 F.Supp. 7 (E.D.Pa.1979), decision supplemented, 488 F.Supp. 988 (E.D.Pa.1979), aff'd, 648 F.2d 922 (3d Cir.1981) (finding that proof of gross statistical disparities, nonstatistical proof showing specifically enumerated departures from hiring hall practices, and testimony of minority individuals regarding their attempts to seek access to hiring hall may create or corroborate inference of employment discrimination).

16 Disparate impact claims do not require proof of discriminatory intent, because " disparate impact theory targets practices that are fair in form, but discriminatory in operation." Smith v. Xerox Corp., 196 F.3d 358, 364 (2d Cir.1999) (internal quotation marks and citation omitted). " To make out a prima facie case of disparate impact, a plaintiff must (1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship between the two." Malave v. Potter, 320 F.3d 321, 325 (2d Cir.2003) (internal quotation marks omitted). The plaintiff may submit statistical data to show a disparity in outcome between groups, but to establish a prima facie case " the statistical disparity must be sufficiently substantial to raise an inference of causation." Id. (internal quotation marks omitted).

Here, even on the face of the complaint there are no allegations that the result of the alleged bypassing practice is that white union members lower on the out-of-work list are referred to " desirable" jobs ahead of minority union members. In fact, rather than alleging that *white* union members receive job referrals in lieu of plaintiffs, the complaint instead solely alleges that " *favored members,* " or " numerous individuals," are the beneficiaries of defendant's " cronyistic and nepotistic" practice. ( *See* TAC ¶ ¶ 64, 71, 105.) In the sole specific example proffered, with respect to Beverly Colon, there is no allegation that the " someone else" who received the long-term work assignment instead of Colon was in fact a nonminority, or, for that matter, a later applicant to the list. (TAC ¶ 77.) [17] The absence of allegations that even one of the named plaintiffs has lost a long-term desirable job given to a nonminority applicant lower on the out-of-work list precludes a finding of typicality.

17 In addition, the complaint does not demonstrate that the union officials in a position to bypass the list are in fact white, which might give rise to an inference that the favored members are also white. See Shipes v. Trinity Indus., 987 F.2d 311, 316 (5th Cir.1993) (affirming district court's certification of class in a pattern-or-practice discrimination case based on, inter alia, evidence that white supervisors at separate plants applied subjective criteria in making personnel decisions). Instead, the complaint generally alleges that " Historically, Local 79 and its predecessors have been controlled by white, non-minorities; there is a history and practice of discriminating against minorities." (TAC ¶ 35.)

Furthermore, unlike *Caridad,* 191 F.3d 283, *Robinson,* 267 F.3d 147, and *Latino Officers Ass'n,* 209 F.R.D. 79, the cases upon which plaintiffs primarily rely, in this case no statistical evidence has been offered to establish commonality. And while a statistical showing is not the only way to establish the existence of an aggrieved class, only the sworn testimony of one named plaintiff, James Bynum, has been offered to support
97 *97 the alleged existence of a behind-the-scenes referral practice that circumvents the out-of-work list. But

Bynum's testimony that the out-of-work list was bypassed because union members who came to the office looking for work were routinely given jobs (Bynum Dep. 150:07-150:19) does not show an aggrieved class, at least in the absence of evidence that a disproportionate number of white workers sought a job assignment in this manner. Nor does the testimony that business agents " once in a blue [moon]" would request an assignment for a friend ( *id.* at 151:09-154:19), at least in the absence of evidence of the race of business agents and the frequency of occurrence, sufficiently establish an aggrieved class.[18] Even assuming the existence of the alleged practice, as is appropriate at the class certification stage, plaintiffs have proffered no evidence of the disparate impact suffered by the putative class members as a result of this practice, let alone evidence to support a conclusion that a some causal connection exists between the alleged practice and alleged effect.

18 While weighing the evidence at this stage is clearly unwarranted, the sufficiency of plaintiffs' evidence on its face is relevant to determining whether the requirements of class certification have been met. To this end, it is worth noting that Bynum's testimony, in its totality, does not provide compelling evidence that the alleged practice of bypassing the out-of-work list in contravention of the Hiring Hall Rules in fact occurs. For one, it appears that Bynum considers the administration of the out-of-work list to be unfair, even when administered in precise accordance with the Hiring Hall Rules. He considers the tier organization of the list to be " crap," and thought the referral system ought to have remained " first come, first serve." (Bynum Dep. 29:06-29:23.) He believes the union " figured they had to structure it to it was where they pacified longer term members or whatever the case may be." ( Id. at 29:18-29:20.) Bynum further considers complying with the Hiring Hall Rules in certain circumstances to constitute " screwing over" laborers on the out-of-work list. Specifically, Bynum cites as an example of the union's " dirty work" the following scenario: when a short-term job comes in to the Hiring Hall for referral, the union will refer that job to the next person on the out-of-work list, even when that person will fill their fifteen-day cumulative employment quota as a result (thereby getting bumped back to the bottom of the list). ( See id. at 144:01-144:25, 147:01-147:25, 149:02-149:20.) According to an objective reading of the Hiring Hall Rules, however, this is the appropriate procedure, and the fact that the referral will cause someone who has been out of work for an extended period to be returned to the bottom of the list at the close of the job is not a basis for deviating from the first in, first out policy. ( See generally Hiring Hall Rules; supra discussion of how the out-of-work list operates.) In short, much of the time that Bynum purports to testify to the alleged bypassing practice, it is not clear he actually is referring to any breach of the Hiring Hall Rules. Finally, a significant detail lacking from Bynum's deposition is any testimony as to the race of the " friends" and " buddies" who are the beneficiaries of the Hiring Hall's favoritism, or the race of those union officials passing out favors, which might raise some inference that the beneficiaries are of the same race.

According to this Court's survey of the case law, the overwhelming majority of Title VII class actions certified in this Circuit include submissions of " some evidence" tending to establish that the proposed class was likely to be paid less, to be promoted less frequently, to be disciplined more frequently, or to be fired more frequently, than their nonminority, male, or younger counterparts, in support of a showing of commonality. *See, e.g., Caridad,* 191 F.3d at 292-93 (concluding that plaintiffs' statistical evidence, proffered to show (1) that African-Americans are more likely to be disciplined than whites, and (2) that being Black has a statistically significant effect on an employee's likelihood of being promoted, supported a finding of commonality); *Hnot,* 228 F.R.D. at 483 (" Plaintiffs' statistical reports also support a finding of commonality. [The expert]'s reports show significant disparities in promotion and compensation between high-level women and men at Willis." ); *Cokely v. New York Convention Ctr. Operating Corp. (" Cokely II" ),* 2004 WL 1152531, at *2 (S.D.N.Y. May 21, 2004) (finding, in plaintiffs' renewed motion for class certification, that commonality and typicality requirements were met, where plaintiffs' submitted, *inter alia,* statistics purporting to demonstrate that the minority plaintiffs were paid less than their white counterparts); *Latino Officers Ass'n,* 209 F.R.D. at 89 (" The statistics submitted by the plaintiffs, regardless of their ultimate persuasiveness, are sufficient to demonstrate common questions of fact because it tends to establish that being Latino or African American has an effect on

98 an officer's involvement *98 and treatment in the NYPD's disciplinary system." ); *Krueger v. New York Tel. Co.,* 163 F.R.D. 433, 439-40 (finding commonality requirement satisfied where plaintiffs proffered " substantial evidence" in the form of, *inter alia,* a statistical analysis concluding that " workers over the age of 40 experienced a statistically significant greater probability of being put at risk of layoff and of being involuntarily terminated than younger workers" ); *Bishop v. New York City Department of Housing Preservation and Development*, 141 F.R.D. 229, 238 (S.D.N.Y.1992) (finding commonality where plaintiffs provide statistical and anecdotal evidence supporting the allegations in the complaint; namely, that promoted employees are disproportionately white); *Warren v. Xerox Corp.,* 2004 WL 1562884, at *10 (E.D.N.Y. Jan.26, 2004) (M.J.Mann) (" [C]onsistent with the decisions in *Robinson, Caridad,* and *Latino Officers,* where, as here, plaintiffs' statistical and anecdotal evidence tends to show that being a member of a racial minority has a negative effect on compensation, that showing suffices to demonstrate a common question of fact concerning defendant's employment practices, within the meaning of Rule 23(a)." ).

Going beyond the pleadings, as the Court must do in deciding whether to certify a class, plaintiffs submit *nothing* in support of their allegation that minority members of Local 79 work fewer hours, earn less money, and receive predominantly short-term, dangerous and otherwise less desirable jobs than similarly situated whites. *Cf. Cokely II,* 2004 WL 1152531, at *2 (S.D.N.Y. May 21, 2004) (granting plaintiffs' renewed motion to certify class based on plaintiffs submission of, *inter alia,* (1) affidavits of fourteen putative class members testifying to discrimination within the defendant-employer's job assignment and seniority systems; (2) affidavits of nonclass member employees testifying to existence of pervasive and overt racism in the workplace and that they suffered retaliation for complaining about it; (3) union grievance forms alleging discrimination and harassment and letters detailing same; (4) verified complaints filed with the New York State Division of Human Rights detailing same; (5) complaints filed with EEOC; (6) table demonstrating how often certain employees are called for work and how much money they have earned and identifying those employees by race; and (7) statistics purporting to demonstrate that minority plaintiffs are paid less than white employees).

As outlined above, plaintiffs do submit a number of exhibits in support of their position that the history of discrimination and corruption in the construction industry and misfeasance by individual union officials supports a finding that there are questions of law and fact common to the class that the individual claims are typical of class-wide claims. It is true, as noted by the court in *Cokely I,* that

> [j]udges sitting and living in New York City can take judicial notice of the fact that discrimination based on race, nationality and gender have been endemic in the construction industry over the past several decades. Nevertheless, a generalized awareness of discrimination is not sufficient to find common issues specific to a proposed class.

2003 WL 1751738, at *3 n. 3 (internal citations omitted). Moreover, even if such evidence were sufficient to demonstrate commonality in certain cases, plaintiffs' submissions do little to support the inference that minority members of Local 79 are the intentional or unintentional victims of discrimination.

The sole exhibit addressing the issue of discrimination is the NYCCHR Report, which includes very limited excerpts detailing the results of a 1993 investigation into the historic practice of race, ethnic, and gender discrimination within New York City's construction industry. (N.Y.CCHR Report 1.) However, these brief excerpts do very little to give rise to the inference plaintiffs invite. Indeed, a major problem identified in the Report is the overrepresentation of minorities and women in the unskilled laborer trades (such as those presently organized under Local 79), as opposed to the better-paid skilled mechanical trades. ( *Id.* at 50, 52.) The study does not appear to make any finding that discrimination exists within the subsection of the

99 construction industry encompassing the types of construction work at *99 issue in this action. This certainly does not preclude a finding that such discrimination in fact does exist, but it does not raise an inference to that effect either.

Plaintiffs' other submissions similarly fail to raise any inference that union officials have a practice of bypassing the out-of-work list in favor of their friends and relatives. Nor do these submissions tend to show that the putative class of minority union members work less hours and earn less money at less desirable jobs than their white counterparts.

The LIUNA-DOJ Consent Decree and the NYSOCTE Report relate to the role of corruption and racketeering in the construction industry, not to discrimination. Specifically the LIUNA-DOJ Consent Decree was the resolution of a criminal prosecution brought to eliminate the corrupting influence of the organized crime syndicate La Cosa Nostra. (LIUNA-DOJ Consent Decree 3-4.) As a result of the Consent Decree, LIUNA agreed to adopt job referral rules and procedures which are the basis for the Hiring Hall Rules which presently govern Local 79. ( *Id.* at 8-9; *see also generally* Union Const.; Hiring Hall Rules.) While the NYSOCTE Report does discuss the potential for abuse in the hiring hall, it is in the context of union abuse of the hiring hall mechanism to control dissent among union members, as opposed to exploring its tendency to be abused for the purpose (or with the effect) of favoring whites over minorities. (N.Y.SOCTE Report 52.)

The Supervisory Hearing Transcript, LIUNA-Local 79 Supervision Agreement, Kearney Interview, and Kearney Plea all pertain to Local 79's former secretary-treasurer, Daniel Kearney, who was prosecuted for embezzling union funds in 2003. ( *See* Kearney Plea 3.) The Garafola Information, Campbell Plea, and Marzulli Article all relate to a prosecution arising out of a scheme to defraud the New York City Metropolitan Transportation Authority that involved the Gambino crime family and Junior Campbell, a business agent for Local 79. While these exhibits do establish that the illegal conduct of Local 79 officials has been the subject of prosecution, they do not tend to establish plaintiffs' allegations of discrimination or disparate impact.

*b. Plaintiffs' Showing of Commonality and Typicality with Respect to Claims Relating to Defendant's Shop Steward Appointment Procedure is Also Insufficient*

As noted above, the allegations in the complaint, taken together and read liberally, lead the Court to draw the conclusion that plaintiffs intend to claim that defendant's shop steward appointment procedure also violates Title VII. Thus, to the extent plaintiffs seek to certify a class including " all minority members of Local 79 who at any time relevant to this action had a shop steward certification from Local 79 or were eligible to obtain a shop steward certification from Local 79," the Court understands plaintiffs' claim to be that the discretionary method by which the Business Manager appoints shop stewards constitutes a pattern or practice of disparate treatment or results in disparate impact on a protected class. Such claims are susceptible to class treatment, and ultimate relief under Title VII. *See, e.g., Ingram v. Madison Square Garden Ctr., Inc.,* 482 F.Supp. 414, 424 (S.D.N.Y.1979) (concluding, after trial in class action, that " Local 3's standardless and for the most part implicit policy of limiting referrals largely to personal friends of acquaintances of its business agent ... clearly operated to exclude the minority employees who make up the plaintiff classes" in violation of Title VII); *see also United States v. Local No. 357 of Int'l Bhd. of Elec. Workers, AFL-CIO,* 356 F.Supp. 104 (D.Nev.1972) (stating in case brought by United States that it is " unlawful for virtually all-white unions and apprenticeship committees to give preference to relatives of union members and union contractors in admission to training program or work referral since such a preference operates to restrict the employment opportunities of [minorities]" ). However, aside from the fact that plaintiffs fail to expressly identify the discretionary shop steward appointment procedure as a basis for a cause of action, the complaint does not contain fact allegations

100 that, if true, would establish that appointed shop stewards are disproportionately white. Plaintiffs have *100 not made any showing-statistical, anecdotal, or otherwise-that minority union members obtain such appointments less frequently than their white counterparts. Absent such a showing, plaintiffs cannot met their burden of showing that there common questions of law or fact to support the certification of a class.

*c. Plaintiffs' Failure to Produce Statistical Evidence*

According to plaintiffs, in response to discovery requests defendant has taken the position that it does not have statistical or other information about the racial composition of its membership. ( *See* Letter from Nathaniel B. Smith, Counsel for Plaintiffs, to Magistrate Judge Theodore H. Katz (Oct. 21, 2005).) Plaintiffs' have complained that they have been unable to compile the necessary statistical evidence to support their motion, *inter alia,* because of defendant's failure to prepare and file with the Equal Opportunity Commission certain reports (" EEO-3 Reports" ) detailing the racial composition of its membership. At the hearing on the present motion, counsel for defendant stated that it was the union's position that it was not required to file such reports but that it " may file something this year." (Mar. 28, 2006 Tr. 13.) Plaintiffs previously applied to Magistrate Judge Katz to compel the production of EEO-3 Reports, which Judge Katz denied. ( *See* Endorsed Letter from Nathaniel B. Smith, Counsel for Plaintiffs, to Magistrate Judge Theodore H. Katz (Oct. 21, 2005).) Upon plaintiffs' motion to sustain their objections to the order entered by Judge Katz [61], this Court denied the motion, because neither the relied-upon regulation, 29 C.F.R. § 1602.24, nor applicable discovery rules authorizes a district court to require a union to prepare and file EEO-3 Reports upon the request of a private litigant. Whether such reports must be prepared is an issue that must be resolved by the EEOC. (Mar. 29, 2006 Order [65].)

While there may be some evidentiary impact at trial arising out of defendant's failure to maintain any required records, plaintiffs are not excused of their obligation, discussed at length above, to proffer evidence giving rise to an inference of discrimination on a class-wide basis in support of their class certification motion. Such information, both statistical and anecdotal, should be obtainable through means other than the nonexistent EEO-3 Reports. Plaintiffs are hereby given leave to conduct additional discovery, by December 31, 2006, on the issues of commonality and typicality and, thereafter, to file a renewed motion to certify a class within thirty (30) days of the close of discovery.

4. *Adequacy of Representation*

The Rule 23(a)(4) test for adequacy has undergone recent changes. The test originally encompassed two determinations, both that (i) the proposed class representatives have no conflicts of interest with other members of the class; and (ii) that the representatives' class counsel be well qualified, experienced and capable of handling the litigation in question. *In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d at 142. However, the Advisory Committee Notes to the 2003 Amendments to Federal Rule 23(g), effective December 1, 2003, state that " Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while [Rule 23(g) ] will guide the court in assessing proposed class counsel as part of the certification decision." Fed.R.Civ.P. 23(g). Thus, because Rule 23(a)(4) no longer governs the selection of class counsel, the Court will only address the adequacy of the proposed class representatives in this section.

Although " a court must be wary of a defendant's efforts to defeat representation of a class [on] grounds of inadequacy when the effect may be to eliminate any class representation," *Kline v. Wolf,* 702 F.2d 400, 402-03 (2d Cir.1983), courts should " carefully scrutinize the adequacy of representation in all class actions." *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555, 562 (2d Cir.1968). That scrutiny is generally directed to three areas. First, courts should consider whether the proposed plaintiffs are credible. *Cohen v. Beneficial Indus. Loan*

*Corp.,* 337 U.S. 541, 549, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) (class representative is a fiduciary, and interests
101 of the class are " dependent upon his diligence, wisdom and integrity" ); *101 *Kaplan v. Pomerantz,* 132 F.R.D. 504, 510 (N.D.Ill.1990) (" [a] plaintiff with credibility problems ... does have interests antagonistic to the class." ) (internal quotation marks omitted). Second, courts should consider whether the proposed plaintiffs have adequate knowledge of the case and are actively involved. *Baffa v. Donaldson, Lufkin & Jenrette Securities Corporation,* 222 F.3d 52, 61 (2d Cir.2000) (recognizing knowledge as a factor to consider in determining class certification but noting that it is properly considered in connection with the " typicality" requirement of Rule 23(a)(3)). Finally, they should consider whether the interests of the proposed plaintiffs are in conflict with those of the rest of the class. *Epifano v. Boardroom Business Prods., Inc.,* 130 F.R.D. 295, 300 (S.D.N.Y.1990) (noting that where defendants have claims for contribution against potential class representatives, their interests might conflict with those of the class).

As noted in *Falcon,* the typicality and commonality requirements not only merge as between themselves, but " also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about ... conflicts of interest." 457 U.S. at 157 n. 13, 102 S.Ct. 2364. This is because " [t]he more similar the claims and defenses of the class and its representatives, the more likely the representative will champion the interests of the class." *Burka v. New York City Trans. Auth.,* 110 F.R.D. 595, 601 (S.D.N.Y.1986). For the reasons discussed above, the defects in plaintiffs' showing with respect to commonality and typicality preclude a finding that the adequacy-of-representation requirement has been met. Until it has been established that there are questions of law or fact common to the class, and that named plaintiffs bring claims typical of those brought on behalf of the class, it is premature to address defendant's specific arguments with respect to any individual conflicts of interest or agendas purported to be " antagonistic to proposed class members." (Def.'s Opp'n Mem. 43) (citing *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.,* 209 F.R.D. 323, 338 (S.D.N.Y.2002).)

**CONCLUSION**

For the foregoing reasons, plaintiffs' motion [46] has been denied without prejudice to renew.

SO ORDERED.

> A: I wouldn't know if-I can't say personally because I don't know if people were on the list, so I really can't say that, but I have been on a job in situations where people came, showed up on the job site saying there were sent from the hall and they weren't all on the out of work list, but either business agents or you know, like I have been on a job site where I had two business agents sent I would say two of their buddies down.

(Bynum Dep. 68:19-69:09.)

> A: A lot of times, even though we had the out of work list, there was members coming in to the office and like I said, if they was like an immediate availability of a job or whatever, if it was something I have for you to go to right there and then, we give it to whoever walked in the door. So did we bypass the list? Millions of times, millions of ways.
>
> Q: So is that in violation of hiring hall rules?
>
> A: I would say so. I know the man sitting on the list, sitting at home waiting for a phone call should have been offered that work.

(Bynum Dep. 150:07-150:19.)

A: I have been in the office when business agents walked in and say my friend is out of work a long time, do me a favor, and say here, take this one....

Q: What BAs did you ever see come in?

A: I basically say everyone did a favor once in a blue. Everybody ever worked there .... A friend, this buddy of mine, do me a favor, you know, help my friend out. He is in a jam or whatever the case may be. I won't say it was normal, but basically every business agent done it at one point in time or another.

(Bynum Dep. 151:09-154:19.)

Docket No. 05-3564 CV
United States Court of Appeals, Second Circuit

# Graves v. Finch Pruyn Co., Inc.

457 F.3d 181 (2d Cir. 2006)
Decided Jul 12, 2006

Docket No. 05-3564 CV.

Argued: January 23, 2006.

Decided: July 12, 2006.

182 Appeal from United States District Court for the Northern District of New York, Gary L. Sharpe, J. *182

Nathaniel B. Smith, Law Offices of Nathaniel B. Smith, New York, NY, for Plaintiff-Appellant.

Michael T. Wallender, Law Offices of Michael T. Wallender, Albany, NY, for Defendant-Appellee .

Before WALKER, Chief Judge, WINTER and SOTOMAYOR, Circuit Judges.

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JOHN M. WALKER, JR., Chief Judge.

In this employment-discrimination lawsuit, plaintiff-appellant George Graves sues his former employer,
183 defendant-appellee Finch Pruyn Company, Inc. ("Finch Pruyn"), alleging that Finch Pruyn forced *183 him out of his job as a paper inspector because of his disability — a bony growth on his heel known as a bone spur — and his age. The district court granted Finch Pruyn's motion for summary judgment in an oral decision from which Graves appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291, and for the reasons stated below, we affirm in part, vacate in part, and remand.

## BACKGROUND

Over the course of seventeen years, George Graves worked his way up from a laborer in the woodroom of paper manufacturer Finch Pruyn to a paper inspector in its quality-assurance department, a position to which he was promoted in 1991. In late 1999, Graves was diagnosed with a bone spur on the heel of his left foot, a painful condition which required surgery and treatment.[1] Because paper inspectors at Finch Pruyn are on their feet for much of their shifts, Finch Pruyn assigned Graves to "light duty" in the months preceding surgery to accommodate his foot pain. After surgery in May 2000, Graves missed three months of work while on paid disability leave to recover from the surgery, and he then returned to work in September 2000.

[1] Graves ultimately was diagnosed with an accessory ossicle, an extra bone, in his left foot. He had the ossicle surgically removed on February 14, 2001.

From September 2000 through October 2000, Graves was again assigned to light duty. At the end of October 2000, the company put Graves back on paid disability leave, informing him that no more light-duty work was available. The six months of paid disability leave to which Graves was entitled under company policy ran out in December 2000. On January 4, 2001, Finch Pruyn's human-resources ("HR") director, Michael Strich, gave Graves three options: (1) return to full-duty work immediately, (2) take a 64% pay cut (from $50,000 to

$18,000 a year) and work at a desk job, or (3) have a doctor state that Graves is totally disabled and take disability retirement with the concomitant disability pension benefits of approximately $269,000. Graves elected the third option. At Graves's request, the company allowed him to work for the quality-assurance department in a sedentary job until the end of January 2001, giving Graves an income stream while he arranged for disability retirement. During this period, Graves did clerical office work and trained a new paper inspector. After this assignment, Graves performed no work for Finch Pruyn.

## DISCUSSION

This court reviews de novo the district court's grant of summary judgment, construing the evidence in the light most favorable to Graves and asking whether there is a genuine issue as to any material fact and whether Finch Pruyn is entitled to judgment as a matter of law. *Miller v. Wolpoff Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir.2003). We first discuss Graves's disability-discrimination claims and then turn to Graves's age-discrimination claim.

### I. Disability Discrimination

Section 102(a) of the Americans with Disabilities Act of 1990 ("ADA") creates a private right of action for disability-based employment discrimination. 42 U.S.C. § 12112(a).[2] A plaintiff suing under the ADA for
184 disability discrimination *184 bears the burden of establishing a prima facie case. In so-called reasonable-accommodation cases, such as this one, the plaintiffs burden "requires a showing that (1) plaintiff is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations." *Rodal v. Anesthesia Group of Onondaga, P.C.*, 369 F.3d 113, 118 (2d Cir.2004); *see* 42 U.S.C. § 12111(8) (defining a "qualified individual with a disability" — a person whom the statute protects — as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires"); *id.* § 12112(b)(5)(A) (defining "discriminate" to include a failure to make reasonable accommodations unless undue hardship would result). On appeal, the parties focus on the third and fourth elements of the prima facie case.[3]

[2] "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

[3] A claim of disability discrimination under the New York State Human Rights Law, N.Y. Exec. Law §§ 290-301 (McKinney 2005), is governed by the same legal standards as govern federal ADA claims. *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 332 n. 1 (2d Cir.2000). Thus, to the extent that Graves brings a state-law disability-discrimination claim, it survives or fails on the same basis as his ADA claim.

Graves has not pointed to record evidence to dispute Finch Pruyn's contention that the essential functions of the job at issue, paper inspector at Finch Pruyn, include lifting up to 30 pounds and pushing heavy rolls of paper. Nor do the parties dispute that Graves's bone spur prevented him from performing these job functions without accommodation. Thus, to establish the third and fourth elements of his prima facie case, Graves must show that he could fulfill the essential job functions with reasonable accommodations that were refused by Finch Pruyn. Graves has contended that, at two points in time, Finch Pruyn should have made such reasonable accommodation.

### A. Reasonable Accommodation in October 2000

In his deposition, Graves asserted that Finch Pruyn should have given him a further light-duty assignment as of October 30, 2000, rather than putting him back on disability leave after determining that there was no longer a need for the light-duty position that Graves occupied. Graves's lawyer pressed this argument again at the summary-judgment hearing, but he does not press it on appeal. The argument is therefore waived, and we will not consider it. *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir.1998).

## B. Reasonable Accommodation in January 2001

### 1. Unpaid Leave of Absence

Graves also argued at the summary-judgment hearing, and argues now on appeal, that as of January 4, 2001, after his disability leave had expired, the company should have given him an accommodation consisting of unpaid leave to see a foot specialist about rehabilitation of his foot. As an initial matter, Finch Pruyn argues that Graves never requested such an unpaid leave of absence in January 2001. This request would matter because, generally, "it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed." 29 C.F.R. pt. 1630, app. at 363 (2003); *accord Flemmings v. Howard Univ.*, 198
185 F.3d 857, 861 (D.C. Cir.1999) ("An underlying *185 assumption of any reasonable accommodation claim is that the plaintiff-employee has requested an accommodation. . . ."). 

It is clear that Graves did not use the phrase "unpaid leave of absence" at any point in his communications with Finch Pruyn. But Graves testified about his January 4, 2001 conversation with HR manager Strich as follows:

> I told him [Strich] Dr. Yovanoff recommended Dr. William O'Connor, who is a specialist in Saratoga, another foot specialist.
>
> I told him I was trying to make an appointment with him [Dr. O'Connor]. He asked me how long it would take. I said maybe a couple weeks. I was then told we do not have any more time. . . .
>
> . . .
>
> . . . I believe I asked for more time, that I was trying to see this specialist, Dr. O'Connor. I was refused.

Graves Dep. 31:11-32:10, Feb. 24, 2004. Although it is a close call, we believe that a reasonable jury could infer from this testimony that Graves was in the process of requesting an unpaid leave of absence to obtain an appointment with Dr. O'Connor and that Finch Pruyn cut off this request. This would be an inappropriate response under *Parker v. Columbia Pictures Industries*, 204 F.3d 326 (2d Cir.2000), which held that an employee's request for an accommodation triggers a duty on the part of the employer "to investigate that request and determine its feasibility," *id.* at 338. To the extent that the district court held against Graves the fact that "the record is unclear about whether or not Finch [Pruyn] was made aware of [Graves's] request [for more time]," Summ. J. Hr'g Tr. 36:18-19, June 2, 2005, the district court improperly drew inferences in Finch Pruyn's favor.[4]

> 4 We reject Finch Pruyn's contention that Graves is foreclosed from raising an argument premised upon a request for unpaid leave. Finch Pruyn contends that under Northern District of New York Local Rule 7.1(a)(3), Graves admitted that his only claim to reasonable accommodation was his October 2000 request for light duty. Putting aside the issue of how a rule designed to isolate factual disputes could directly limit legal claims, Finch Pruyn's argument fails because Graves did contest Finch Pruyn's assertion by contending in his reply Rule 7.1 submission that Finch Pruyn "should have extended to Plaintiff additional time in which to have his foot examined and treated by Doctor William O'Connor, a foot specialist and orthopedic surgeon in Saratoga, New York, as requested by Plaintiff." Pl's Resp. to Def.'s Local Rule 7.1(a)(3) Statement of Material Facts 15, June 1, 2004.

Of course, to satisfy the third element of his prima facie case, Graves also must show that the requested unpaid leave of absence was a reasonable accommodation. The district court held that the contemplated leave of absence would not be a reasonable accommodation because it was indefinite. *Id.* at 36:23-24. On appeal, Finch Pruyn adopts the district court's reasoning, arguing that the indefinite nature of Graves's request renders it unreasonable.[5]

[5] Finch Pruyn avoids the argument that an unpaid leave of absence is never a reasonable accommodation. This court has not had the occasion to address whether a finite unpaid leave of absence is a reasonable accommodation under the ADA. *Cf. Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 9 (2d Cir.1999) (holding that the ADA does not require an employer to give an employee an indefinite leave of absence where there was no expectation that the employee would be able to return to work). Most other circuits and the Equal Employment Opportunity Commission have concluded that, in some circumstances, an unpaid leave of absence can be a reasonable accommodation under the ADA. *See, e.g., Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1136 (9th Cir.2001); *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 649-50 (1st Cir.2000); *Cehrs v. Nw. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 781-83 (6th Cir.1998); *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591, 601 (7th Cir. 1998); *see also* 29 C.F.R. pt. 1630, app. at 356 (providing that a reasonable accommodation could include "unpaid leave for necessary treatment"). We note, however, that the idea of unpaid leave of absence as a reasonable accommodation presents "a troublesome problem, partly because of the oxymoronic anomaly it harbors" — the idea that allowing a disabled employee to leave a job allows him to perform that job's functions — "but also because of the daunting challenge of line-drawing it presents." *Garcia-Ayala*, 212 F.3d at 651-52 (O'Toole, J., dissenting).

But even Judge O'Toole would not read the ADA literally, requiring a reasonable accommodation to be effective immediately in enabling an employee to perform the essential functions of his or her job. Instead he allows, as have most courts, that " *some* leaves of absence might qualify as reasonable accommodations." *Id.* at 655; *see* Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 Wake Forest L.Rev. 439, 459 (2002) ("Courts, however, have found such a strict interpretation to be unreasonably narrow and impractical."). Because Finch Pruyn does not press this point, we address it no further.

Viewing the record in the light most favorable to Graves, it was imprecise to call the requested leave of absence
186 "indefinite." A factfinder could find, based on *186 Graves's testimony that he asked for "more time" to get a doctor's appointment and that it would take a "couple of weeks," *see Graves* Dep. 31:16, 32:8-9, Feb. 24, 2004, that Graves requested two weeks of leave — a finite amount of time — to see Dr. O'Connor and learn of his chances for rehabilitation. Granting this leave of absence would not require Finch Pruyn to hold open Graves's position indefinitely. *See Parker*, 204 F.3d at 338 ("The duty to make reasonable accommodations does not . . . require an employer to hold an injured employee's position open indefinitely . . ."). The district court erred in rejecting Graves's claim on the basis that the requested leave was "indefinite," Summ. J. Hr'g Tr. 34:1, June 2, 2005, and accordingly, we vacate the grant of summary judgment as to this claim of disability discrimination.[6]

**2. Reassignment**

[6] Because we vacate on the basis of the district court's misidentification of Graves's leave request as "indefinite," we do not reach the question of how assured the employer must be of an employee's successful return following a proposed finite leave of absence in order for the finite leave to be a reasonable accommodation. We note that courts considering this question have concluded that a leave of absence may be a reasonable accommodation where it is finite and will be reasonably likely to enable the employee to return to work. *See, e.g., Humphrey*, 239 F.3d at 1136 (identifying a "could have plausibly enabled [job performance]" standard for the reasonableness of a requested leave of absence); *Walsh v. UPS*, 201 F.3d 718, 726-27 (6th Cir.2000) (distinguishing the case of short and definite leave with a "reasonable prospect of recovery" from the case of indefinite leave with a vague medical opinion about recovery prospects); Haschmann, 151 F.3d at 601 (finding a short leave of absence reasonable in reliance on a doctor's stated optimism about its benefits); *Criado v. IBM Corp.*, 145 F.3d 437, 440, 444 (1st Cir.1998) (holding that a jury could find that the

employee's request for a short period of leave beyond her disability-leave allowance was reasonable where the employee's doctor was optimistic that the leave would "ameliorate her disability"); *see also Garcia-Ayala*, 212 F.3d at 655 (O'Toole, J., dissenting) (surveying the case law and observing that "[the leave] must be instrumental to effect or advance a change in the employee's disabled status with respect to the job, so that the employee is enabled to do it.").

On remand, Finch Pruyn should be allowed to move for summary judgment based upon insufficient assurance of Graves's successful return to work. At this stage, we decline to consider this argument without benefit of the district court's analysis. *See generally Miranda v. Bennett*, 322 F.3d 171, 175-76 (2d Cir.2003) (emphasizing that we are entitled to the district court's analysis of the issues be cause it informs our review).

187 Graves further contends that as a reasonable accommodation in January *187 2001, Finch Pruyn should have "reassigned" him to a new, sedentary desk job in the quality-assurance department rather than offering this position only as a temporary job for a few weeks to give Graves an income stream after his election of disability retirement. The ADA lists reassignment to an existing, vacant position as a possible reasonable accommodation, 42 U.S.C. § 12111(9)(B), but the ADA does not require creating a new position for a disabled employee, *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 99 (2d Cir.1999); *accord Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 457 (6th Cir.2004); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1174-75 (10th Cir.1999) (en banc); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 53 (5th Cir.1997); *Benson v. Nw. Airlines, Inc.*, 62 F.3d 1108, 1114 (8th Cir. 1995).

Graves concedes that the sedentary position he desired was created at his request after his election of disability retirement. Given that the ADA does not require creating a new position for Graves at all, we fail to see how it can dictate the duration of a new position that his employer created for him as a matter of grace. We hold that the ADA did not require Finch Pruyn to give Graves this new position for any longer than it did.

* * *

For the foregoing reasons, we vacate the grant of summary judgment as to Graves's claim premised on a January 2001 request for an unpaid leave of absence, and we remand this case for further proceedings on that claim consistent with this opinion. We affirm the grant of summary judgment on Graves's claims premised on an October 2000 request for light duty and a January 2001 request for reassignment.

## II. Age Discrimination

Graves claims relief for age discrimination pursuant to the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-34. Because Graves presents no direct evidence of age discrimination, the court evaluates his ADEA claim under the *McDonnell Douglas* burden-shifting framework. *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 76 (2d Cir.2005) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). Graves bears the initial burden to establish a prima facie case of age discrimination by showing that "[1] at the relevant time the plaintiff was a member of the protected class; [2] the plaintiff was qualified for the job; [3] the plaintiff suffered an adverse employment action; and [4] the adverse employment action occurred under circumstances giving rise to an inference of discrimination, such as the fact that the plaintiff was replaced by someone `substantially younger.'" *Roge v. NYP Holdings, Inc.*, 257 F.3d 164, 168 (2d Cir.2001) (quoting *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996)). The burden then shifts to Finch Pruyn to articulate a legitimate reason for the adverse employment action; thereupon, Graves bears the ultimate burden of showing that the proffered reason is a pretext for age discrimination. *Id.*

The district court held that there is no factual dispute about Graves's inability to show the second, third, and fourth elements of his prima facie case. On appeal, Graves argues that there is a factual dispute because a jury might view either of two younger paper inspectors, hired months before Graves's resignation, as Graves's
188 replacement rather than the older *188 paper inspector hired nineteen days after Graves's resignation. Graves also argues that he demonstrated the other elements of his prima facie case.

We need not resolve these questions because even if Graves established genuine factual questions as to all elements of his prima facie case of age discrimination, he has not pointed to any record evidence to dispute Finch Pruyn's legitimate reason (so far as the ADEA is concerned) for the alleged adverse employment action — that Graves's disability prevented him from performing the essential job functions of a paper inspector. Although the ADA might prohibit adverse employment action against Graves on the basis of his disability, the ADEA protects only against discrimination motivated by age. 29 U.S.C. § 623. Because Graves has not pointed to any record evidence indicating that Finch Pruyn's legitimate reason for the alleged adverse employment action is a pretext, we affirm the grant of summary judgment to Finch Pruyn on Graves's ADEA claim.

Graves also claims that Finch Pruyn discriminated against him because he was denied the opportunity to have a more flexible job that Finch Pruyn gave to a younger paper inspector, 34-year-old Irene O'Keefe, after he left the company. O'Keefe suffered a knee injury in December 2000 and worked light duty from late January through March 2001. She then had surgery and later transferred into a job that was more sedentary. Even assuming that the failure to give Graves the same opportunity to compete for a more flexible position that was created some months after he left the company would be an adverse employment action, Graves has failed to raise an issue of fact that he was qualified for the position or that Finch Pruyn's legitimate nondiscriminatory reasons for not considering him were pretextual.

## CONCLUSION

The judgment of the district court granting summary judgment to Finch Pruyn is affirmed in part and vacated in part, and the case is remanded for further proceedings.

No. 04 Civ.3143
United States District Court, S.D. New York

# Duggan v. Local 638

419 F. Supp. 2d 484 (S.D.N.Y. 2005)
Decided Nov 21, 2005

No. 04 Civ.3143.

485 November 21, 2005. *485

Nathaniel B. Smith, Sheldon Karasik, New York City, for Plaintiff.

Richard S. Brook, Law Office of Richard S. Brook, Mineola, NY, for Defendant.

486 *486

## OPINION ORDER

BAER, District Judge.

Plaintiff, Leon Duggan ("Duggan") brought this action against his union, Local 638, Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine, Air Conditioning and General Pipefitters ("Local 638" or "the union"). Duggan alleges that Local 638 discriminated against him because of
487 his *487 race by failing to refer him for work assignments. Duggan claims that Local 638's conduct violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* ("Title VII"), as well as 42 U.S.C. § 1981, Section 296 of the New York Human Rights Law, Section 43 of the New York Civil Rights Law, and Section 8-107 of the New York City Administrative Code. Local 638 has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Oral argument was held before this Court on September 27, 2005. Following the argument, I ordered plaintiff to provide the Court with "a statistical analysis demonstrating as precisely as possible the hours of work performed by minority and non-minority union members from January 1, 2000 through December 31, 2004." (Order dated September 30, 2005). In compliance with that Order, plaintiff submitted additional exhibits and a supplemental memorandum of law on October 28, 2005. Defendant responded on November 4, 2005. Having reviewed the parties' supplemental submissions, for the reasons set
2 forth below, the motion for summary judgment is GRANTED. *2

## I. BACKGROUND

### A. Factual Background

Duggan is an African-American male with 30 years experience as a professional welder. (Affirmation of Richard S. Brook, Esq., dated July 28, 2005 ("Brook Aff."), Ex. 22; Affidavit of Leon Duggan, dated August 10, 2005 ("Duggan Aff.") ¶ 9). Local 638 consists of construction and service steamfitters who perform work within New York City and on Long Island. (Affidavit of William R. Abbate, dated July 14, 2005 ("Abbate Aff.") ¶¶ 5-7). Duggan first applied for membership in Local 638 in May 2000, but his application was

rejected. (Duggan Aff. ¶ 3). Duggan applied unsuccessfully again in October 2000. (Id. ¶ 4). Finally, after letters to Local 638 were written on Duggan's behalf by a staff attorney at the NAACP, by the Executive Director of "Fight Back," an organization dedicated to combating racism in employment, and by counsel to Mr. Duggan, Duggan was admitted into the union on January 8, 2002. (Id. ¶¶ 2, 5-7).[1]

[1] In this action, Duggan does not assert a claim based on the union's previous denials of membership. (See Compl. ¶¶ 14-21).

Plaintiff asserts that Local 638 exerts considerable influence over the work assignments of its members by referring contractors to individual members and by informing members of contractors who are hiring.[2] (Id. ¶ 8). Plaintiff claims that, after joining Local 638, he "actively sought . . . referrals" for full-time work but "received virtually none." (Id. ¶ 10). Specifically, during the three year period beginning in January 2002 and ending February 1, 2005, Duggan worked a total of 997 hours. (Id. ¶ 11). Duggan earned approximately $40,000 from his union work. (Id. ¶ 12). However, Duggan contends that he was available for work 40 hours per week for
488 150 weeks during this period. (Id. ¶ 11).[3] *488

[2] Local 638 disputes plaintiff's characterization of the method by which union members receive work assignments. The union contends that members seek and find work on their own, by word of mouth, and that the union does not operate any formal work referral system. (Abbate Aff. ¶¶ 13-15).

[3] Duggan notes that he received almost no union work in 2002, but that after filing a complaint with the EEOC on February, 24, 2003 his work assignments increased dramatically. (Duggan Aff. ¶¶ 13-14). During 2003 Duggan's gross pay on union projects exceeded $25,000. (Id. at 14). However, in 2004 Duggan's work assignments decreased and his total wages for union work that year were less than $7,000. (Id.).

On February 24, 2003 Duggan filed a complaint against Local 638 with the United States Equal Employment Opportunities Commission ("EEOC"). (Affirmation of Sheldon Karasik, Esq., dated August 16, 2005 ("Karasik
3 Aff."), Ex. G). On February 27, 2004 the EEOC *3 terminated its investigation of Duggan's complaint and issued him a "Notice of Right to Sue." (Karasik Aff., Ex. J). Plaintiff filed the instant action on April 26, 2004.

**B. The 1973 Injunction**

Local 638's past discriminatory practices have been the subject of litigation in this District. It is helpful to briefly review the history of that litigation. On June 21, 1973, in a consolidated action brought against Local 638 by the United States and by a class of non-white steamfitters, then District Judge Dudley Bonsal found that Local 638 had violated Title VII by, *inter alia,* discriminating against non-whites in its admission of new members, and by discriminating against non-whites in its work referral practices. See United States v. Local 638, 360 F. Supp. 979 (S.D.N.Y. 1973). In so finding, Judge Bonsal held that the union did not "maintain a formal hiring hall" and that there was "no formal method of referring workers for employment. . . . Information concerning available employment is circulated informally by word of mouth and other means." Id. at 986. Judge Bonsal also found that "there [was no] evidence that . . . Local 638 . . . engaged in purposeful discrimination" with regard to work referral. Nonetheless, the court held that common work referral practices "in combination with the history of discrimination" in admissions to the union gave "whites advantages in obtaining employment." Id. at 990. Therefore, the court ruled that the steamfitting industry's work referral practices should be "modified if past discriminatory patterns are to be corrected." Id. To remedy the situation, the court mandated that Local 638 maintain a list of available jobs and of steamfitters seeking work, and that this list be accessible to union members and to contractors. Id. at 991. The court also appointed a special Administrator to recommend the adoption of additional measures. Id.

In the ensuing litigation over the damages due individual class members as a result of Judge Bonsal's findings, the Second Circuit held that "any nonwhite steamfitter . . . who claims that he was discriminated against by work referral practices is entitled to prove the discrimination against him and any resulting damages." EEOC v.
4 Enterprise Assoc. Steamfitters Local No. 638, 542 F.2d 579, 587 (2d Cir. 1976). *4

## II. APPLICABLE STANDARD

### A. Summary Judgment

A court will not grant a motion for summary judgment unless it determines that there is no genuine issue of material fact and the undisputed facts are sufficient to warrant judgment as a matter of law. Fed.R.Civ.P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986). The party opposing summary judgment "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). In determining whether there is a genuine issue of material fact, the Court must resolve all ambiguities, and draw all inferences, against the moving party. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) ( *per curiam*); Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834
489 F.2d 54, 57 (2d Cir. 1987). It is not the court's role *489 to resolve issues of fact; rather, the court may only determine whether there are issues of fact to be tried.Donohue, 834 F.2d at 58 (citations omitted). However, a disputed issue of material fact alone is insufficient to deny a motion for summary judgment, the disputed issue must be "material to the outcome of the litigation," Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986), and must be backed by evidence that would allow "a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

A discriminatory intent or animus is essential to the ultimate determination of employment discrimination claims and therefore a "trial court must be cautious about granting summary judgment."Gallo v. Prudential Residential Serv., Ltd. P'ship, 22 F.3d 1219, 1224 (2d Cir. 1994); *accord* Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998) (holding that "in an employment discrimination case when, as here, the employer's intent is at issue, the trial court must be especially cautious about granting summary."). Essentially, the question on summary judgment is "whether the evidence, taken as a whole, supports a sufficient rational inference of discrimination." Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000).

### B. Title VII

Pursuant to Title VII, an employer may not "discharge any individual, or otherwise . . . discriminate against any
5 individual with respect to his compensation, terms, conditions, or *5 privileges of employment, because of such individual's race, color, religion, sex, or national origin" 42 U.S.C. § 2000e-2(a)(1). The Supreme Court articulated a three-step framework for reviewing cases brought under Title VII inMcDonnell Douglas Corp. v. Green. 411 U.S. 792 (1973). First, under McDonnell Douglas and its progeny, the plaintiff-employee "must establish a prima facie case of discrimination." Cruz v. Coach Stores, Inc., 202 F.3d 560, 567 (2d Cir. 2000). Second, if the plaintiff-employee satisfies this burden, the defendant-employer has the opportunity to "articulate a legitimate, clear, specific and non-discriminatory reason" for its adverse employment action. Kerzer v. Kingly Mfg., 156 F.3d 396, 401 (2d Cir. 1998) (internal quotation omitted). Third, where necessary and appropriate, plaintiff-employee may demonstrate that the defendant-employer's explanation was not the actual reason for the plaintiff-employee's dismissal. In other words, "the plaintiff has the ultimate burden to prove that the employer's reason was merely a pretext for discrimination." Holt v. KMI-Continental, Inc., 95 F.3d 123, 129 (2d Cir. 1996).

Plaintiff purports to assert a claim under a "disparate impact" theory of employment discrimination. (Compl. ¶¶ 25-26). A disparate impact claim alleges that a facially neutral employment policy disproportionately impacts a protected group. See EEOC v. Joint Apprenticeship Comm. of the Joint Indus. Bd. of the Elec. Indus., 186 F.3d 110, 117 (2d Cir. 1999). To establish a *prima facie* case of disparate impact discrimination, a plaintiff must allege a specific employment practice and demonstrate that the practice has a disproportionate impact on a protected group. Id. Here, plaintiff claims that the "nepotistic and cronyistic [work] referral practices" of Local 638 have prevented him from receiving adequate work assignments. (Compl. ¶ 25). This appears to be an allegation not of a "facially neutral" employment practice, but of intentional discriminatory behavior. Thus, the
490 gravamen of plaintiff's claim more closely resembles a "disparate treatment" theory of *490 discrimination. To establish a *prima facie* case of disparate treatment discrimination, a plaintiff must demonstrate that "1) he belongs to a protected class; 2) he was . . . treated disparately then similarly situated non-members of his protected class; and 3) there is evidence of discriminatory intent by the defendant." Batista v. Union of Needleworkers, 97 Civ. 4247, 2000 WL 1760923, *3 n. 5 (S.D.N.Y. Nov. 30, 2000) (Baer, J.) (noting that plaintiff failed to produce evidence showing discriminatory intent). As will be set forth below, plaintiff's claim
6 is deficient under either standard. *6

In addition, plaintiff alleges a "retaliation" claim under Title VII. (Compl. ¶ 26). To establish a prima facie case of retaliation, plaintiff must demonstrate that "1) he was engaged in a protected activity; 2) defendant knew of plaintiff's participation in that activity; 3) an employment action adversely affected the plaintiff; and 4) a causal connection existed between the protected activity and the adverse action."Batista, 2000 WL 1760923, at * 4.

### C. Additional Claims

Plaintiff's claims under 42 U.S.C. § 1981, the New York Human Rights Law and the New York City Administrative Code are subject to the same analytical framework as plaintiff's Title VII claims.See Hudson v. Int'l Business Machines Corp., 620 F.2d 351, 354 (2d Cir. 1980) (Section 1981 claim subject to burden shifting analysis); Dawson v. Bumble Bumble, 398 F.3d 211, 217 (2d Cir. 2005) (New York Human Rights Law and New York City Human Rights Law claims subject to same analysis as Title VII employment discrimination claim).[4] Therefore, these claims will be analyzed together with plaintiff's Title VII claims.

4 Plaintiff also asserts that his New York Civil Rights Law claim is governed by the same analysis as his Title VII claim. However, Dawson, the case plaintiff relies on for this proposition, does not discuss a claim predicated on the New York Civil Rights Law. See Dawson, 398 F.3d 211. Defendant does not dispute plaintiff's characterization of the substance of this claim, but defendant does argue that the New York Civil Rights Law claim is barred because plaintiff failed to serve notice upon the New York Attorney General. See New York Civil Rights Law § 41. For the purposes of this Opinion, the Court will assume that plaintiff's claim under the New York Civil Rights Law is subject to the same analysis as plaintiff's Title VII claim. Since, for reasons set forth below, defendant's motion for summary judgment is granted, this Court need not address defendant's argument regarding service of process.

## III. DISCUSSION

To establish a *prima facie* case of disparate treatment discrimination, plaintiff must demonstrate that similarly situated non minority individuals were treated differently than himself under circumstance giving rise to an inference of racial discrimination. See Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157, 161 (2d Cir. 1991) (to satisfy *prima facie* burden "a Title VII plaintiff initially must . . . offer evidence adequate to create an inference that an employment [action] was based on a discriminatory criterion") (internal quotation omitted). To survive summary judgment, a plaintiff "may raise . . . an inference [of discrimination] by showing that [his] employer .
7 . . treated him less favorably than a similarly situated employee *7 outside his protected group." Graham v.

Long Island Rail Road, 230 F.3d 34, 39 (2d Cir. 2000). Here, plaintiff has provided evidence that he received relatively little work (997 hours over the course of three years) during his time in the union. Furthermore, in an
491 attempt to demonstrate a disparity in the treatment of minority and *491 non-minority union members, plaintiff has provided a statistical analysis of the hours worked by those groups of employees.[5]

5 Plaintiff also attests that he "believes" that he was denied work opportunities because of his race. (See Duggan Aff. ¶¶ 10, 14, 26). However, plaintiff provides no evidence of any basis for that belief apart from his lack of work and Local 638's history of racial discrimination. While plaintiff attests that his belief is based on his "own personal observations and experiences," he provides no description of those observations and experiences. (Id. ¶ 10). In addition, plaintiff has provided an affidavit from another African-American member of Local 638, Trevor Lewis, in which Mr. Lewis attests that he has "frequently been given reason to believe that the Union is hostile to African-Americans." (Lewis Aff., dated August 6, 2005, ¶ 6). However, Mr. Lewis provides no factual assertions in support of his allegation.

"A plaintiff may . . . present statistical findings as circumstantial evidence of intentional discrimination." Smith v. Xerox Corp., 196 F.3d 358, 370 (2d Cir. 1999). However, the statistical evidence must be sufficient to create an inference of discrimination. See Hollander v. American Cynamid Co., 172 F.3d 192, 202 (2d Cir. 1999). See also Hudson v. International Business Machines, 620 F.2d 351, 355 (noting that statistics alone cannot satisfy a plaintiff's *prima facie* burden in a disparate treatment case). Here, in his initial submission, plaintiff compared the weeks worked by African-American union members in 2002 to the weeks worked by a randomly selected group of non-minority union members during that same period.[6] Plaintiff found that, during 2002, only 19% of the African-American union members were assigned 40 or more weeks of work, while approximately 35% of the white union members were assigned 40 or more weeks of work during that same period.[7] Furthermore, in his supplemental submission, plaintiff compared the hours worked by all African-American union members between 2000 and early 2005 with the hours worked by a random sample of non-minority union members during that same time period. Plaintiff found that 3.5% of the African-American union members logged over 10,000 total hours of work, while 7% of non-minority union members exceeded 10,000 hours. Plaintiff also
8 demonstrated that, during this same period, 10.5% of the African-American *8 members logged less than 1,000 total hours, while only 4% of the non-minority union members logged less than 1,000 hours. Finally, plaintiff demonstrated that, between 2000 and early 2005, the average African-American union member logged 5,824 hours while the average non-minority union member logged 6,061 hours — a difference of slightly less than 4%.

6 This analysis was performed by plaintiff's counsel, and is set forth in plaintiff's Memorandum in Opposition. (See Plaintiff's Memorandum in Opposition, dated August 16, 2005 ("Pl.'s Mem.") at 11). Plaintiff arrived at a list of African-American union members by taking defendant's list of all minority union members and removing those with Asian and Hispanic surnames. (Pl.'s Mem. at 11 n. 2).

7 Plaintiff claims that these statistics violate the EEOC's "four-fifths rule," which states that a "selection rate" for any minority group which is less than four-fifths or 80% of the selection rate for non minorities will "generally be regarded" by federal agencies as "evidence of adverse impact." 29 C.F.R. § 1607.4(D). However, "[t]his rule is not binding on courts, and is merely a `rule of thumb' to be considered in appropriate circumstances." Joint Apprenticeship Comm., 186 F.3d at 118.

Defendant has also provided a statistical comparison of the hours worked by African-American and non-
492 minority union members.[8] Defendant has demonstrated *492 that, between 2000 and 2004, African-American union members averaged 5,932 hours while non-minority union members averaged 5,943 hours — a difference of .19%. Defendant has broken this data down by year to show that in 2000 and 2001 African-American union members actually averaged more hours than their non-minority counterparts. Further, defendant asserts that

plaintiff's comparison of union members who exceeded 10,000 hours is inapposite. First, defendant points out that plaintiff mistakenly omitted one African-American union member who did in fact exceed this benchmark. When this individual is included, 5.2% of African-Americans worked more than 10,000 hours as compared with 7% of non-minority members. Further, defendant asserts that the 10,000 hour mark is completely arbitrary. When a benchmark of 9,500 hours is utilized instead, 10.5% of African-Americans exceeded that level, as compared with 11% of non-minority union members. When a benchmark of 7,000 hours is used (35 hours per week for 40 weeks over 5 years) more African-Americans exceeded this number than non-minority members. Likewise, defendant asserts that a 1,000 cutoff is arbitrary. If 500 hours is used instead, more non-minority union members worked less than 500 hours than African-American members. Finally, defendant argues that, by
9 plaintiff's own analysis, plaintiff himself logged drastically fewer hours (871) *9 between 2000 and 2004 than did either the average African-American or the average non-minority union member during that same period.[9]

[8] There are differences between the data sets utilized by plaintiff and defendant. Plaintiff asserts that his data set consists of all members who joined the union on or after the date that plaintiff joined. (See Karasik Aff., dated October 28, 2002, ("Karasik Aff. II") ¶ 3). Defendant claims that its data concerns all individuals who joined the union either two years before or two years after the date that plaintiff joined. (See Brook Aff. dated November 4, 2005 ("Brook Aff.II") ¶ 4). Therefore, defendant's data set includes individuals who joined the union up to and including December 31, 2003 (but not those who joined in 2004). Further, defendant's analysis includes all hours worked by union members up to December 31, 2004, while plaintiff includes hours worked "through the first few months of 2005." (Karasik Aff.II ¶ 4). Finally, plaintiff has compared the hours worked by African-American union members with the hours worked by a random sample of 114 non-minority union members. (Karasik Aff. II ¶ 4). Defendant has compared the average hours worked by all African-American union members to the average hours worked by all non-minority union members. (Brook Aff. II ¶¶ 6-15).

[9] Neither plaintiff nor defendant has adjusted this data for other factors, such as skill level or level of training, that could affect the amount of work received. Both parties assert that the union does not keep information regarding such characteristics. (Karasik Aff. II ¶ 9; Brook Aff. II ¶ 5).

Plaintiff's statistical analysis does not suffice to demonstrate that plaintiff was treated differently than similarly situated non minority union members under circumstances giving rise to an inference of discrimination.See, e.g. Gulino v. Board of Educ. of the City of New York, 236 F. Supp. 2d 314, 340 (S.D.N.Y. 2002) ("In order to demonstrate the specific racial motivation in a disparate treatment case . . . plaintiffs must control for multiple variables, to eliminate the likelihood that the employment action was the result of non-discriminatory factors.") Defendant correctly asserts that plaintiff's 1,000 hour and 10,000 hour benchmarks are completely arbitrary, and that a more reasonable 7,000 hour benchmark produces a higher pass rate for African-Americans than for non-minorities. Furthermore, when average overall hours worked are compared, plaintiff's data reveals a disparity of less than 4% between African-Americans and non-minority union members, while defendant's data
493 produces a difference of.19%. Defendant's numbers are more reliable *493 here as well, since defendant has analyzed the average hours worked by all non-minority members, while plaintiff used only 114 randomly selected non-minority members for comparison. A difference of less than .2% does not raise an inference of disparate treatment.[10]

[10] Plaintiff's comparison of the percentage of African-American and non-minority union members who worked more than 40 weeks per year is less demonstrative than a comparison of average overall hours worked. Plaintiff has provided no reason to compare weeks rather than hours or to use 40 weeks per year as the appropriate benchmark.

Plaintiff's claim fares no better under a disparate impact analysis. In disparate impact cases, "[s]tatistical data may be admitted to show a disparity in outcome between groups, but to make out a *prima facie* case the statistical disparity must be sufficiently substantial to raise an inference of causation."Smith, 196 F.3d at 365. A plaintiff must "present statistical evidence . . . sufficient to show that the [employment] practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."Id. (internal quotation omitted). Here, the purported statistical disparities are not "substantial enough to raise an inference of causation." EEOC, 186 F.3d at 117.

Logic dictates that plaintiff's claim cannot proceed under a retaliation theory either. Assuming that plaintiff has
10 shown that he engaged in a protected activity of which defendant was *10 aware, plaintiff has not shown that he suffered any adverse employment action. See Batista, 2000 WL 1760923, at * 4. Since plaintiff has not demonstrated that he was treated differently than other similarly situated union members, he has also not shown that his lack of work referrals constituted an adverse employment action.

Since plaintiff has failed to demonstrate that he was treated differently than similarly situated non minority union members, plaintiff has failed to meet his *prima facie* burden. Therefore, there are no triable issues of fact and defendant is entitled to summary judgment as a matter of law.[11]

[11] Plaintiff has requested that, in the event this Court finds plaintiff has failed to carry its *prima facie* burden, plaintiff be permitted to reopen discovery. However, this Court is not inclined to give plaintiff a third bite at the apple. Furthermore, there does not appear to be any additional evidence that plaintiff could adduce that would affect the outcome of this motion.

## IV. CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is GRANTED. The Clerk of the Court is directed to close this motion and remove this case from my docket.

IT IS SO ORDERED.

1 *1

No. 04 Civ. 7598(RWS)
United States District Court, S.D. New York

# Falchenberg v. New York City Dept. of Educ

375 F. Supp. 2d 344 (S.D.N.Y. 2005)
Decided Jul 1, 2005

No. 04 Civ. 7598(RWS).

345 July 1, 2005. *345

Kristian Karl Larsen, New York, NY, Nathaniel B. Smith, New York, NY, for Plaintiff.

Honorable Michael A. Cardozo, Corporation Counsel of the City of New York, New York, NY, (Chad I. Rosenthal, Assistant Corporation Counsel, of counsel), for Defendants New York City Department of Education and the City of New York, of New York, of counsel.

Honorable Eliot Spitzer, Attorney General of the State of New York, New York, NY, (Antoinette W. Blanchette,
346 Assistant Attorney General, of counsel), for State of *346 New York and New York State Department of Education.

Rogers Hardin, Atlanta, GA, (Zachary R. Davis, of counsel), for Defendant National Evaluation Systems, Inc.

## OPINION

SWEET, District Judge.

The defendants New York City Department of Education ("DOE"), the City of New York (the "City") (collectively the "City Defendants") have moved under Rule 12, Fed.R.Civ.P., to dismiss the complaint of plaintiff Marsha Falchenberg ("Falchenberg" or the "Plaintiff") for failure to state a claim. For the reasons set forth below, the motion is granted.

**Prior Proceedings**

Falchenberg filed her complaint on September 24, 2004 alleging that the defendants, including the DOE and the City, discriminated against her in violation of the Americans with Disabilities Act, 42 U.S.C. 12111 et seq. ("ADA"), the Rehabilitation Act, 29 U.S.C. § 794a ("Rehab Act"), N.Y.S. Human Rights Law § 296(1) ("SHRL"), and N.Y. Admin. Code § 8-107 ("CHRL").

The City Defendants' motion to dismiss was heard and marked fully submitted on February 16, 2005.

**The Complaint**

The Plaintiff has alleged that she was hired by DOE as a public school science teacher in September 2001, and
3 satisfactorily performed her duties. See Complaint at ¶ 9. During the course of *3 her employment with DOE, she was informed by DOE that she was required to become certified as a teacher by passing a test established by the New York State Department of Education ("NYSDE") and administered by National Evaluation

Systems, Inc. ("NES"). See Complaint at ¶ 10. She was further informed that if she failed to become certified, the DOE would be required by State regulation to terminate her employment. Id. Plaintiff did not take the certification test administered by NES, id. at ¶ 17, did not obtain her certification, and was terminated by DOE on September 2, 2003. Id. at ¶ 18.

The Plaintiff has alleged that "[t]he graveman [sic] of the action is that the defendants refused to provide plaintiff with a reasonable accommodation for plaintiff's disability, dyslexia . . ." Id. at ¶ 1. Prior to the examination, Falchenberg had requested specific accommodations, including a reader and transcriber, which were granted by NES on October 1, 2003, but only under the condition that she also provide spelling, punctuation, capitalization and paragraphing, id. ¶ 19, which she found unsatisfactory. Id. at ¶¶ 12-14. Her allegations of discrimination pertain to the failure to accommodate her alleged disability so that she could successfully take the certification test. Id. at ¶¶ 16-17. She had not alleged in her complaint that she was
4 wrongfully terminated, but that she was terminated on September 2, 2003. Id. at ¶¶ 19-20. *4

The complaint has alleged that NES administers the certification exam, id. at ¶¶ 1, 10, and not DOE, id. at ¶¶ 9-20. The complaint has acknowledged that NYSDE requires that any person employed by DOE as a teacher, in the same position as plaintiff, be certified, id. at ¶¶ 1, 10, and that NES is the entity that arranged the Plaintiff's accommodation. Id. at ¶ 19. The complaint has not alleged that DOE had any role in determining what, if any, accommodation would be made for the Plaintiff to take the exam. Id. at ¶¶ 9-20.

No allegations are contained concerning the City.

Although the Plaintiff has alleged that DOE's conduct constituted disability discrimination in violation of the
347 ADA, no details are set forth as to the alleged conduct. *347 Id. at ¶¶ 24, 29. Plaintiff has alleged without more that "defendants" discriminated against Plaintiff in violation of the Rehab Act, N.Y.S. Hum. Rights Law § 296(1) and N.Y.C. Admin. Code § 8-107. Id. at ¶¶ 33, 35, 36.

**The Rule 12(b) Standard**

Rule 12(b), Fed.R.Civ.P., provides that a defendant may move to dismiss a complaint for "(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4)
5 insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief *5 can be granted, [and] (7) failure to join a party under Rule 19." Fed.R.Civ.P. 12(b). Although the government has not specified which subsection of Rule 12 is being invoked in connection with its motion to dismiss the complaint, the grounds raised in the motion suggest that subsection (6) is the relevant provision.

In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court construes the complaint liberally, "accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor, Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002) (citing Gregory v. Daly, 243 F.3d 687, 691 (2d Cir. 2001)), although "mere conclusions of law or unwarranted deductions" need not be accepted. First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 771 (2d Cir. 1994) (quotation marks and citation omitted).

"`[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" York v. Ass'n of Bar of City of New York, 286 F.3d 122, 125 (2d Cir.) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)), cert. denied, 537 U.S. 1089 (2002). In other words, "`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.'" Eternity Global
6 Master Fund Ltd. v. Morgan Guar. Trust Co. of New York, 375 F.3d 168, 176 (2d Cir. 2004) *6 (quoting Geisler

v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980)). "[T]he court should not dismiss the complaint for failure to state a claim `unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957));accord Eternity Global Master Fund, 375 F.3d at 176-77.

**The Complaint Against The City Is Dismissed**

The City has cited the basis for its assertion that the City and DOE are separate and distinct entities. See N.Y.S. Edu. Law § 2251; Kelly v. Bd. of Ed., 141 N.Y.S.2d 34 (N.Y.Sup.Ct. 1955) (See Mun. Def. Mem., at 3-4).

While factual allegations must be construed in a light most favorable to the Plaintiff, the issue of whether or not DOE is a department of the City is a legal issue. In the absence of any allegations demonstrating participation
7 by the City, the complaint fails to state a cause of action against it. *7 **The Complaint Against The DOE Is Dismissed**

DOE has relied upon N.Y. Education Law § 3009 and N.Y. Edu. Law § 3001 (Mun. Def. Mem., at 4), as well as 8 NYCRR § 7.3, which states in relevant part:

> A teacher shall possess or be entitled to a certificate of qualification, or shall possess or be entitled to a provisional certificate, or shall possess a regional credential before the teacher enters into a contract to
348 teach; and before beginning *348 service the teacher shall present the certificate or credential for recording to the city, village or district superintendent in whose jurisdiction he or she is to teach.

The Plaintiff's interpretation of the regulation would require that a person who claims that she needs an accommodation can remain employed until that person takes the test, but the regulation does not so provide.

The regulation is promulgated by the State Education Department, and the Plaintiff has offered no support for her implicit contention that the City Defendants are accountable for the contents of the regulation. See N.Y. Edu. Law § 3004(1);see also 8 NYCRR § 7.3 ("No trustee or board of education shall contract with a teacher not legally qualified."). As stated by the City Defendants, there was no alternative but to enforce the regulation.
8 (Mun. Def. Mem., at 4-5). *8 **Plaintiff Is Not A Qualified Individual Within The Meaning Of The Disability Laws**

While the Plaintiff is correct that "[t]he federal, state and local laws impose an obligation on employers to provide qualified individuals with reasonable accommodations," (Pl. Mem. at 6), the Plaintiff under these circumstances is not a qualified individual. See 42 U.S.C. § 12111(8) (ADA protects only qualified individuals, and requires that consideration be given to the employer's standard of essential requirements of the job);Shannon v. New York City Transit Authority, 332 F.3d 95, 103 (2d Cir. 2003) (noting that similar requirements are imposed under federal, state, and city law). Plaintiff is not a qualified individual because she did not take the examination, which the State has set as a necessary prerequisite to qualification for a teaching certification. Notably, the examination itself, when challenged in a separate case, was held to be a valid job-related requirement. See Gulino v. Board of Education, "Findings of Fact and Conclusions of Law," No. 96 CV 8414, at ¶¶ 163-64 (CBM) (Sept. 4, 2003 S.D.N.Y.).

Falchenberg's challenge is restricted to whether she can be considered qualified if she refuses to take a state-mandated certification examination, the legitimacy of which has already been upheld. The Second Circuit, in affirming a grant of summary judgment by this Court, recently rejected a similar challenge by another plaintiff.

See Shannon, 332 F.3d at 102-04. InShannon, the Second Circuit affirmed the summary judgment decision and
9 noted *9 that state and federal regulations defining qualifications barred plaintiff's federal, state and local disability law claims against a city agency. Id.

Even more significantly, the complaint against the City Defendants must be dismissed because Plaintiff does not allege that she requested a reasonable accommodation from the City Defendants which was refused. The grant of accommodation, when given, comes from NES and NYSDE, two entities over which DOE has no control. It is settled that an "employee cannot hold an employer liable for failing to provide an accommodation that the employee has not requested in the first place." Thorner-Green v. New York City Dept. of Correction, 207 F. Supp. 2d 11, 14-15 (E.D.N.Y. 2002) (citation omitted).

Plaintiff has relied on the pretrial decision in Gulino v. Bd. of Educ., 236 F. Supp. 2d 314 (S.D.N.Y. 2002), correctly contending that the certification examination was held to be subject to Title VII inGulino. [1] However,
349 the certification examination *349 is not at issue in this case. There is no allegation that the certification test
10 itself is discriminatory, and there is *10 no indication that the City Defendants had anything to do with any of Plaintiff's accommodation requests.

[1] After a bench trial, the Honorable Constance Baker Motley ruled in favor of the defendants and found that the certification test is job related. See Gulino v. Bd. of Educ. ("Gulino II") "Findings of Fact and Conclusions of Law," No. 96CV8414 (CBM) (Sept. 4, 2003 S.D.N.Y.). Accordingly, the Court in Gulino did not reach the issue of whether the DOE had a valid counterclaim against the State Education Department. See Gulino II, at p. 34.

The Plaintiff cannot show that she is a qualified individual under the disability acts, and does not state a claim against the City Defendants.

**Failure To File A Notice Of Claim Bars The Action**

Plaintiff failed to demonstrate that a notice of claim was filed with the DOE, as required by N.Y. Educ. Law § 3813.[2] Furthermore, Plaintiff's attempts to avoid the notice of claim requirements are unavailing.

[2] Plaintiff's opposition papers inaccurately refer to the statute as N.Y. Educ. Law § 3218.

In her opposition papers, Plaintiff has referred to a letter that her attorney wrote to Lawrence Becker, an attorney in the Human Resources Department at DOE, and has cited Mennella v. Uniondale Union Free Sch. Dist., 287 A.D. 2d 636, 732 N.Y.S.2d 40 (2d Dept. 2001), where the court held that plaintiff's petition to the Commissioner of Education, six days after termination, satisfied the notice of claim requirement. Id. at 638. However, a letter to an attorney in the Human Resources Department is not the equivalent of a petition to the
11 Chancellor, who is comparable to the commissioner in Mennella. Additionally, the Mennella court *11 held that plaintiff's petition constituted an effective constructive notice of claim, where the agency's response indicated its awareness of the nature of plaintiff's discrimination claims. Id. The letter on which Plaintiff relies does not put DOE on notice of a potential lawsuit against DOE and states, "I believe that [SED official] Dr. Mackey's solution could work, and litigation with the NYSDE and NES could be avoided, if efforts are made to retain Ms. Falchenberg as an employee of [DOE]."

In support of the contention that she is exempt from the notice of claim requirement, the Plaintiff cites Simpson v. New York City Transit Authority, 188 A.D.2d 522, 591 N.Y.S.2d 350 (2d Dept. 1992) ("Simpson I"). However, the Second Department sua sponte revised itself on this very issue. Simpson v. New York City Transit Authority, 1993 N.Y. App. Div. LEXIS 7398 (1993) ("Simpson II"). In the Simpson I decision, the

Second Department stated that "the plaintiff was not required to serve a notice of claim. Employment discrimination claims brought pursuant to Executive Law § 296 are not subject to notice of claim provisions." 591 N.Y.S.2d 52. In Simpson II, the Second Department stated as follows:

> ORDERED that on the court's own motion, the decision and order of this court dated December 14, 1992 [Simpson I], in the above-entitled case, is amended by deleting the last paragraph thereof and substituting therefor:
>
> "Furthermore, the court was authorized to grant the plaintiff leave to file a late notice of claim (see, General Municipal Law § 50-e[5]; Mills v. County of Monroe, 59 N.Y.2d 307, 312, 464 N.Y.S.2d 709)."

350 *12 Simpson II. Thus, the court removed the portion of its decision that the Plaintiff has relied upon. *350

The Plaintiff also has cited Dworkin v. City of New York, 1996 U.S. Dist. LEXIS 17214 (S.D.N.Y. 1996), where the court addressed the question of whether employment discrimination is a tort, and therefore subject to the notice of claim requirement of N.Y.Gen. Mun. Law § 50(a), and concluded that it was not. However, the City was the defendant in Dworkin and not DOE.

Furthermore, New York General Municipal Law § 50(a)(1) does not apply to the present action. The applicable statute in this action is N.Y.Educ. Law § 3813, which reads:

> No action or special proceeding, for any cause whatever, except as hereinafter provided, relating to district property or property of schools provided for in article eighty-five of this chapter or chapter ten hundred sixty of the laws of nineteen hundred seventy-four or claim against the district or any such school, or involving the rights or interests of any district or any such school shall be prosecuted or maintained . . . unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim.

N.Y.Educ. Law § 3813(1).

There is no question as to whether employment discrimination is included within the umbrella of § 3813. The
13 axiom was set *13 forth in Biggers v. Brookhaven-Comsewogue Union Free School District, 127 F. Supp. 2d 452 (S.D.N.Y. 2001), which stated:

> The New York Court of Appeals has interpreted the statute as follows: "The Legislature has spoken unequivocally that no action or proceeding may be prosecuted or maintained against any school district or board of education unless a notice of claim has been `presented to the governing body,' and this court may not disregard its pronouncement."

Id. at 454-55 (quoting Parochial Bus Sys., Inc. v. Board of Educ., 60 N.Y.2d 539, 549 (1983)). This holding has been adopted by the Southern District courts. See e.g., Bloom v. New York City Bd. of Educ., 2003 U.S. Dist. LEXIS 5290 (S.D.N.Y. 2003) (quoting Biggers); Marrero v. City of New York, 2004 U.S. Dist. LEXIS 3529 (S.D.N.Y. 2004); ("Failure to file a notice of claim against a governmental subdivision for acts arising out of the state civil rights laws is `fatal' unless the plaintiff is vindicating a public interest."); Francis v. Elmsford Sch. Dist., 2004 U.S. Dist. LEXIS 15325 (S.D.N.Y. 2004). As such, the notice provision quite clearly applies to Plaintiff's action.

However, an exception does exist for actions that seek vindication of a public interest. See Biggers; Kushner, 285 F. Supp. 2d 314 (E.D.N.Y. 2003). In contrast, the Plaintiff in this case seeks, among declaratory and injunctive relief, money damages for "back pay, reinstatement or front pay, compensatory damages, damages
14 for lost pension benefits, plaintiff's emotional pain and *14 suffering, punitive damages, nominal damages, and incidental monetary relief." Complaint at 8. These are private interests.See Biggers at 455 ("[plaintiff's] allegations of discriminatory conduct on the part of the School District refer only to conduct as it relates to her. She seeks relief on the basis that she alone was denied a certain position on the basis of her gender. In addition, she seeks money damages for her own alleged emotional and financial suffering"); see also Kushner at 316 ("
351 [plaintiff] seeks to vindicate his own private interest and to recover money damages for his own alleged *351 emotional and financial loss"). The injunctive relief that Plaintiff requests, i.e., granting her requested accommodations is by definition a private interest inuring solely to the benefit of the Plaintiff.

The claims against DOE under State and City human rights laws are dismissed for Plaintiff's admitted failure to file timely notice of claim.

**Conclusion**

For the reasons set forth above, the complaint against the City Defendants is dismissed pursuant to Rule 12(b),
15 Fed.R.Civ.P., for failure to state a cause of action. The Plaintiff is *15 granted leave to replead within twenty (20) days of the entry of this opinion and order.

It is so ordered.

1 *1

# Kawoya v. Pet Pantry Warehouse

3 A.D.3d 368 (N.Y. App. Div. 2004) · 771 N.Y.S.2d 86
Decided Jan 15, 2004

1879.

Decided January 15, 2004.

Order of the Appellate Term of the Supreme Court, First Department, entered April 15, 2002, which, in an action alleging an unlawful lockout and destruction of personal property, reversed so much of an order of the Civil Court, New York County (Eileen Rakower, J.), entered October 31, 2001, as granted defendants-appellants' motion for summary judgment dismissing the complaint as against them, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants-appellants dismissing the complaint as against them.

Nathaniel B. Smith, for Plaintiff-Respondent.

Jeffrey R. Metz, for Defendants-Appellants.

Before: Andrias, J.P., Ellerin, Williams, Lerner, Gonzalez, JJ.

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Plaintiff, a New York resident, was employed as a stock person by defendants Pet Pantry Warehouse, Inc. and Pet Pantry Super Discount Stores, LLP (hereinafter jointly Pet Pantry), a Connecticut corporation, at their Greenwich, Connecticut location. Defendant Douglas Staley (Staley), Pet Pantry's chief operating officer,
369 proposed that plaintiff move into his private Connecticut *369 apartment with his nephew in exchange for $600 per month, payable to Staley, in order to alleviate plaintiff's daily commute from New York City to Greenwich, as well as to offset Staley's costs in maintaining an apartment he vacated following his marriage. Plaintiff alleges that shortly after he notified Pet Pantry that he intended to seek medical coverage for an on-the-job back injury, he was locked out of the apartment by Staley and his nephew and that his personal property was destroyed in retaliation.

Pet Pantry subsequently moved for summary judgment, contending, inter alia, that the subject apartment was wholly owned by Staley, who was not a partner of Pet Pantry, and that Staley's decision to rent his private residence to plaintiff and the alleged destruction of plaintiff's personal property were not within Staley's duties or responsibilities as an employee of Pet Pantry. By order entered on October 31, 2001, the Civil Court, inter alia, granted the motion and dismissed the complaint against Pet Pantry, finding that it: (1) was not a party to the oral rental agreement between plaintiff and Staley; (2) did not have control over the subject premises; and (3) was not responsible for the alleged lockout or subsequent property loss. The Appellate Term reversed and denied Pet Pantry's motion for summary relief, finding, inter alia, questions of fact as to whether Staley's actions were within the scope of his employment or in furtherance of Pet Pantry's business under the doctrine of respondeat superior. This Court granted Pet Pantry leave to appeal and we now reverse.

It is well settled that under the doctrine of respondeat superior, "[a]n employer may be held vicariously liable for the tortious acts of its employee only if those acts were committed in furtherance of the employer's business and within the scope of employment" ( *N.X. v. Cabrini Medical Center*, 280 A.D.2d 34, 37, *affd in part modified in part* 97 N.Y.2d 247). However, "`where an employee's conduct is brought on by a matter wholly personal in nature, the source of which is not job related, his actions cannot be said to fall within the scope of his employment'" ( *Davis v. City of New York*, 226 A.D.2d 271, 272, *lv denied* 88 N.Y.2d 815, quoting *Stavitz v. City of New York*, 98 A.D.2d 529, 531).

In the instant matter, we find no question that Staley's actions in renting his private residence to plaintiff and the alleged subsequent destruction of plaintiff's personal property were personal in nature and not within the scope of his employment with Pet Pantry. After a careful review of the record, it is clear that Staley took in his
370 nephew and plaintiff as tenants primarily *370 to collect rent to pay off his private apartment's maintenance charges and mortgage after Staley vacated the premises following his marriage. The landlord-tenant relationship between Staley and plaintiff was primarily in furtherance of Staley's personal financial situation, rather than advancing the business of Pet Pantry. Indeed, Staley himself brokered the agreement with plaintiff without the consent of Pet Pantry and collected the $600 monthly rental for his own use. We further find no indication in the record that Staley's private residence was utilized as a "company apartment" for the benefit of Pet Pantry or that Pet Pantry exercised any control, either directly or indirectly, over Staley's apartment.

We have considered the plaintiff's remaining contentions and find them unavailing.

All concur except Williams and Gonzalez, JJ. who dissent in a memorandum by Williams, J. as follows:

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WILLIAMS, J. (dissenting).

I would affirm the order of the Appellate Term.

The contention of the Pet Pantry defendants, that defendant Staley, their chief operating officer, was not acting within the scope of his employment when, as plaintiff alleges, he unlawfully locked plaintiff out of the apartment that he rented to plaintiff and then destroyed plaintiff's personal property, is not sufficiently supported to warrant a grant of summary judgment. Indeed, the evidence arguably shows that Staley utilized the apartment in question as a company apartment, i.e., to house Pet Pantry employees so as to place them more readily at their employer's disposal, and that Staley's alleged wrongful conduct was precipitated by plaintiff's termination as a Pet Pantry employee shortly after he notified Pet Pantry that he would seek medical coverage for the on-the-job back injury he sustained. Consequently, issues of fact are raised as to whether the complained-of acts attributed to Staley were performed to further the interests of the Pet Pantry defendants and within the scope of Staley's employment ( *see Riviello v. Waldron*, 47 N.Y.2d 297, 302-303).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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# In re Mason Hill Co., Inc.

Decided Dec 10, 2003

SIPA Proceeding, Case No. 95-99999 (SMB), Adv. Pro. No. 02-8030A (SMB)

December 10, 2003

Elizabeth Page Smith, Esq., John S. Kinzey, Esq., Herbert K. Ryder, Esq., Of Counsel, LeBOEUF, LAMB, GREENE MacRAE, L.L.P., New York, New York, for the Securities Investor Protection Corporation

NATHANIEL B. SMITH, ESQ., New York, New York, for Jeffrey Levine

## MEMORANDUM DECISION OVERRULING JEFFREY LEVINE'S OBJECTION TO THE DENIAL OF HIS CUSTOMER CLAIM

STUART BERNSTEIN, Chief Judge, Bankruptcy

Jeffrey Levine submitted a customer claim (the "Claim") in the sum of $298,903.00 in this liquidation proceeding under the Securities Investor Protection Act of 1970, 15 U.S.C. § 78aaa et seq. ("SIPA"). The
2 Securities Investor Protection Corporation ("SIPC"), acting as trustee, denied the Claim. Levine filed an *2 objection to that denial, SIPC responded, and the parties consented to the treatment of their submissions as cross-motions for summary judgment regarding the denial of the Claim. (Transcript of hearing, held Oct. 30, 2003 ("Tr."), at 33.) For the reasons that follow, SIPC's motion is granted, Levine's is denied, and his objection is overruled.

## BACKGROUND A. The Transaction

At all relevant times, the debtor, Mason Hill Co., Inc., was engaged in business as a broker-dealer, belonged to the National Association of Securities Dealers (the "NASD") and SIPC, and traded securities for the accounts of its clients.[1] Prior to the transactions in question, Levine maintained trading account no. 614-10017 (the "Account") with the debtor. On February 29, 2000, Levine and the debtor entered into a Memorandum of
3 Understanding (the "Memorandum").[2] Pursuant to the *3 Memorandum, Levins proposed to wire $1 million into his Account, the debtor promised to deliver 800,000 shares of common stock in Digital Mafia Enterprises ("Digital Mafia") "as collateral," and the parties agreed that upon the repayment of the $1 million.

1 Evidence of the debtor's membership in the NASD and SIPC, as well as the transactions discussed in this opinion, are contained in the Client Account Statements sent to Levine each month. These statements, which cover the period February 1, 2000 through December 31, 2000 (except for August), are attached as part of Exhibit A to Levine's Hearing Request and Opposition to Denial of SIPC Claim, dated July 16, 2003 ("Levine's Objection")

2 A copy of the Memorandum is attached as Exhibit F to the'Trustee's Response to Opposition of Jeffrey Levine to Denial of SIPC Claim, dated Oct. 1, 2003 (`Trustee's Response").

Levine would return 650,000 shares of Digital Mafia, and keep the balance. Christopher Kinsley, one of the debtor's brokers and principals, signed the Memorandum on behalf of the debtor. Levine wired $1 million into the Account on or about March 1, 2000.[3] During March 2000, the debtor engaged in thirty-three purchases and sales of securities in the Account, resulting in a net trading loss of $329,918.70. By the end of March, the debtor had wired $642,111.88 to Levine. This more or less represented the return of the $1 million, minus the March trading losses and the negative margin balance that existed at the beginning of the month.

[3] At the beginning of March, the Account had a total asset value of $25,588.01, net of a negative margin balance of $28,601.99.

After the end of March, Levine received a Client Account Statement (the "March Statement") depicting each of these transactions. The March Statement included a legend warning Levine that "[t]his statement shall be
4 conclusive if not objected *4 to in writing within ten days." Levins does not dispute that he received the March Statement and never protested any of the thirty-three transactions.

The Account still had a total asset value of $151,898.22 when April began, and the trading continued. During April, the Account engaged in approximately twenty-five buy and sell transactions, earning a net credit of $55,681.39. On April 13, 2000, the debtor wired $59,000.00 to Levine. By the end of the month, the Account had a total asset value of $135,397.37. In May 2000, the Account engaged in thirteen transactions, suffered a net trading loss of $40,368.42, and ended the month with a total asset value of $391,668.22. In June 2000, the busiest month, there were forty trades, the Account sustained net trading losses of $77,464.84, and ended the month with a total asset value of $81,162.40. As with the March Statement, the monthly statements covering April, May and June were sent to Levine, they contained the same legend requiring objections within ten days, and Levine never objected to any of the 100 plus transactions.

Between July 1st and July 27th, the Account engaged in another twenty-three transactions, realized a net trading
5 gain of $44,586.29, and reflected a total asset value of $190,088.18 by *5 month's end. On July 28, 2000 — one day after the final July transaction — Levine sent a memorandum to Kinsley threatening legal action and demanding the turn over of 800,000 shares of Digital Mafia as collateral for Levine's "unpaid loan". (Levine's Objection, Ex. C.) Levine also insisted that the debtor liquidate the Account immediately, and send a check for the net proceeds.[4] Levine's memorandum omitted any mention of the earlier buy-sell transactions reflected in the monthly statements. **B. This Proceeding**

[4] The debtor apparently ignored Levine's instruction, and continued to trade for the Account. By the end of the year, the value of the assets in the Account was completely dissipated. The parties have agreed that Levine may file an untimely customer claim based upon the debtor's failure to liquidate the Account. (Tr. 32.) Hence, that issue is not part of the Claim currently before the Court.

The debtor ceased doing business on or about April 5, 2001. On March 27, 2002, SIPC commenced this liquidation proceeding in the United States District Court for the Southern District of New York, and was appointed trustee by the District Court on the same day.

Levine filed the Claim with SIPC for a cash credit balance of $298,903.00 on July 2, 2002. In his
6 accompanying letter, *6 Levine's attorney alleged that the debtor had "improperly used [Levine's] funds and failed to return $298,903." (Trustee's Response, Ex. A.) SIPC denied the claim, and on July 16, 2003, Levine submitted his "Hearing Request and Opposition to Denial of SIPC Claim." **C. Kinsley's Bankruptcy**

After the debtor's demise, Kinsley filed a chapter 7 bankruptcy petition in the Eastern District of New York. Levine commenced an adversary proceeding for a determination that his claim against Kinsley — the same claim he has asserted in this proceeding — was not dischargeable. In a decision dated May 23, 2003, Bankruptcy Judge Stan Bernstein granted summary judgment to Levine under 11 U.S.C. § 523(a)(2)(A) and 523(a)(4). (Levine's Objection, Ex. D.) According to the bankruptcy court's decision, Kinsley (1) misrepresented that Levine's funds would be secure and that he would provide security for the account deposit, (2) used the money to "shore up" his own trading accounts, and (3) engaged in unauthorized short sales. (Id. at 8, 9-10.) Kinsley, who was appearing pro se by that time, did not respond to the motion. **D. The Parties' Contentions** *7

SIPC makes two straight forward arguments in opposition to Levine's objection. First, the transaction between Levine and the debtor was a loan, and Levine is not entitled to protection as a customer under SIPA. Second, even if Levine was a customer, his Claim is based on unauthorized trading, and is barred as a matter of law.

Levine's contentions are less straightforward, and at times contradictory. In his initial submission, Levine based his Claim on some of the theories articulated in Judge Stan Bernstein's decision. Levine maintained that Kinsley had misappropriated the funds and securities in the Account for improper purposes, but emphasized, for reasons that will soon become apparent, that his claim was not based on unauthorized trading. (Levine's Objection ¶ 9.)

Levine's reply papers raised a new claim and different theories. For the first time, he asserted a claim based on the debtor's failure to liquidate his Account and remit the balance in accordance with the July 2000 direction. (Reply Memorandum of Law, dated Oct. 29, 2003, at 3-4, 7.) This had nothing to do with the $1 million deposit. In addition, Levine seemed to embrace all of the grounds cited by Judge Stan Bernstein. He *8 returned to the idea that his losses were due to Kinsley's misrepresentations regarding the use of his funds, unauthorized trading and misappropriation. (Id., at 2.)

Lastly, paragraph 3 of Levine's reply declaration (the Declaration of Jeffrey F. Levine, dated Oct. 28, 2003), described a hybrid trading-guarantee agreement. According to Levine, Kinsley urged him to increase the amount of his business, and Levine agreed because Kinsley and he enjoyed a long-term business relationship. He was concerned, however, that the debtor was a newly-formed broker-dealer, and asked for "some protection." Kinsley gave him a secured guarantee (my words, not Levine's) to ensure the repayment of the $1 million, and Levine then transferred the funds.

## DISCUSSION

### A. The Standards Governing Summary Judgment

The standards governing a summary judgment motion are well-settled. A court must grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). *9 The moving party bears the initial burden of showing that the undisputed facts entitle him to judgment as a matter of law.Rodriguez v. City of New York, 72 F.3d 1051, 1060-61 (2d Cir. 1995). If the movant carries this initial burden, the nonmoving party must set forth specific facts that show triable issues, and cannot rely on pleadings containing mere allegations or denials. Fed.R.Civ.P. 56(e); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587 (1986). In deciding whether material factual issues exist, the Court must resolve all ambiguities and draw all reasonable inferences against the moving party. Id. at 587-88.

## B. Levine Was Not A "Customer"

The threshold question raised by the objection is whether Levine enjoys the status of a customer under SIPA. A creditor with customer protection under SIPA is entitled to preferential treatment over other creditors in the
10 distribution of assets of *10 the debtor's estate marshaled by the trustee.[5] "Customer," as defined in § 78 *111*(2) of SIPA, includes:

> 5 This preference derives from two sources: the availability of funds in the debtor's estate and funds made available by SIPA. Each customer's claim for "net equity,"as defined in 15 U.S.C. § 78fff(11) (the difference between what is owed to the customer by the debtor and what is owed by the customer to the debtor), is satisfied pro rata from the assets of the debtor. If thatpro rata share does not satisfy a customer's claim, SIPA authorizes SIPC to advance funds to the Trustee of up to $500,000.00 for each customer, with a maximum of $100,000.00 for a claim for cash rather than securities. 15 U.S.C. § 78fff-3(a)(1). Claimants of the debtor's estate who are not "customers" under SIPA must seek recovery from the assets of the general estate on the same terms as the debtor's other general creditors. 15 U.S.C. § 78fff-2(c)(1)(B).

> any person (including any person with whom the debtor deals as principal or agent) who has a claim on account of securities received, acquired, or held by the debtor in the ordinary course of its business as a broker or dealer from or for the securities accounts of such person for safekeeping, with a view to sale, to cover consummated sales, pursuant to purchases, as collateral security, or for purposes of effecting transfer. The term "customer" includes any person who has a claim against the debtor arising out of sales or conversions of such securities, and any person who has deposited cash with the debtor for the purpose of purchasing securities, but does not include—
>
> . . . .
>
> (B) any person to the extent that such person has a claim for cash or securities which by contract, agreement, or understanding, or by operation of law, is part of the capital of the debtor, or is subordinated to the claims of any or all creditors of the debtor, notwithstanding that some ground exists for declaring such contract, agreement, or understanding void or voidable in a suit between the claimant and the debtor.

11 Accord 11 U.S.C. § 741(2). *11

The claimant bears the burden of proving that he is a "customer" within the meaning of SIPA. Schultz v. Omni Mutual. Inc., No. 93-3700 (KG), 1993 WL 546671, at *2 (S.D.N.Y. Dec. 30, 1993); In re A.R. Baron Co., Inc., 226 B.R. 790, 795 (Bankr. S.D.N.Y. 1998); In re Adler Coleman Clearing Corp., 204 B.R. 111, 115 (Bankr. S.D.N.Y. 1997). A claimant can qualify as a customer for some transactions with his broker, but not others. In re First Interregional Equity Corp., 290 B.R. 265, 274 (Bankr. D.N.J. 2003). Hence, the determination must be based on the transaction giving rise to the claim.

To satisfy his burden, the claimant must demonstrate that the transactions underlying the claim (1) relate to investment, trading or participation in the securities markets, and (2) arise out of the type of fiduciary relationship that generally exists between a broker-dealer and his customer. Id. at 274; In re Brittenum Assocs., Inc., 82 B.R. 64, 67 (Bankr. E.D. Ark. 1987); see SEC v. F.O. Baroff Co., 497 F.2d 280, 284 (2d Cir. 1974) (loan of securities to broker to help it out of a cash bind did not involve participation in securities markets or the "indicia of the fiduciary relationship between a broker and his public customer," and claimant was not a

12 customer). One involved in an ordinary debtor-creditor relationship with the broker is *12 not a customer, SIPC v. Executive Sec. Corp., 556 F.2d 98, 99 (2d Cir. 1977); SEC v. F.O. Baroff Co., 497 F.2d at 284; In re Hanover Square Sec., 55 B.R. 235, 239-40 (Bankr. S.D.N.Y. 1985), as Levine concedes. (Tr. 5.)

The undisputed facts show that Levine was not a customer, as the transaction giving rise to the Claim appears to be a short-term loan. The Memorandum was essentially a promissory note, and used several terms more consistent with Article 3 of the Uniform Commercial Code than SIPA. It referred to the debtor as the "Maker" and to Levine as the "Holder". It also referred to the 800,000 shares of Digital Mafia stock "as collateral," and required Levine to return all but 150,000 shares — the cost of the loan, or interest — upon "repayment" of the $1 million. The debtor returned the $1 million, minus the March trading losses and the negative margin balance, in less than thirty days. Furthermore, Levine's July 2000 memorandum referred to his $1 million as "my unpaid loan," and demanded that Kinsley turn over the "collateral."(Levine's Objection, Ex. C.)

Even under Levine's version of what occurred, he is still not a customer. According to Levine, he transferred
13 the $1 million into his Account for the purpose of conducting securities *13 transactions, but first insisted on "protection" for his money. Since the funds were intended to permit trading, the "protection" necessarily meant a guarantee against trading losses. In response, Kinsley delivered a guarantee of repayment secured by the Digital Mafia stock.

The agreement described by Levine was plainly illegal. A broker cannot lawfully guarantee a customer against a loss in a securities transaction. NASD Rule 2330(e).[6] Thus, his claim based on the failure to honor the guarantee did not arise from the typical fiduciary relationship between a broker and his customer. Levine failed, therefore, to prove that he was a customer under SIPA with respect to the transaction underlying the Claim.

6 At the time of the transactions at issue, NASD Rule 2330(e) stated:

> No member or person associated with a member shall guarantee a customer against loss in connection with any securities account transaction or in any securities account of such customer carried by the member or in any securities transaction effected by the member with or for such customer.

I raised this precise issue with Levine's counsel at the oral argument. He responded that he was not sure of the legality, but nonetheless insisted that the Memorandum reflected just such an agreement. (Tr. 9.)

14 **C. Levine's Hypothetical Customer Claims Lack Merit** *14

Even if Levins had demonstrated that he was a customer, his Claim would still fail. He seems to argue that the debtor either misappropriated his funds (or stock) after the transfer into his Account, or engaged in unauthorized trading. There is no evidence of misappropriation or diversion. To the contrary, the Client Account Statements provide a full accounting of what happened to the $1 million. The funds were deposited into the Account and remained there, until the balance was returned in March after deducting the March trading losses and negative margin balance. In addition, the statements reflect that they were prepared by CIBC Oppenheimer. CIBC was an independent record keeper, and there is no suggestion — much less evidence — of collusion between the debtor and CIBC. (See Tr. 29-30.)

This leaves a claim based on unauthorized trading in the Account. Levine has flip-flopped, at times rejecting
15 and at other times embracing this theory,[7] but an unauthorized trading *15

7 Levine first insisted that he was "not seeking to recover for unauthorized trading in his account." (Levine's Objection ¶ 9.) Yet at the oral argument, the following colloquy took place between the Court and Nathaniel B. Smith, Esq., Levine's lawyer:

> THE COURT: . . . How is that $300,000.00 covered by SIPC?
>
> MR. SMITH: Well, because it was unauthorized trading.
>
> THE COURT: But I thought that you said in your papers that this was not an unauthorized trading?
>
> MR. SMITH: Well, if I said that, then that's not what I was saying. . . .

(Tr. 22-23.)

claim is doomed to failure. "While there is no separate written-objection requirement specifically set forth under SIPA, courts have generally enforced such provisions of customer agreements requiring that a party objecting to securities transactions as unauthorized, present that objection in writing." In re John Dawson Assocs., Inc., 271 B.R. 561, 566 (Bankr. N.D. Ill. 2001). The written objection rule avoids swearing contests, and prevents an investor from playing the market and crying foul when stock prices fall. See, e.g.,Modern Settings. Inc. v. Prudential-Bache Sec. Inc., 936 F.2d 640, 646 (2d Cir. 1991); Richardson Greenshields Sec. Inc. v. Lau, 819 F. Supp. 1246, 1259-1260 (S.D.N.Y. 1993) (timely complaint is necessary to give the broker a chance to correct a disputed trade; in the absence of such a complaint, the customer may play the market with impunity and complain only if a trade becomes a losing proposition);DBL Liquidating Trust v. Clarkson Constr. Co. (In re Drexel Burnham Lambert Group), 157 B.R. 539, 543 (S.D.N.Y. 1993) ("requirement of prompt written notice of repudiation of trades has long stood as a pillar in the law of customer-broker
16 relations"); In re Stratton Oakmont, Inc., 257 B.R. 644, 646 *16 (Bankr. S.D.N.Y. 2001) (noting that "each of the Claimants has met the Trustee's stringent requirements as to proof that unauthorized trading occurred in the customer's account — for example, by having asserted and documented claims for unauthorized transactions long before the broker failed").

Here, Levine received the March Statement which required objections within ten days. He failed to object to any of the March trades. He also failed to object to the April trades, while accepting a $59,000.00 payment primarily generated by the trading profits in that month. He failed to object to the May and June trades as well. In fact, his July demand did not object to any of the trades either.

Levine has, therefore, failed to show that the trading activity in his account was unauthorized, and he cannot recoup the market losses that he has suffered as a result. See, e.g., SEC v. Albert Maauire Sec. Co., 560 F.2d 569, 572 (3d Cir. 1977) (SIPA provides no protection "against the vagaries of the market"); SIPC v. Associated Underwriters. Inc., 423 F. Supp. 168, 171 (D. Utah 1975) ("SIPC is not an insurer, nor does it guarantee that customers will recover their investments which may have diminished as a result of, among other things, market
17 *17 fluctuations or broker-dealer fraud"); SIPC v. Charisma Sec. Corp., 371 F. Supp. 894, 899 n. 7 (S.D.N.Y.) ("claims for market losses against brokerage houses are not included in the insurance umbrella afforded by SIPC"), aff'd, 506 F.2d 1191 (2d Cir. 1974)

Finally, the proceedings in Kinsley's personal bankruptcy case are irrelevant. According to Levine, Judge Stan Bernstein found that Kinsley lied to him about the use of the funds, used the funds for unauthorized trading in the debtor's account, lost the funds in some unaccounted manner, misappropriated the funds and used the funds to cover trading losses in the debtor's own account. (Levine's Objection ¶ 5.)

The trustee was not a party to that proceeding, and Kinsley, appearingpro se, did not oppose the motion. Furthermore, if Judge Stan Bernstein had not had to depend on the description of the transactions supplied by Levine, and instead, had the benefit of the trustee's arguments as I have, I am confident that he would have reached different conclusions than those relied on by Levine in this litigation. In addition, the question here, unauthorized trading, requires a prompt written objection while a challenge to dischargeability does not. *18

18

## CONCLUSION

The submissions show that Levins loaned $1 million to the debtor, or, accepting his version, he received a guarantee against trading losses, and the debtor thereafter breached their agreement by failing to collateralize its obligation, return the balance of the $1 million or pay the 150,000 shares of Digital Mafia. Levine never put $1 million at risk for trading in the stock market. Although his loss is an unfortunate consequence of doing business with Kinsley and the debtor, it does not transform that loss into a customer claim under SIPA. The trustee's motion for summary judgment is granted, Levine's motion for summary judgment is denied, and the Levine's objection to the trustee's rejection of his customer claim is, therefore, overruled.

Settle order on notice.

1 *1

Appellate Division of the Supreme Court of New York, Third Department

# Tufano v. Morris

286 A.D.2d 531 (N.Y. App. Div. 2001) · 728 N.Y.S.2d 835
Decided Aug 2, 2001

August 2, 2001.

Appeal from an order of the Supreme Court (Canfield, J.), entered June 5, 2000 in Rensselaer County, which, inter alia, partially granted plaintiff's motion for summary judgment.

Nathaniel B. Smith, New York City, for appellants.

Burke, Casserly Gable (Christine M. Legorius of counsel), Albany, for respondent.

Before: Crew III, J.P., Spain, Mugglin, Rose and Lahtinen, JJ.

## MEMORANDUM AND ORDER

Mugglin, J.

In February 1999, plaintiff entered into a building improvement contract with defendant Jonathan Morris whereby plaintiff agreed to make specified alterations and renovations to his commercial building — at Morris' expense — so that Morris and defendant Nanette La Rose (Morris' wife) could use the premises as a dental
532 office. Simultaneously, plaintiff and defendants entered into a 10-year lease of the premises to *532 commence on the first day of the month following completion of the installation of the necessary dental equipment by defendants, but no later than 14 days after completion of plaintiff's renovations under the building improvement contract. Morris paid the initial installment of $15,000 and plaintiff started renovations of the building.

According to Morris, he telephoned plaintiff in early April 1999 and, as a result of marital difficulties, requested plaintiff to put the project on hold. When it became evident to Morris that he could not overcome his marital difficulties, he contacted plaintiff in late April or early May 1999 and indicated that he would have to cancel the project. According to Morris, plaintiff agreed to cancel the lease, but requested $10,000 to restore the premises to its original condition. Morris further claims that he considered the $10,000 figure to be too high, but that he agreed to pay a fair price for this work. In late April 1999, plaintiff advertised the premises for rent as a dental office and, in July 1999, commenced this action seeking damages for the alleged breach of both the building improvement contract (first cause of action) and the lease agreement (second cause of action).

Following joinder of issue, plaintiff, inter alia, moved for summary judgment on both causes of action asserted in his complaint and defendants, inter alia, cross-moved for partial summary judgment dismissing the second cause of action. Supreme Court denied plaintiff's motion for summary judgment on the first cause of action finding that defendants raised a triable issue of fact regarding the completion of that agreement. The court, however, granted plaintiff's motion for summary judgment on the second cause of action, concluding that the lease term began on May 1, 1999, the lease had not been canceled and plaintiff had not discharged defendants from liability on the lease. Defendants now appeal.

We first address Supreme Court's denial of plaintiff's motion for summary judgment on the first cause of action as it is relevant to our determination with respect to the second cause of action. In this regard, we observe that Supreme Court's decision is somewhat confusing since, after finding issues of fact which would prevent summary judgment, Supreme Court seemed to regard the issue as one of damages only by holding "that [plaintiff] is entitled to collect the damages he has suffered as a result of Morris' breach". This language is, of course, consistent with granting summary judgment on the issue of liability and not on the issue of damages. In
533 our view, summary judgment was properly denied on the first cause of action *533 because plaintiff failed to submit sufficient, competent, admissible evidence of his entitlement to judgment as a matter of law (see, Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324). In both the complaint and in his affidavit in support of his motion for summary judgment, plaintiff alleged that he had completed the construction contract. In his affidavit in response to defendants' cross motion for summary judgment, plaintiff "correct[s]" his prior statements by, in essence, admitting that his prior allegations were not in fact truthful. Thus, we hold that the burden never shifted to defendants to lay bare their evidence and demonstrate triable issues of fact with respect to the first cause of action.

For the same reason, summary judgment should not have been granted to plaintiff on his second cause of action since, given plaintiff's ultimate admission that the renovations were incomplete, a genuine issue of fact concerning the commencement date for the lease term remained unresolved. Despite the burden not having shifted, Morris' affidavit establishes issues of fact (1) by asserting that plaintiff "was very understanding" and told him "not to be concerned about the project", (2) by alleging that he told plaintiff that $10,000 seemed a bit excessive for restoring the premises to the original condition but that he agreed to pay plaintiff "a fair price" and plaintiff agreed "to provide [defendant] with an itemization", and (3) most significantly, by averring that plaintiff told him that he "would not be responsible for leasing the [p]remises". Moreover, Morris averred that plaintiff "indicated that I did not have any obligation under the lease during our discussion on the telephone when I agreed to pay him a fair price to restore the space to its original condition". Viewing this evidence in the light most favorable to defendants as the nonmoving parties (see, Redcross v. Aetna Cas. Sur. Co., 260 A.D.2d 908, 914), defendants "establish[ed] the existence of a triable issue of fact" (Toomey v. Adirondack Surgical Assocs., 280 A.D.2d 754, 755).

We further conclude that plaintiff's reliance upon General Obligations Law § 15-501 is inappropriate because he did not rely on this statute before Supreme Court and, therefore, this argument is not preserved for purposes of appellate review (see, Scheller v. Bowery Sav. Bank, 217 A.D.2d 506, 507). Moreover, it is not possible at this juncture to determine whether the parties intended the cancellation to operate as an accord and satisfaction or a substitute agreement because there is a genuine dispute of fact regarding whether the parties agreed to
534 cancel the contracts in the first place. We also find unavailing *534 plaintiff's argument that General Obligations Law § 5-1103 compels granting summary judgment to him. That statute requires a writing to modify or discharge a lease in the "absence of consideration" (General Obligations Law § 5-1103). Morris' allegations, if true, establish adequate consideration for the cancellation of the lease — his promise to pay the costs of returning the building to its original condition in exchange for plaintiff's promise to rescind the original agreement.

Nor do we find availing plaintiff's argument that summary judgment on the second cause of action in his favor was appropriate because the price term of the purported cancellation agreement was not "reasonably certain". "It is well settled that the price to be paid under a contract is a material term * * * and `[i]f an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract'" (Village of Lansing v. Triphammer Dev. Co., 193 A.D.2d 919, 920, quotingCobble Hill Nursing Home v. Henry Warren Corp., 74

N.Y.2d 475, 482,cert denied 498 U.S. 816 [citation omitted]). A price term, however, "may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties" (Cobble Hill Nursing Home v. Henry Warren Corp., supra, at 483). Here, the price term is "reasonably certain" (id., at 482) because Morris allegedly agreed to pay "a fair price" to restore the building to its original condition — i.e., the "costs actually incurred [by plaintiff] in performing the work" — once he was provided with an itemized list of restoration-related costs (see generally, Village of Lansing v. Triphammer Dev. Co., supra, at 921).

Since issues of fact exist, we find it unnecessary to address whether defendants surrendered the leased premises to plaintiff and whether summary judgment should have been awarded before discovery occurred.

Crew III, J.P., Spain, Rose and Lahtinen, JJ., concur.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as granted plaintiff's motion for summary judgment on his second cause of action; motion denied to that extent; and, as so modified, affirmed.

Appellate Division of the Supreme Court of New York, First Department

# Carson v. New York City Dept. of Sanitation

271 A.D.2d 380 (N.Y. App. Div. 2000) · 707 N.Y.S.2d 93
Decided Apr 27, 2000

April 27, 2000.

Order, Supreme Court, New York County (Barry Cozier, J.), entered September 23, 1998, which, to the extent appealed from, granted defendant-respondent's motion to convert petitioner's breach of contract action into an article 78 proceeding, and order, same court (Beverly Cohen, J.), entered March 16, 1999, which dismissed the ensuing CPLR article 78 petition seeking to, inter alia, annul respondent's determination terminating petitioner from his position as a New York City Department of Sanitation (DOS) employee, unanimously affirmed, without costs.

Nathaniel B. Smith, for plaintiff-appellant.

Helen P. Brown, for defendants-respondents.

MAZZARELLI, J.P., ELLERIN, LERNER, RUBIN, ANDRIAS, JJ.

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Petitioner's action for breach of contract and promissory estoppel was properly converted into a proceeding pursuant to CPLR article 78, since the complaint filed by petitioner effectively sought petitioner's reinstatement to his former position as a DOS employee, and respondents had the statutory and regulatory authority to issue a final and binding determination with respect to this employment (cf., Abiele Contr., Inc. v. New York City School Constr. Auth., 91 N.Y.2d 1). Also proper was the ensuing dismissal of petitioner's application pursuant to CPLR article 78. In this connection, petitioner's claim of promissory estoppel is without merit, for even if a DOS employee had promised petitioner reinstatement upon his completion of a drug treatment program, the promise was unauthorized and DOS was not bound by it (Granada Bldgs., Inc. v. City of Kingston, 58 N.Y.2d 705, 708), particularly in light of petitioner's prior execution and violation of a final termination agreement,
381 *381 which agreement was concealed from the DOS employee. Finally, we note that, even if the instant petition possessed merit, it would have been properly dismissed as time-barred since it was filed more than four months subsequent to issuance of the challenged determination (see, CPLR 217[1]).

THIS CONSTITUTES THE DECISION AND ORDER OF SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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No. 97-7247
United States Court of Appeals, Second Circuit

# Wilson v. Fairchild Republic Co., Inc.

143 F.3d 733 (2d Cir. 1998)
Decided May 11, 1998

No. 97-7247

Argued: October 23, 1997

Decided: May 11, 1998

Appeal from a decision of the United States District Court for the Eastern District of New York (Raymond J. Dearie, Judge) granting summary judgment to defendant on the ground that plaintiff's claims, brought pursuant to 42 U.S.C. § 1981, were time-barred.

734 Affirmed in part, reversed and remanded in part. *734

NATHANIEL B. SMITH, Ranni Smith, New York, NY, for Plaintiff-Appellant.

MARK N. REINHARZ, Rains Pogrebin, P.C., Mineola, N Y (Terence M. O'Neil, of counsel), for Defendant-Appellee.

Before NEWMAN, ALTIMARI, and CALABRESI, Circuit Judges.

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CALABRESI, Circuit Judge:

This case presents the question of whether two claims made by the plaintiff are timely. According to the defendant, these claims were first made in a brief filed some two and one-half years after plaintiff's last amendment to his complaint. Under the applicable statute of limitations, these claims would be timely only if they could be set forth in an amended pleading that would relate back to the original complaint. We agree with United States District Court for the Eastern District of New York (Raymond J. Dearie, Judge) that one of these was untimely, because it was new and did not relate back. We conclude, however, that the other was first raised in plaintiff's original complaint, that it was preserved through all subsequent amendments to that complaint, and that it was never waived. It should not, therefore, have been dismissed. Accordingly, we affirm the district court's dismissal of the first claim, and we reverse its dismissal of the second.

## I. Background

Although, in the end, the legal questions in this appeal may be disposed of easily, the long and tortured procedural history of the case requires detailed exposition.

On March 21, 1984, after having received a "right to sue" letter from the Equal Employment Opportunity Commission ("EEOC") pursuant to 42 U.S.C. § 2000e-5(f)(1) following his submission of two EEOC charges, plaintiff Harold Wilson filed a timely pro se complaint (the "original complaint") against defendant Fairchild
735 Republic Co. Wilson alleged employment discrimination on the basis *735 of race, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq. Specifically, he complained that on

multiple occasions between June 1976 and January 1984, he was demoted, received less responsibility than other employees, was given smaller pay increases, was denied promotions, and suffered harassment because he is black. One of Wilson's allegations concerned events that occurred in late 1983 and early 1984 (the "1983/84 claim"). Wilson stated that, at that time, he submitted an application for promotion to the position of general foreman or manager of Fairchild's building service division. He did not get the job; instead, Gerard Walters, a white man, was made acting general foreman in November 1983, and, in January 1984, when Walters declined a permanent assignment to the job, Kenny Parker, also white, was appointed to the position.

Wilson filed a first amended complaint, also pro se, on May 22, 1985. In that complaint, he alleged a number of discriminatory actions taken by Fairchild. Among these was the following restatement of the 1983/84 claim:

> That in or about November, 1983 plaintiff again applied for a promotion to a position for which he was duly qualified and again defendant FAIRCHILD declined to promote plaintiff. Defendant did appoint a caucasian employee to the position that plaintiff applied for.

First Am. Compl. ¶ 13. The only failure-to-promote claim that Wilson made in the first amended complaint arose from this incident.

In February 1987, Wilson, who by then was represented by counsel, moved to amend his complaint a second time in order to add claims under 42 U.S.C. § 1981.[1] Wilson's § 1981 claims included the following allegations:

[1] In this second amended complaint, Wilson also restated and elaborated upon his original Title VII claims. He alleged that Fairchild had retaliated against him ever since 1977, when he had obtained a favorable administrative ruling on a prior discrimination charge that he had filed with the EEOC and the New York State Division of Human Rights. He also asserted specific instances in which Fairchild had demoted him, failed to give him raises equal to those of other employees, and reduced his pay grade. And, he repeated verbatim the statement from the first amended complaint regarding the 1983/84 claim. See First Am. Compl. ¶ 13.

> 20. Plaintiff was denied the promotion and raises based upon his race, as part of a continued pattern of discrimination by the defendant to deny him "full and equal benefits of all laws and proceedings for the security of persons and property as enjoyed by white persons" in violation of 42 U.S.C. § 1981.
>
> 21. Defendant, intentionally, maliciously, wilfully and wantonly pursued a promotion policy which systematically denied promotions and raises to blacks based upon their race, and as a result of such policy, plaintiff was denied promotions and raises for which he was qualified, based upon his race.

Second Am. Compl. ¶¶ 20-21. This second amended complaint also added a jury trial demand.

In opposition to Wilson's motion to amend, Fairchild argued that the § 1981 claims were time-barred. Fairchild asserted, among other things, that, while the Title VII suit was premised on discrete discriminatory acts, the § 1981 cause of action alleged systematic discrimination, and therefore that the first amended complaint had not provided Fairchild with adequate notice of any claims arising out of an alleged pattern of discrimination. On April 30, 1987, the district court, in accordance with our decision in Rosenberg v. Martin, 478 F.2d 520, 526-27 (2d Cir. 1973), rejected Fairchild's position and held that the second amendment related back to the date that the first amended complaint was filed because it "arose out of the `conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.'" Apr. 30, 1987 Mem. Order at 2 (quoting 6 Charles Alan Wright et al., Federal Practice Procedure § 1501, at 526-27 (1971)). The court explained that "the existing

Complaint is based on the same underlying conduct as the proposed Section 1981 cause of action, and the Title
736 VII claim encompasses continuing discriminatory treatment." Id. at 3. Accordingly, the court *736 granted Wilson's motion to amend.[2] See id. at 5.

2 In doing so, the court also ruled that no further amendments would be permitted.

On January 28, 1988, in his Supplemental Responses to Defendant's Third Set of Interrogatories, Wilson set forth a number of new claims of discrimination allegedly committed by Fairchild. Specifically, he listed twenty-three positions at Fairchild for which he had applied between 1981 and 1985, most of which had not been mentioned earlier in the litigation. Wilson claimed that, though he was qualified for all of these positions, he was denied appointment to them solely on account of his race. [A 103-05] Fairchild moved to dismiss these additional allegations as beyond the scope of the second amended complaint.

In a March 3, 1988 order, the district court reserved decision on Fairchild's motion. At the same time, it severed the Title VII and § 1981 claims. (The claims were severed after the district court concluded that Fairchild had conceded Wilson's jury trial demand with respect to the § 1981 cause of action. By contrast, a bench trial was to be held on the Title VII claims.) The court then directed the parties to proceed forthwith to the bench trial on the Title VII claims, and stated that it would "determine at a future date the scope of the Section 1981 cause of action as it pertains to" the twenty-three listed positions. [A 6] Wilson preferred, however, to have all of his claims tried before a jury. Accordingly, he elected to withdraw the Title VII claims and to proceed solely on the § 1981 action. Wilson's decision was understandable because, at the time he made it, there was no bar to the § 1981 suit covering both Fairchild's alleged discrimination against black employees generally (which was alleged in Paragraph 21 of the second amended complaint) and Wilson's claims of individual discrimination against him (which had been the basis of the withdrawn Title VII action).

Shortly thereafter, however, and before the district court had resolved whether the twenty-three new failure-to-promote claims were within the scope of the § 1981 cause of action, the Supreme Court's decision in Patterson v. McLean Credit Union, 491 U.S. 164 (1989), threw a wrench into the works. The High Court held in Patterson that § 1981 "covers only conduct at the initial formation of the [employment] contract and conduct which impairs the right to enforce contract obligations through legal process." Id. at 179-80. Challenges to the conditions of one's employment, the Court explained, were therefore only actionable under Title VII. See id. Accordingly, Wilson's claims regarding demotions, denials of raises, and the like, which had been part of the original Title VII action, did not survive the district court's grant of voluntary dismissal of that action. The Supreme Court in Patterson noted, however, that a claim of discrimination for failure to promote is actionable under § 1981 "where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer." Id. at 185. Hence, at least some of Wilson's individual claims against Fairchild were possibly spared.[3] Fairchild, nonetheless, filed a renewed motion for summary judgment, in which it sought dismissal of all of Wilson's § 1981 claims on Patterson grounds.

3 Congress subsequently passed the Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071 (1991), to overturn Patterson's limitations on § 1981 and broaden the statute to cover challenges to the conditions of employment. See Pub. L. No. 102-166, § 101; see also Rivers v. Roadway Express, Inc., 511 U.S. 298, 306-309 (1994) (recognizing that Congress enacted § 101 in response to Patterson). But the Supreme Court held that this amendment did not apply retroactively to preenactment conduct. See Rivers, 511 U.S. at 313; see also Landgraf v. USI Film Prods., 511 U.S. 244, 280-86 (1994) (holding that § 102 is not retroactive).

In a brief that he submitted in response to this motion (Wilson's "Patterson Brief"), Wilson argued that he

> ha[d] alleged numerous instances of discriminatory conduct by the defendants. Among these claims are several specific instances where promotions were denied, as well as specific instances of demotion in
737 *737 employment status. These claims are clearly within the [post-Patterson, pre-Civil Rights Act of 1991] scope of [§] 1981 actions.
>
> In 1981, a new position, Environmental Engineer was created at FAIRCHILD. Upon information and belief, this position held a grade of 21, and constituted a separate division of FAIRCHILD. . . . Plaintiff was qualified for this position and applied for the job, but a white man, Thomas Webb, received the promotion. The position held new and different duties and obligations, as well as salary and benefit increases. This new position clearly falls within the conduct still protected by [§] 1981, despite the Patterson ruling, as the promotion would have resulted in a clear change in contract status. This claim was raised in both the Title VII and [§] 1981 causes of action.
>
> In 1982, the position of Manager, Building and Grounds, a position immediately under the Facilities Director was made available. The position was divided into two distinct jobs, Manager of Buildings and Grounds and General Supervisor of Buildings and Grounds, both positions immediately under the Facilities Director. The General Supervisor, the position then held by plaintiff, reported to the Manager of Buildings and Grounds and General Supervisor of Buildings and Grounds. At the time this position was made available, plaintiff was employed at Fairchild as a General Supervisor, although he was clearly qualified to hold higher level positions. Plaintiff applied for the position of Manager of Buildings and Grounds, which would have moved him a considerable upward distance in the corporate hierarchy, and within the realm of the change in contract status.

Pl.'s Sept. 7, 1989 Mem. of Law, at 6-7. In his supporting affidavit, Wilson elaborated on the factual bases for these assertions. Specifically, he described in detail the position of Environmental Engineer, stated his qualifications for it, explained that a white employee was promoted in his stead, and claimed that "I believe the only reason this promotion was denied me and awarded to [the white employee], despite my superior qualifications and work experience, was the result of Defendants [sic] refusal to promote blacks." Wilson Aff. at 2. Wilson then described the positions of General Foreman and General Supervisor of Building and Grounds, and said:

> 8. I applied for promotion to General Supervisor of Building and Grounds. I was again clearly qualified for this promotion, yet it was given to a white man, Gerard Walter in November 1983.
>
> 9. Walter left the position of General Supervisor of Building and Grounds, and I again applied for, and was denied the promotion, despite being qualified for the job. William Stange, a white man, who was less capable of performing the duties of the position was promoted instead of me in January of 1984.

Id. at 3.

On January 9, 1995, the district court held that Patterson barred most of Wilson's claims. It also concluded that, of those claims that arguably survived Patterson, Wilson had waived all but two. These two, according to the court, were those that Wilson had specifically listed in his Patterson Brief — "the 1981 refusal to promote to Environmental Engineer and the 1982 refusal to promote to Manager of Building and Grounds." Jan. 9, 1995 Am. Mem. Order, at 5 n. 2 ("The Court interprets Wilson's Memorandum of Law dated September 7, 1989, as conceding that all other promotions or demotions alleged at various points of this litigation do not survive the Patterson decision."). At the same time, the court denied a motion by Wilson to reinstate his Title VII suit with respect to the claims barred by Patterson.[4] The court then stated that it did not yet have sufficient information to

determine whether or not the events alluded to in the two unwaived allegations of discrimination sufficed to state claims under Patterson. It therefore postponed ruling on whether to dismiss them, and assigned a
738 magistrate judge to hold an evidentiary hearing to determine *738 "to what extent, if at all, those positions would involve `an opportunity for a new and distinct relation between the employee and the employer.'" Id. at 6-7 (quoting Patterson, 491 U.S. at 185).

> 4 Wilson has not sought review of this ruling, or of the district court's determination that the twenty-three additional claims — most of which were first made in 1988 — were waived.

The seemingly final nail in the coffin of Wilson's case came on January 27, 1997, when the district court dismissed these two remaining claims. It did not do so, however, because of the Patterson decision but because it concluded, in response to a motion by Fairchild for reconsideration of its earlier motion to dismiss, that these claims were newly raised in the Patterson Brief and did not relate back either to the original or to the first amended complaint. Hence, they were barred by the statute of limitations. The court found that the failure-to-promote claims that Wilson had made in the original and first amended complaints were "not stated generally, but very specifically." Jan. 27, 1997 Mem. Order, at 7. Therefore, the court wrote that, "[d]espite [an] inclination, indeed obligation, to construe pro se complaints liberally, [it could not] interpret these initial complaints as in any way encompassing the 1981 and 1982 failure to promote claims . . . [without] effectively rewrit[ing] the pleadings, an undertaking well beyond the Court's authority." Id. at 7-8.

## II. Discussion

On appeal, Wilson challenges the district court's dismissal of these two claims. He argues that the district court erred when it held that these claims were untimely, and asserts that they were either first made in the original complaint or could be said to relate back to it or to the first amended complaint. Technically, it is not the claim in the brief that would relate back, but an amended complaint setting forth that claim. Whether a new claim "arguably arises out of the same `transaction or occurrence'" as the one that the plaintiff originally alleged, and thus an amended pleading setting forth that claim can be said to relate back to the original complaint, lies in the district court's discretion. Leonelli v. Pennwalt Corp., 887 F.2d 1195, 1199 (2d Cir. 1989). And it is for abuse of that discretion that we review the district court's decision. See id. See generally Yeardon v. Henry, 91 F.3d 370, 378 (2d Cir. 1996).

Because the two alleged denials of promotion listed in Wilson's Patterson Brief were first mentioned at very different times, we consider them separately. As to each, we must first determine whether the claim was "new" when the Patterson Brief was filed. If we find that it was, we must next consider whether it was already comprehended within Wilson's original or amended complaints, or, if not, whether it could be set forth in a further amended pleading that would relate back, under Federal Rule of Civil Procedure 15(c), to the original or first amended complaint.

## A. The Environmental Engineer Position

Wilson did not allege either in his EEOC charges or in any of his three complaints that he was denied a promotion to the position of Environmental Engineer in 1981. Instead, he first mentioned the claim in his September 1989 Patterson Brief and in the affidavit accompanying that brief, which would appear to make it untimely under the applicable statute of limitations.[5] A claim that would otherwise be untimely may, however, "relate back" to an earlier complaint, and not be barred by the statute of limitations. In order for a claim to relate back, it must arise out of the same "conduct, transaction, or occurrence" as the claims raised in the earlier filing. See Fed. R. Civ. P. 15(c) (an amendment relates back to an earlier complaint when the new claim "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading");

Goss v. Revlon, Inc., 548 F.2d 405, 407 (2d Cir. 1976) (same). The pertinent inquiry, in this respect, is whether the original complaint gave the defendant fair notice of the newly alleged claims. See Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 149 n. 3 (1984). Because Wilson's original and first amended complaints
739 asserted only a Title *739 VII cause of action, we must consider whether the Title VII violations charged in the first amended complaint put Fairchild on fair notice of the claim that Wilson was denied a promotion to Environmental Engineer in 1981.

[5] Section 1981 employment discrimination claims brought in New York are subject to that state's three-year statute of limitations. See Tadros v. Coleman, 898 F.2d 10, 12 (2d Cir. 1990).

In this circuit, the clear rule is that "[a] district court only has jurisdiction to hear Title VII claims that either are included in an EEOC charge or are based on conduct subsequent to the EEOC charge which is `reasonably related' to that alleged in the EEOC charge." Butts v. City of New York Dep't of Housing Preservation Dev., 990 F.2d 1397, 1401 (2d Cir. 1993). Wilson's EEOC charges were filed in January and May of 1983 — both well after the events occurred that gave rise to Wilson's allegation with respect to the Environmental Engineer position. But his claim that he was not appointed to Environmental Engineer is found nowhere in his EEOC filings. It follows that, although Wilson was required to exhaust his administrative remedies with respect to the claim, he did not do so. It also follows that he would not have had a Title VII cause of action for the denial of the promotion, and that the claim could not properly have been included in the original pleadings. Accordingly, the existence of the Title VII action could not have put Fairchild on notice of the claim.[6]

[6] We note, however, that this case does not present the question — which we do not decide — of whether an unexhausted claim that was specifically raised in an initial complaint alleging only Title VII violations would put an employer on notice of that claim for purposes of a subsequently added § 1981 cause of action (for which no administrative exhaustion requirement applies). We hold only that, where the claim (a) was not expressly stated in the original pleading, and (b) would have been improper on administrative exhaustion grounds had it been included, it is not an abuse of discretion for the district court to conclude that the employer lacked fair notice of it.

We conclude that the record supports the district court's ruling that the Environmental Engineer claim was barred by the three-year statute of limitations and did not relate back to Wilson's original or first amended complaint under Federal Rule of Civil Procedure 15(c).[7]

[7] It might seem possible to argue that the claim could, nonetheless, be timely if the assertion of the claim in the Patterson Brief (and its accompanying affidavit) could be set forth in an amended pleading that would relate back, derivatively, to the filing of the original complaints by first relating back to the filing of the § 1981 cause of action in the second amended complaint, and then being incorporated by that amendment into the earlier pleadings. But the only failure to promote alleged in the second amended complaint was the 1983/84 claim, regarding the Manager of Building and Grounds position, and not the 1981 allegation, involving the Environmental Engineer position. As a result, no derivative relation back is available for this latter claim.

## B. The Manager of Building and Grounds Position

The district court's dismissal of the Manager of Building and Grounds claim raises altogether different issues. In his original complaint, Wilson stated the 1983/84 claim, and alleged that he was denied a promotion when, between November 1983 and January 1984, other Fairchild employees were appointed to the position Wilson sought, one on an interim basis and another to the permanent position. The first and second amended complaints reworded these allegations to focus more directly on the November 1983 date, but they clearly referred to the same conduct by Fairchild. The allegation was, moreover, repeated in Wilson's affidavit filed in support of his Patterson Brief. The Patterson Brief itself, however, listed a 1982 denial of a promotion to

Manager of Building and Grounds. And it was this allegation that the district court held to be time-barred because it was a new claim that did not relate back to the original or first amended complaints. (The court never mentioned the 1983/84 claim.)

Under the circumstances, including the reiteration of the 1983/84 claim in every amendment to the original pleading that Wilson filed, we believe that the 1982 date in the Patterson Brief was most likely nothing more than a typographical error. The supporting affidavit to the Patterson Brief, moreover, provided detailed descriptions of both the organizational hierarchy in the Building and Grounds department and the events surrounding Fairchild's failure to promote Wilson to manager of that division. These conformed to, and elaborated upon, Wilson's statements in the Patterson Brief about the "1982" failure to promote. The only material difference between the brief and the affidavit was the date on which the event was said to have happened. There is, furthermore, nothing in the record to indicate that Wilson ever suggested that two adverse employment actions — one in 1982 and the other in 1983/84 — occurred with respect to this same position. Thus, the district court's failure to recognize that the "1982" Manager of Building and Grounds allegation was the same as the original 1983/84 failure-to-promote claim was erroneous. And the court's dismissal of that claim as time-barred was also incorrect.

We note that Wilson's attorney never took any steps to dispel the court's confusion with respect to the apparently typographical error. And this failing is particularly troubling because it should have been clear to counsel, at least by January 1995, that the district court was unsure about when the claim accrued and whether it was the one mentioned in the original pleadings. (In 1995, the court specifically referred to "the 1982 refusal to promote to Manager of Building and Grounds." Jan. 9, 1995 Am. Mem. Order, at 5.) Yet counsel, in the more than two years that elapsed from that time until the January 1997 dismissal on statute of limitations grounds, never made any attempt to set the record straight.

Under the circumstances, the district court's confusion is entirely understandable. Nevertheless, because (a) Wilson consistently alleged the 1983/84 failure to promote claim in all three of his complaints; and (b) his affidavit in support of his Patterson Brief stated the correct 1983/84 date when it discussed the Building and Grounds position, we think that the district court's dismissal of the claim was erroneous (because based on a misapprehension of which promotion Wilson was referring to in his Patterson Brief and affidavit). We therefore hold that Wilson's § 1981 claim as to the 1983/84 Building and Grounds position was not newly made in the Patterson Brief but was instead timely and remains properly before the court.

## Conclusion

Accordingly, the judgment of the district court is affirmed with respect to the Environmental Engineer job, but reversed and remanded as to the Building and Grounds position.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

740 *740

No. 95 Civ. 4671 (SAS)
United States District Court, S.D. New York

# Rosenblatt v. Bivona Cohen, P.C.

969 F. Supp. 207 (S.D.N.Y. 1997)
Decided Jul 2, 1997

No. 95 Civ. 4671 (SAS).

208 July 2, 1997. *208

Nathaniel B. Smith, Ranni Smith, New York City, for Plaintiff.

Thomas W. Hyland, Edward P. Gilbert, Elizabeth M. Kelly, Wilson, Elser, Moskowitz, Edelman Dicker, New York City, for Defendant.

## *OPINION AND ORDER*

SCHEINDLIN, District Judge.

Plaintiff Theodore Rosenblatt ("Rosenblatt") is suing Bivona Cohen, P.C., alleging unlawful employment discrimination on the basis of race in violation of 42 U.S.C. § 2000e-2(a)(1), 42 U.S.C. § 1981 and New York
209 Human Rights Law ("NYHRL") *209 § 296.[1] Defendant now moves for summary judgment and plaintiff cross moves for partial summary judgment on the affirmative defense that plaintiff was not an employee for purposes of Title VII. The parties bring these motions pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. For the reasons stated below, defendant's motion is denied and plaintiff's cross motion is granted.

[1] Plaintiff originally alleged a violation of 42 U.S.C. § 1985(3), which has been abandoned. Prior to the instant motion, defendant moved for summary judgment on the grounds that plaintiff's action was premature and procedurally deficient, and that plaintiff lacked standing because he was not a member of a protected class. That motion was denied in its entirety. *See Rosenblatt v. Bivona Cohen,* 946 F. Supp. 298 (S.D.N.Y. 1996).

## I. Factual Background

### A. Undisputed Facts

Rosenblatt maintained a relationship with Bivona Cohen, P.C., for a dozen years. He joined the firm, then known as Levy, Bivona Cohen, as a senior associate in 1982. Defendant's 3(g) Statement ("Def.'s 3(g)") at ¶ 1; Plaintiff's 3(g) Statement ("Pl.'s 3(g)") at ¶ 1. Initially, plaintiff was viewed as a competent attorney. Deposition of John Bivona ("Bivona Dep."), Bivona Cohen President, at 86; Deposition of Marlene Monteleone ("Monteleone Dep."), Bivona Cohen partner, at 17-18; Deposition of Joseph Figliolo ("Figliolo Dep."), Bivona Cohen partner, at 29-30; Deposition of Marc Lust ("Lust Dep."), Bivona Cohen partner, at 57-59. Plaintiff worked for several years in Unit 2 under the supervision of partner Marc Lust, until plaintiff was promoted to manager of Unit 3 and made a non-equity partner of the firm in 1986. Def.'s 3(g) at ¶ 4; Pl.'s 3(g) at ¶ 4. As director of Unit 3, plaintiff supervised the work of several associates and a junior partner. Def.'s 3(g) at ¶ 3; Pl.'s 3(g) at ¶ 3. His duties included several projects of firmwide significance, including production of master

forms and billing practices, handling of firm insurance matters, and negotiation of the lease for the current office space. Affidavit of Theodore Rosenblatt ("T. Rosenblatt Aff.") at ¶ 6; Defendant's Reply Memorandum in Support of Motion for Summary Judgment ("Def.'s Reply") at 2.

In 1987, plaintiff, who is white, entered into an extramarital relationship with his secretary, Babsie Gould-Henry, who is black. Def.'s 3(g) at ¶ 8; Pl.'s 3(g) at ¶ 8. The pair remained co-workers throughout the majority of their affair of six years' duration, following which they were married in 1993. Def.'s 3(g) at ¶¶ 14-16; Pl.'s 3(g) at ¶¶ 14, 16. In December 1989, when Gould-Henry was pregnant with plaintiff's child, he permitted her, without prior authorization by the Partnership Governing Committee, to take an extended unpaid leave of absence. Def.'s 3(g) at ¶¶ 9-10; Pl.'s 3(g) at ¶¶ 9-10. Although Gould-Henry gave birth to plaintiff's child during this absence, plaintiff explained to defendant that the reason for the leave was caring for a sick relative in England. Def.'s 3(g) at ¶¶ 9-10; Pl.'s 3(g) at ¶¶ 9-10. Gould-Henry was terminated by letter dated February 1, 1990, and later rehired by defendant in mid-1990. Def.'s 3(g) at ¶ 14; Pl.'s 3(g) at ¶ 14; Defendant's Appendix ("Def.'s App."), Exh. D.

Plaintiff's ongoing relationship with Gould-Henry eventually became known throughout the firm. Def.'s 3(g) at ¶¶ 11, 13; Pl.'s 3(g) at ¶ 11; T. Rosenblatt Aff. at ¶ 9. In March 1992, plaintiff left his first wife and children to live with Gould-Henry, Def.'s 3(g) at ¶ 13, after which plaintiff alleges that he felt "increasing harsher criticism and pressure from Sidney Cohen and others." T. Rosenblatt Aff. at ¶¶ 10-11. In early 1992, Gould-Henry terminated her employment with defendant. Def.'s 3(g) at ¶ 15; Deposition of Theodore Rosenblatt ("T. Rosenblatt Dep.") at 138-39.

Two controversial events characterize the deterioration of plaintiff's relationship with the firm. First, although their accounts differ, the parties do not dispute that in December 1992, plaintiff became intoxicated at a firm Christmas party, leading to an encounter that a firm secretary reported as sexual harassment. Affidavit of John Bivona ("Bivona Aff.") at ¶ 9; Def.'s 3(g) at ¶¶ 18-20; Pl.'s 3(g) at ¶ 19; T. Rosenblatt Aff. at ¶¶ 27-28. Unable to recollect the incident, plaintiff nevertheless formally apologized at Bivona's direction. Def.'s 3(g) at ¶ 19;
210 Pl.'s 3(g) at *210 ¶ 19; Bivona Aff. at ¶ 9; T. Rosenblatt Aff. at ¶¶ 27-28.

Second, in mid-1993, AIG, one of defendant's significant clients, audited the firm's work and identified 34 late attorney status reports, 15 of which had been the responsibility of associates assigned to plaintiff's Unit 3. Def.'s 3(g) at ¶¶ 21-23; T. Rosenblatt Aff. at ¶¶ 30-35; Plaintiff's Appendix ("Pl.'s App."), Exhs. 9, 13-14; Bivona Aff. at ¶¶ 7-8; Cohen Dep. at 154-60. An additional six files belonged to Monteleone's Unit, five to Lust's, and four to Figliolo's. Pl.'s App., Exh. 14. The parties dispute the details of this audit and the resultant effect on defendant's business; however, it is undisputed that AIG sent a letter to defendant in August 1993, reporting its findings and observing that changes needed to be made in the handling of its account. T. Rosenblatt Aff. at ¶¶ 37-38; Pl.'s App., Exh. 9. AIG reported several inappropriately handled matters and suggested improvements in defendant's performance. Following the audit, AIG files were transferred from Unit 3 in late 1993, and the Unit was reorganized, including the demotion, transfer to another Unit and subsequent discharge of Mark Kalmanowitz, the junior partner directly under plaintiff's supervision. Def.'s 3(g) at ¶¶ 23-25; Pl.'s 3(g) at ¶ 25; Answer and Counterclaim ("Ans.") at ¶ 48; T. Rosenblatt Dep. at 236, 240.

In August 1994, John Bivona terminated plaintiff's employment. Def.'s 3(g) at ¶ 2; Pl.'s 3(g) at 2. None of the other Unit supervisors was terminated. At the time of plaintiff's discharge, Bivona Cohen was organized as a professional corporation, the sole shareholders of which were John Bivona and Sidney Cohen. Pl.'s 3(g) in Support of Cross-Motion ("Pl.'s 3(g) in Support") at ¶ 2; Defendant's Second 3(g) Statement ("Def.'s Second

3(g)") at ¶ 2. Only Bivona and Cohen had the authority to discharge plaintiff from the firm. Pl.'s 3(g) in Support at ¶ 2; Def.'s Second 3(g) at ¶ 2. Plaintiff's employment was at all times at will. Pl.'s 3(g) in Support at ¶ 4; Def.'s Second 3(g) at ¶ 4.

## B. Disputed Issues

**1. Disagreement over specific events**

Controversy surrounds several pivotal events during plaintiff's tenure with the firm. While both parties agree that plaintiff misrepresented the reasons for his extension of an unauthorized leave to Gould-Henry in 1989, plaintiff alleges that, on learning of it, Bivona did not object to reserving Gould-Henry's position as plaintiff's secretary until her return. T. Rosenblatt Aff. at ¶ 18. By contrast, Cohen objected that the extended leave was in contravention of company policy. *Id.;* T. Rosenblatt Dep. at 136-38. Plaintiff maintains that Cohen ordered plaintiff to send a letter to Gould-Henry formally terminating her employment with the firm. T. Rosenblatt Aff. at ¶ 18; T. Rosenblatt Dep. at 136-38. Cohen testifies that although he was aware of the letter, he did not direct plaintiff to send it. Deposition of Sid [sic] Cohen ("Cohen Dep."), Bivona Cohen Vice President and Secretary, at 89-92. Plaintiff maintains that the passage of approximately five years between this incident and his termination, as well as the history of extended leaves granted to the secretaries of other partners, indicates that defendant did not consider this a serious infraction. Affidavit of Babsie Rosenblatt ("B. Rosenblatt Aff.") at ¶ 11; Deposition of Tammy Hoffman ("Hoffman Dep."), Bivona Cohen secretary, at 14-19.

Defendant contends that plaintiff attended a client-sponsored ski weekend on defendant's behalf in 1991, to which he brought Gould-Henry without permission. Bivona Aff. at ¶ 4. Defendant claims that while there, plaintiff became intoxicated and flaunted his extramarital affair in contravention of the conduct expected of a representative of defendant's firm at a business event. *Id.* In addition, defendant characterizes the 1992 Christmas party incident as an "extremely serious indiscretion" for which "[p]laintiff was severely reprimanded by the Partnership Governing Committee." Defendant's Memorandum of Law in Support of Motion for Summary Judgment ("Def's Mem.") at 5. While plaintiff admits to having become intoxicated and to having been directed to apologize, he asserts that once his apology was accepted, the issue was not raised again during
211 his tenure at the firm. Pl.'s 3(g) at ¶ 19; T. Rosenblatt Aff. at ¶¶ 27-29. *211

Plaintiff suggests that Cohen lied when questioned about the reason behind his failure to attend plaintiff's wedding in early December of 1993. T. Rosenblatt Aff. at ¶ 23. Cohen testified that it was his custom to spend the month of December in Vermont. Cohen Dep. at 150-51. Plaintiff counters that no firm records of such a trip exist, and that Lust testified to having discussed plaintiff's wedding with Cohen at the office the following Monday. T. Rosenblatt Aff. at ¶ 23. Plaintiff alleges that he canceled his pre-approved honeymoon due to what he perceived as Cohen's anger when the subject was raised, as well as a warning by Lust and Figliolo that "Cohen was prepared to fire me if I went on vacation." *Id.* at ¶ 24.

## 2. Plaintiff's interracial relationship

The parties are also in dispute as to when plaintiff's romantic involvement with Gould-Henry, was first perceived by defendant. Defendant alleges that the Partnership Governing Committee became aware of the relationship in 1987, and regarded it as "Plaintiff's personal business." Ans. at ¶ 41. Defendant contends further that plaintiff's interracial relationship "was common knowledge throughout the entire firm at all times from 1990," that the birth of plaintiff and Gould-Henry's child was known of "more than four years prior to Plaintiff's termination," and that defendant was already aware of this occurrence when it re-hired Gould-Henry

in 1990. *Id.* at ¶ 42; Def.'s 3(g) at ¶ 12. Plaintiff denies these statements, conceding only that "[o]ver time, . . . knowledge of our relationship became more commonly known in the firm," despite his and Gould-Henry's efforts to keep the relationship private. Pl.'s 3(g) at ¶ 12; T. Rosenblatt Aff. at ¶ 9.

Notwithstanding defendant's argument that the Partnership Governing Committee knew of plaintiff's relationship as early as 1987, and that the rest of the firm knew by 1990, Cohen testified that he himself was unaware of the existence of this relationship as late as 1991. Ans. at ¶¶ 41-42; Cohen Dep. at 97-98. Cohen also testified to having seen Gould-Henry on only a few occasions and to having formed no opinion as to her race, despite the fact that she was employed by defendant for seven years and in contrast to partner Martin Stewart's testimony that "everybody knew" that plaintiff's wife was black. Cohen Dep. at 82-83; Deposition of Martin Stewart ("Stewart Dep."), Bivona Cohen partner, at 23.

Defendant contends that "[n]o one at Bivona Cohen, P.C. ever voiced disapproval of plaintiff's relationship" and that plaintiff never heard any racially derogatory comments made by Cohen or Bivona. Def.'s 3(g) at ¶¶ 28, 30. Plaintiff alleges, however, that "[o]ver the years" other partners made various remarks "designed to inflict pain on [him] because of the color of [his] wife's skin." T. Rosenblatt Aff. at ¶¶ 12-13. Plaintiff contends that partners commented on his sexual preference for "dark meat," referred to a black street beggar or black waiter as a member of plaintiff's "family" or his "cousin," and asked whether plaintiff would be eating "chicken again" for dinner. *Id.* at ¶ 12. Plaintiff states that he felt himself an "outsider" and an "outcast" at the firm because of his relationship with Gould-Henry. *Id.* at ¶ 13. While plaintiff does not attribute racially discriminatory remarks directly to Cohen or Bivona, he alleges that Cohen was present when at least two such comments were made by others. *Id.* at ¶ 12; T. Rosenblatt Dep. at 166-67, 172-73. Plaintiff also asserts that when he informed Cohen of his decision to live with Gould-Henry, Cohen responded with an expression of disapproval of and hostility toward his interracial relationship. T. Rosenblatt Aff. at ¶¶ 10, 12; T. Rosenblatt Dep. at 61, 114.

## 3. Plaintiff's relationship with Cohen

The timing of the initial downturn in plaintiff's relationship with Cohen is also disputed. According to the testimony of defendant's partners, the relationship began to sour in 1991 following the client-sponsored ski weekend; yet plaintiff testifies that the turning point was March 1992, when he informed Cohen of his cohabitation with Gould-Henry. Figliolo Dep. at 93, 97-99; Monteleone Dep. at 17; T. Rosenblatt Aff. at ¶ 10.
212 Plaintiff points out that prior to this time *212

> [Cohen] gave me a lot of special projects. We worked closely together on a lot of these things, and commencing at approximately March of '92, is when he stopped either giving me new assignments or started being hypercritical over my handling of the assignments that he had previously given me.

T. Rosenblatt Dep. at 53-54. March 1992 is also the time at which plaintiff identifies the first of what he refers to as Cohen's veiled comments expressing disapproval of his relationship, "Something like, `I don't understand you.' I believe that was the specific words he used, `I don't understand you.'" *Id.* at 61. Plaintiff testified that this was also the first time at which joking comments about deficiencies in his appearance became serious. *Id.* Plaintiff asserts that Cohen made almost daily threats to his job, "either by direct threat or innuendo, or through Mr. Lust and Mr. Figliolo." *Id.* at 45. He also refers to Cohen's "irrational rants and ravings," recollecting that "[h]e would scream at me about isolated items, a memo of law having a mistake in the caption, about my responsibilities for the entire 24th floor." *Id.* at 47. At times, Cohen's behavior escalated to outright threats, such as screaming, "I am gonna fire you" and "I am gonna take you out of that chair." *Id.* at 48. Plaintiff also

recounts discussing with Bivona "his concern about Sid's attitude towards me." *Id.* at 65. "There was one occasion he told me that if anything went wrong on the 24th floor, that Sid would consider it my fault and he included that if the bathrooms didn't work or the toilets didn't work that Sid would probably blame me." *Id.*

Plaintiff remembers having been warned on multiple occasions by both Lust and Figliolo that his job was in jeopardy. *Id.* at 43-44. After plaintiff took up residence with Gould-Henry in March 1992, he recalls at least one occasion on which Lust led plaintiff to understand that the reason his job was endangered was that, as plaintiff puts it, "Sid Cohen turned on me. He didn't approve of my relationship." *Id.* at 69-70. Plaintiff testified further that

> Marc said that I shouldn't be seen with Babs because Sid might see us together. Marc told me not to have her come, that she shouldn't come up to the office to meet me after work. She shouldn't meet me at the car, she should go home by herself. And that was over a period of time in many, many such communications, that Sid Cohen was upset when he saw us and it just inflamed him and his anger at me.

*Id.* at 141; *see also* T. Rosenblatt Aff. at ¶¶ 20-21; B. Rosenblatt Aff. at ¶¶ 15-17.[2] Plaintiff also testified to having discussed with Lust on such occasions "how can I kiss Sid's ass more or please him more, or be more of what he wants, and cover up Babs, basically. That was the concept, the understanding." T. Rosenblatt Dep. at 61-71.

[2] In addition, Gould-Henry testified that Lust commented to her that she could resume working for the firm if Sidney Cohen died. B. Rosenblatt Aff. at ¶ 18.

During a telephone conversation with Bivona in December 1993, plaintiff decided to confront Cohen regarding his disapproval of plaintiff's interracial relationship.

> I then . . . told him I was gonna call Sid and try to meet with Sid because I wanted to sit down with him and try and talk man to man, outside the office, discuss his problems with me, and my relationships and whatever else he was concerned with. I called Sid and asked him if I could — told him I was willing to come from the Poconos to Vermont immediately, sit down with him, and his response was, "No, we have nothing to talk about."

*Id.* at 73-74. Early in 1994, plaintiff testifies that he was again rebuffed when he approached Cohen with the invitation, "`Sid, I'd like to talk to you.' He said, `I don't want to talk,' he said, `I don't want to get aggravated.'" *Id.* at 75.

## 4. Events surrounding plaintiff's termination

Plaintiff characterizes the July 1993 AIG audit and subsequent moratorium on new assignments to defendant as a pretextual reason for his termination. Pl.'s 3(g) at ¶ 23. Although Cohen testified that the late submission of attorney status reports uncovered by the audit: served as the catalyst for his decision to terminate plaintiff,
213 *plaintiff* *213 argues that the number of late reports filed by each Unit involved was proportional to the number of AIG files handled, and that his Unit filed 44% of the late reports solely because his Unit handled the greatest share of the AIG account. Cohen Dep. at 103, 154; T. Rosenblatt Aff. at ¶ 35. Plaintiff points out that other Units responsible for proportionally equivalent percentages of report mishandling were not reorganized, nor were their leaders terminated.

Plaintiff has also provided evidence that AIG's decision to withdraw certain business from Bivona Cohen was due to many reasons in addition to the late reports. Pl.'s App., Exh. 13. He contends that the late status reports were only an insignificant part of the mishandling of AIG's account, in support of which he submits AIG's letter and report offering suggestions for firm-wide improvement. *See* Pl.'s App., Exhs. 9, 13.[3]

[3] Of the nine-page AIG audit report, only a portion of one page is devoted to the delinquent attorney status reports. Pl.'s App., Exh. 13. Although Cohen testified that defendant lost a substantial portion of its AIG business due directly to plaintiff's inefficiencies in overseeing the delinquent reports, plaintiff offers as contradictory evidence the memorandum sent to Unit leaders in response to AIG's letter, in which Bivona addressed the need of the entire firm to respond collectively to the AIG problem, making no effort to pinpoint plaintiff or Unit 3 as having played any greater part than others. Cohen Dep. at 103; 157-58; Pl.'s App., Exh. 12. Plaintiff also provides testimony from Harold Jacobowitz of AIG, regarding the firm-wide breadth of errors uncovered by the audit as well as the decrease in AIG business assigned to all similarly situated firms. *See* Deposition of Harold Jacobowitz, American International Group Vice President of claims litigation, at 24-28, 43, 53; Pl.'s App., Exh. 9.

Also at issue is which individuals were specifically responsible for the decision to discharge plaintiff. Plaintiff alleges that his termination was at the direction of Sidney Cohen, which defendant denies. Pl.'s 3(g) in Support at ¶ 3; Def.'s Second 3(g) at ¶ 3. Defendant maintains that it was the Partnership Governing Committee, composed of John Bivona and Sidney Cohen, who made this decision. Bivona Aff. at ¶ 3. There are statements in the deposition testimony of Figliolo and Bivona to the effect that Cohen himself made the actual decision, and overruled others who disagreed. Figliolo Dep. at 93-99; Bivona Dep. at 159-62. Figliolo testified that from March of 1991 until August 1994, "if we didn't intercede, Ted would have been fired." Figliolo Dep. at 93, 98-99. Finally, in late spring of 1994, the tension escalated to the point that

> Sid wouldn't hear anything from any of us, if we brought up his name, "I don't want to hear it," he said, "I want this guy out of here." And then we, what, I know I did, I went to John, I said, "John, it looks like my words are not getting anywhere. See what you can do, go in there, talk to Sid and see if you can change his mind and whatnots" And John said, "I'll see what I can do."

Figliolo Dep. at 97. Bivona also testified that he finally acquiesced in August 1994 to Cohen's desire to discharge plaintiff because "Sid was so adamant. Sid never yells at me. Ever. I've been with him for 25 years. Sid yells at everybody, but he never yells at me . . . He started yelling at me, and I knew he was right." Bivona Dep. at 160-61.

The question most heatedly disputed is the motivation behind plaintiff's discharge. Bivona claims that "Plaintiff's termination by Sid Cohen and myself was the result of a totality of circumstances occurring over a period of years." Bivona Aff. at ¶ 3. Defendant portrays plaintiff's termination as "a business decision . . . resulting from the cumulative effect of a number of deficiencies in Plaintiff's job performance," and asserts that "plaintiff was warned several times that his performance was unsatisfactory." Ans. at ¶¶ 47-48; Def.'s Second 3(g) at ¶ 5.

Plaintiff, in contrast, avers that "at all relevant times, [he] ably and competently performed his duties." Complaint at ¶ 9. Plaintiff reports that no explanation was offered for his termination other than Bivona's comments that "You know what's coming," and "you know why," and asserts that "it was clear to [him] that Cohen had finally prevailed in *his* quest to have [plaintiff] fired." T. Rosenblatt Aff. at ¶ 25 (emphasis in original). Plaintiff does not recall having been warned or reprimanded regarding the quality of his work,

214 although he does testify to having been aware for several years that Cohen *214 wanted to fire him and that other partners made multiple attempts to save his job. T. Rosenblatt Aff. at ¶¶ 125, 43. He contends that his termination was due to racial animosity and prejudice on account of his interracial marriage to Gould-Henry.

## II. Legal Standard for Summary Judgment

Federal Rule 56(c) provides that summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In evaluating a motion for summary judgment, all inferences justifiable in light of the totality of the evidence presented are to be drawn in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The function of a district court in the summary judgment context is not to weigh the evidence, but merely to determine whether there is a genuine issue for trial. *Gallo v. Prudential Residential Servs., Ltd. Partnership,* 22 F.3d 1219 (2d Cir. 1994).

In an employment discrimination case, the burden of proof rests at all times with the plaintiff alleging discrimination. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 507, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993). "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." *Chambers v. TRM Copy Centers Corp.,* 43 F.3d 29, 37 (2d Cir. 1994). This is especially true where the employer's intent is at issue. "Summary judgment is notoriously inappropriate for determination of claims in which issues of . . . good faith and other subjective feelings play dominant roles." *Krishna v. Colgate Palmolive Co.,* 7 F.3d 11, 16 (2d Cir. 1993) (quoting *Leberman v. John Blair Co.,* 880 F.2d 1555, 1560 (2d Cir. 1989)). Thus, although a plaintiff cannot withstand summary judgment by raising purely metaphysical questions, a "trial court must be cautious about granting summary judgment to an employer [and] affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Gallo,* 22 F.3d at 1224.

## III. Plaintiff's Motion for Partial Summary Judgment

Because it is potentially dispositive, I initially address the plaintiff's motion for partial summary judgment on the affirmative defense that plaintiff does not qualify as an employee for purposes of Title VII.[4] The parties do not dispute that defendant is a professional corporation with more than 14 employees and thus qualifies as an "employer" under 42 U.S.C. § 2000e(b). They also agree that plaintiff's employment was at all times at will and that John Bivona and Sidney Cohen, as sole shareholders of the firm, possessed the exclusive authority to discharge plaintiff. The parties dispute whether a non-equity partner of Bivona Cohen is an "employee" under Title VII.

[4] Because the relevant provisions of 42 U.S.C. § 1981 and NYHRL § 296 are governed by the same standards as Title VII in New York, these claims are addressed together.

Section 701(f) of Title VII defines an employee as "an individual employed by an employer," to which it specifies several exemptions. 42 U.S.C. § 2000e(f). Neither this definition nor its exemptions address whether non-equity law firm partners qualify as employees.

Whether a "partner" qualifies as an "employee" depends on whether a true partnership relationship exists.[5]
215 Courts in this *215 Circuit have used tests both of organizational form and of economic realities to draw the "employee" boundaries on a case-by-case basis. While the Court of Appeals has recognized that "the benefits of the anti-discrimination statutes [generally] do not extend to those who are properly classified as partners," *Hyland v. New Haven Radiology Associates,* 794 F.2d 793, 797 (2d Cir. 1986), the court has also concluded that an economic realities test need not be applied "where the individual involved is a corporate employee, . . . for we hold that every such employee is `covered' for purposes of the ADEA and that any inquiry respecting partnership status would be irrelevant." *Id.* at 798. After "[h]aving made the election to incorporate," the defendant professional corporation could not later call itself a partnership in substance. *Id.* The Court of Appeals recently reasserted that "[t]he fact that certain modern partnerships and corporations are practically indistinguishable in structure and operation . . . is no reason for ignoring form of business organization freely chosen and established," in affirming a district court's refusal to grant summary judgment based on a per se partnership exemption. *E.E.O.C. v. Johnson Higgins,* 91 F.3d 1529, 1537 (2d Cir. 1996) (quoting *Hyland,* 794 F.2d at 798). *Hyland* explicitly provided that this rule extends to a professional corporation "whose structure resembles that of a partnership." *Id.* (explaining *Hyland,* 794 F.2d 793). Here, where defendant is admittedly a professional corporation of which plaintiff is a non-equity partner, plaintiff is a corporate employee for Title VII purposes.[6]

5 Because Title VII, the ADA and the ADEA set forth identical definitions of the term "employee," courts generally cross-reference discussions of the standards required by these statutes. *See Hyland v. New Haven Radiology Associates,* 794 F.2d 793, 796 (2d Cir. 1986) (asserting that because the FLSA and the ADEA "have a similar purpose — to stamp-out discrimination in various forms — cases construing the definitional provisions of one are persuasive authority when interpreting the others"). This cross-construction method is also supported by the directive in the E.E.O.C. Interpretative Guidelines that defined terms are to have the same meaning under Title VII and the ADA. *See* 56 Fed. Reg. 35,740 (1991); *Jones v. Inter-County Imaging Centers,* 889 F. Supp. 741 (S.D.N.Y. 1995).

6 Some courts that have found partners not to be employees for employment discrimination purposes have based that conclusion on Justice Powell's concurrence in *Hishon v. King Spalding,* 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). As support for a rigid distinction between law firm partners and employees, defendant relies on Justice Powell's statement that "[t]he relationship among law partners differs markedly from that between employer and employee" *Hishon,* 467 U.S. at 79, 104 S.Ct. at 2235-36 (Powell, J., concurring). The *Hishon* concurrence also cautions, however, that "an employer may not evade the strictures of Title VII simply by labeling its employees as `partners.'" *Id.* at n. 2.

Even were defendant organized not as a professional corporation, but as a partnership, plaintiff would still qualify as an employee under Title VII. *Hyland* noted two factors the E.E.O.C. considers relevant to a determination of whether a "partner" is an "employee": the ability to "control and operate the business, and to determine compensation and the administration of profits and losses." *Hyland,* 794 F.2d at 798. Other courts have expanded on these factors and have established a three-part economic realities test consisting of at least the following factors: (1) the extent of an individual's ability to control and operate the business as evidenced by participation in policy decisions; (2) the extent to which an individual's compensation is based on a percentage of business profits; and (3) the extent of employment security enjoyed by the individual. *See Caruso v. Peat, Marwick, Mitchell Co.,* 664 F. Supp. 144, 149-50 (S.D.N.Y. 1987) (rejecting a per se rule making partners exempt from ADEA protection and holding partner an eligible employee). Both parties agree that plaintiff's employment was at-will, thereby precluding his classification as a non-employee partner. A firm "may not fire a partner or otherwise terminate his employment merely because of disappointment with the

quantity or quality of his work, but may only remove the partner in extraordinary circumstances." *Id.* at 149. Thus, even if Bivona Cohen is considered to be a partnership, rather than a corporation, plaintiff is an employee under Title VII. Plaintiff's motion for partial summary judgment is therefore granted on this issue.

## IV. The Legal Framework in Employment Cases: Burdens of Proof

In an employment discrimination case in which direct evidence of discrimination is lacking, courts apply the *McDonnell Douglas* three-part burden shifting analysis characterized by the Supreme Court as the "allocation
216 of burdens and the creation of a *216 presumption by the establishment of a *prima facie case* . . . intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Texas Dep't of Comm. Affairs v. Burdine,* 450 U.S. 248, 254 n. 8, 101 S.Ct. 1089, 1094 n. 8, 67 L.Ed.2d 207 (1981). At the initial stage, the plaintiff must present evidence sufficient to establish a *prima facie* case of discrimination. In defending against a motion for summary judgment, the plaintiff's burden at this stage is de minimis. Once a *prima facie* case has been established, a rebuttable presumption of discrimination arises, and the evidentiary burden shifts to the defendant to articulate a legitimate reason for the disputed employment decision, which causes the presumption of discrimination to "[drop] from the case." *Id.* at 255, 101 S.Ct. at 1094-95. Finally, at stage three, the plaintiff is afforded the opportunity of demonstrating that the defendant's proffered reasons served merely as a pretext for discrimination.

As recently expounded by the Court of Appeals in an *en banc* decision, this burden-shifting framework provides a gift to the plaintiff by delaying his or her ultimate burden until the employer has been forced to narrow the scope of inquiry by offering a nondiscriminatory justification for its adverse decision. *See Fisher v. Vassar College,* 114 F.3d 1332 (2d Cir. 1997). Once the plaintiff makes a satisfactory *prima facie* showing, "the remaining elements (discrimination and causation) are presumed *at this stage* of the litigation." *Id.* at 133 (emphasis in original). Then, once the defendant has met its burden of articulating a legitimate reason, "plaintiff's burden is enlarged to include every element of the claim. Discrimination and cause are no longer presumed." *Id.* The plaintiff is now faced with his or her ultimate burden, which may be defined via "the same question asked in any other civil case: Has the plaintiff shown, by a preponderance of the evidence, that the defendant is liable for the alleged conduct?" *Id.* at 1336. Thus, "once the minimal *prima facie* case has served its purpose of forcing the employer to proffer a reason, all presumptions drop out and the case proceeds like any other — *i.e.,* with the burden on plaintiff to prove the case by evidence of discrimination sufficiently persuasive to allow a favorable verdict." *Id.* at 1343.

Courts in this Circuit have held that, if an employee offers sufficient evidence that a jury could reasonably find in his or her favor, and the employer counters with a legitimate reason that does not as a matter of law require a finding in its favor, an inference on either's behalf is permissible and summary judgment is not appropriate. A plaintiff opposing summary judgment must simply show that the employer's proffered reasons do not tell the whole story, by producing evidence supporting a reasonable inference that an impermissible reason, such as race, played a significant role in the adverse decision. *See Fields v. New York State Office of Mental Retardation and Developmental Disabilities,* 115 F.3d 116, 120 (2d Cir. 1997) ("a Title VII plaintiff can prevail by proving than an impermissible factor was `a motivating factor,' without disproving that the employer's proffered explanation was not some part of the employer's motivation").[7] It is consistent with Title VII's purpose as it has been traditionally construed to require a plaintiff to show not "`that the employer's proffered reasons were false or played no role in the employment decision, but only that [race] was at least one of the motivating factors.'" *Padilla v. Metro-North Commuter Railroad,* 92 F.3d 117, 122-23 (2d Cir. 1996) (quoting *Cronin,* 46 F.3d at 203). This proposition also reflects the 1991 Amendments to the Act, which modified Title

VII to require a showing that "race . . . was a motivating factor for any employment practice, even though other
217 factors also motivated the practice." 42 U.S.C. § 2000e-2. Thus, plaintiff is *not* required to prove that *217
defendant's proffered reasons for the termination were false.

[7] *See also Cronin v. Aetna Life Insurance Co.,* 46 F.3d 196, 206 (2d Cir. 1995) ("a plaintiff defending a motion for summary judgment need demonstrate only that a genuine issue exists as to whether, despite the employer's ostensible rationale and overall operations, intentional discrimination is the persuasive explanation for the plaintiff's treatment,"); *Hagelthor v. Kennecott Corp.,* 710 F.2d 76, 82 (2d Cir. 1983) (plaintiff "was not required to show that the reasons offered were false, but that they were not [defendant's] only reasons and that age made a difference").

## A. Step 1: Establishment of a prima facie case

The elements comprising a plaintiff's *prima facie* case were initially defined as (1) membership in a protected class; (2) satisfactory performance of employment duties; (3) the occurrence of an adverse employment decision; and (4) replacement by an individual outside the protected class. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The Supreme Court, however, "expressly noted that the *McDonnell Douglas* standard, though a useful yardstick, is not necessarily applicable in every respect to differing factual situations [and] stressed that the *McDonnell Douglas* analysis is neither `rigid' nor `mechanized' and that the primary focus is always whether an employer treats an employee less favorably than other employees for an impermissible reason." *Montana v. First Federal Savings and Loan Assoc. of Rochester,* 869 F.2d 100, 104 (2d Cir. 1989) (quoting *McDonnell Douglas,* 411 U.S. at 802 n. 13, 93 S.Ct. at 1824 n. 13; *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 2949-50, 57 L.Ed.2d 957 (1978)). A plaintiff is "not required to prove, as part of his *prima facie* case, that he was replaced by any employee or that his job continued to exist." *Hagelthorn,* 710 F.2d at 81; *see also Meiri v. Dacon,* 759 F.2d 989, 995 (2d Cir. 1985) (whether the plaintiff's position was refilled or eliminated "is of little relevance and should not sound a death knell to [plaintiffs] Title VII claim."). Rather, as the Court of Appeals stated in *Fisher,* a "preference for someone outside the protected class" will suffice for this element of the *prima facie* case. 114 F.3d at 1336-37.

There is no dispute that plaintiff has satisfied the first and third elements of a *prima facie* case. This Court has previously determined that the plaintiff is a member of a protected class based on his interracial marriage, and plaintiff has been terminated from his employment. *See Rosenblatt,* 946 F. Supp. 298.

In support of his allegations that his performance was satisfactory and that he was qualified for his position, plaintiff points to admissions in the deposition testimony of Bivona, Cohen, and other partners that he was a capable attorney. Bivona Dep. at 8586; Cohen Dep. at 144-45; Figliolo Dep. at 29-30; Lust Dep. at 57-59; Monteleone Dep. at 17-18. In addition, plaintiff notes that Unit 3 was more profitable than Units 1 and 2 for the years 1992 through 1994. T. Rosenblatt Aff. at ¶ 7; Pl.'s App., Exh. 1. Finally, plaintiff argues that the firm-wide management duties consistently entrusted to him indicate that his services were trusted and valued. T. Rosenblatt Aff. at ¶ 6. "[P]roof of competence sufficient to make out a *prima facie* case of discrimination was never intended to encompass proof of superiority or flawless performance [but solely] the basic skills necessary for performance of [the] job." *Powell v. Syracuse University,* 580 F.2d 1150, 1155 (2d Cir. 1978). Plaintiff has met the de minimis burden of showing that he possessed the qualifications required by his position.[8]

[8] Defendant asserts that although plaintiff "was responsible for procuring and determining what malpractice insurance would be carried by Bivona Cohen, drafting the defendant law firm's litigation form books, establishing Bivona Cohen's billing guidelines and billing codes and dealing with the landlord with regard to lease negotiations for firm office space," plaintiff "just didn't get the job done. He wouldn't complete any tasks." Def.'s Reply at 2; Figliolo Dep. at

96. These assertions raise a material issue of fact as to plaintiff's qualification; however, as "[i]t is not the province of the summary judgment court itself to decide what inferences should be drawn," this is a question for a jury. *Chambers,* 43 F.3d at 38.

Finally, although plaintiff was not replaced, he has satisfied the requisite showing of preference for someone outside the protected class. Although the AIG audit had analogous implications for the performance of other Unit supervisors, those managers were not terminated, nor were their cases transferred to other units.

**B. Step 2: Defendant Articulates Legitimate Non-Discriminatory Reason for Plaintiff's Termination**

218 The burden now shifts to the defendant to come forward with a legitimate *218 reason for plaintiff's termination that would, if believed, allow a factfinder to find in its favor. Defendant has amply met its evidentiary burden through provision of a plethora of nondiscriminatory reasons for plaintiff's discharge, consisting primarily in (1) plaintiff's failure to properly supervise attorneys under his authority and manage his Unit; (2) plaintiff's inept handling of files under his supervision, as reflected by client dissatisfaction; (3) plaintiff's misrepresentation to the Partnership Governing Committee as to the circumstances surrounding Gould-Henry's 1989 leave; and (4) plaintiff's public intoxication and harassment of another of defendant's employees. Defendant has therefore articulated sufficient legitimate non-discriminatory reasons for plaintiff's termination to dispel the presumption of discrimination arising from plaintiff's *prima facie* case

**C. Step 3: Plaintiff's Burden to Raise Fact Issue Regarding Defendant's Improper Motive**

Plaintiff now has the opportunity to show that defendant's proffered reasons serve as a pretext for discrimination. In *Burdine,* the Supreme Court taught that a plaintiff could prevail at phase three of the *McDonnell Douglas* analysis "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine,* 450 U.S. at 256, 101 S.Ct. at 1095 (emphasis added). In *St. Mary's,* the Supreme Court provided further clarification, holding that proof that the defendant's proffered reason was false was neither required nor sufficient in itself to establish the "pretext for discrimination." *St. Mary's,* 509 U.S. at 515, 113 S.Ct. at 2751-52. Proof of *discrimination* was thus the essential facet of the *McDonnell Douglas* plaintiff's case, whether adduced partly through proof that the proffered legitimate reason was untrue, or shown exclusively through evidence of discrimination. The Court of Appeals recently clarified that *St. Mary's* and *Burdine*

> do not require a finding of pretext in addition to a finding of discrimination. . . . Since a plaintiff prevails by showing that discrimination was a motivating factor, it can invite the jury to ignore the defendant's proffered legitimate explanation and conclude that discrimination was a motivating factor, whether or not the employer's proffered explanation was also in the employer's mind.

*Fields,* 115 F.3d at 121 (internal citations omitted). *See also Hagelthorn,* 710 F.2d at 81 (the "central question is whether [the] plaintiff has presented sufficient evidence to permit a reasonable fact-finder to conclude that age was a determinative factor in the employer's decision"). Therefore, the relevant question at this stage is whether plaintiff has succeeded in adducing evidence supporting a reasonable conclusion that race "`was at least one of the "motivating" factors'" in defendant's decision to terminate his employment. *Fields,* 115 F.3d at 121 (quoting *Cronin,* 46 F.3d at 203). Plaintiff has met this burden.

Defendant has put forward what it describes as "a litany" of reasons in support of its general contention that plaintiff was terminated because of long-term deterioration in his performance. Def.'s Mem. at 22. However, the record remains unclear regarding several material issues. Disparities exist between plaintiff's and

defendant's evidence, as well as additional incongruities in the testimony of defendant's own partners, all of which give rise to questions of fact that can only be resolved at trial. On a motion for summary judgment,

> no special rules affect the weight to be given to the *prima facie* case, the truthfulness or falsity of the employer's explanation, or any other piece of evidence. As in any other type of case, the judge must analyze the evidence, along with the inferences that may be reasonably drawn from it, and decide if it raises a jury question as to whether the plaintiff was the victim of discrimination.

*Fisher,* 114 F.3d at 1347.

Plaintiff argues that defendant's proffered reasons are pretextual and that race was a motivating factor in his discharge because of (1) statistical and circumstantial evidence showing general firm policy and disparate
219 treatment of those in the protected class; *219 (2) inconsistencies in the deposition testimony of defendant's partners regarding the reason for his termination; and (3) the sequence and timing of events preceding his termination. Plaintiff has proffered sufficient evidence to raise a fact issue as to whether race was a motivating factor in his termination. This question of fact precludes summary judgment.

First, plaintiff contends that Bivona Cohen has never employed a black attorney during its 30-year history. *See* Bivona Dep. at 162-63; Cohen Dep. at 192.[9] Furthermore, plaintiff asserts that when he recommended a black associate in 1993, Cohen declined to interview him or review his resume, responding simply that "it would not be a good idea" to hire him. T. Rosenblatt Aff. at ¶ 15. Plaintiff's contentions regarding defendant's disparate treatment of both plaintiff and Gould-Henry could also contribute to a reasonable conclusion that race was a motivating factor in his termination. For example, plaintiff claims that after having agreed to represent Gould-Henry without charge in her divorce proceedings in 1987, defendant's partner Martin Stewart was forbidden by Cohen from doing so, although he was not directed to curtail his concurrent or subsequent representation of a white employee of the firm in a similar matter. B. Rosenblatt Aff. at ¶¶ 5-7; Stewart Dep. at 18-19. In addition, plaintiff contends that although he was required to terminate Gould-Henry's employment in 1989, the white secretaries of other partners, including Cohen himself, were allowed leaves exceeding stated firm policy. B. Rosenblatt Aff. at ¶¶ 8-11; Hoffman Dep. at 14-19; Def.'s App., Exh. C. Plaintiff also points to Cohen's failure to attend plaintiff's wedding, as well as Cohen's impassivity when racially discriminatory remarks were made in his presence, as evidence that race played a factor in plaintiff's termination.

> 9 When asked at his deposition whether defendant had ever hired a black lawyer, Bivona initially responded "Yes," the firm had hired Ken Rolands; however, he quickly admitted that Rolands was not admitted to the New York Bar, and, while employed by defendant, had never appeared in court in the capacity of an attorney. Bivona Dep. at 162-63.

Plaintiff argues additionally that the AIG episode is a pretextual justification for his termination. He offers proof that the AIG letter reporting the results of the audit "does not single out any particular unit's work, and the observations in the letter about `areas where changes need to be made' apply equally to all of the units." T. Rosenblatt Aff. at ¶ 31. He argues that despite the fact that AIG suggested firm-wide changes in the handling of its files, defendant responded by reorganizing only plaintiff's Unit and terminating plaintiff, while leaving intact other Units responsible for a proportionally equivalent number of mishandled files. *Id.* at ¶¶ 31-34; Pl.'s App., Exhs. 9, 14. Particularly when viewed in conjunction with plaintiff's evidence that from 1992 through 1994 his Unit was more profitable than two of those whose directors were implicated by the AIG audit but not terminated, this circumstance could give rise to a reasonable conclusion that the loss of AIG business was a pretextual reason for terminating plaintiff's employment.

In addition, fact questions remain as to (1) who specifically was responsible for making the final decision to terminate plaintiff; (2) the veracity of defendant's reliance on long-dormant objections to plaintiff's "indiscretions" as potentially pretextual reasons for his termination; and (3) defendant's state of mind regarding the race of plaintiff's wife. The resolution of the remaining fact issues in this case could lead a finder of fact to reasonably conclude that the race of plaintiff's wife was a motivating factor in his termination. While neither Bivona nor Cohen's conduct was necessarily indicative of a discriminatory intent, neither was it, in light of plaintiff's evidence, unambiguously neutral. Although defendant has introduced evidence that plaintiff's termination may have been based on legitimate grounds, defendant has not succeeded in precluding an inference that the legitimate reasons proffered for plaintiff's discharge served as a pretext for a true discriminatory motive. As both inferences are permissible, "[i]t remains the province of the finder of fact to decide which inference should be drawn." *Cronin,* 46 F.3d at 206. *See also Hagelthor,* 710 F.2d at 83 ("where
220 *220 there is evidence of both a discriminatory reason and a legitimate reason for termination, it is for the fact-finder to determine").

## V. Conclusion

For the foregoing reasons, defendant's motion for summary judgment is denied. Plaintiff's motion for partial summary judgment on the issue of his status as an employee is granted.

No. 95 Civ. 4826 (BSJ)
United States District Court, S.D. New York

# Cohen v. Citibank, N.A.

954 F. Supp. 621 (S.D.N.Y. 1996)
Decided Dec 5, 1996

No. 95 Civ. 4826 (BSJ)

622 December 5, 1996.*622

Nathaniel B. Smith, Ranni Smith, New York City, for plaintiff.

R. Paul Wickes, Ann M. Vermes, Shearman Sterling, New York City, for defendant Citibank, N.A.

## MEMORANDUM ORDER

BARBARA JONES, District Judge.

In 1992, defendant Citibank, N.A. ("Citibank"), a banking institution, extended an advance of $1,120,000 to
623 plaintiff Adina Cohen ("Cohen"). Two years later, Citibank notified Cohen that the amounts outstanding *623
on the advance were due and payable. At least a portion of the loan still remains outstanding.

Cohen now asserts seventeen causes of action, essentially alleging that Citibank acted in concert with defendants David Blech ("Blech") and D. Blech Company, Incorporated ("DBC") to grant her the advance in violation of various federal and state laws, thereby rendering any obligation based on the advance void and unenforceable. Pending is Citibank's motion to dismiss the amended complaint pursuant to Fed.R.Civ.P. 12(b)(6).

## BACKGROUND[1]

[1] As this is a motion to dismiss, this section is culled from the Complaint, which we assume to be true. *See Cruz v. Beto,* 405 U.S. 319, 322, 92 S.Ct. 1079, 1081-82, 31 L.Ed.2d 263 (1972).

Cohen and Blech met in the early 1980s. (Am.Compl. ¶ 24.) Over time, Blech became Cohen's investment advisor and broker and asserted control over the day-to-day handling of her financial affairs. ( *Id.* ¶ 26.)

On or about February 9, 1990, Blech opened DBC as a registered broker-dealer under the Securities Exchange Act of 1934 (the "1934 Act"). ( *Id.* ¶ 10.) DBC specialized in the promotion, placement, sale, and marketing of "bio-technology" securities (the "Blech Securities"). ( *Id.* ¶ 13.) At all times relevant to this motion, Blech was DBC's sole shareholder, director, and controlling person. ( *Id.* ¶ 11.) In addition, Blech was the beneficial owner of a large portion of the Blech Securities. ( *Id.* ¶ 14.) However, it was Citibank that financed the securities operations of both Blech and DBC, maintaining and operating various accounts on behalf of Blech, DBC, and others. ( *Id.* ¶ 15-18.)

In or about December 1992, Cohen obtained a line of credit from Citibank for $1,120,000 (the "1992 Advance"). ( *Id.* ¶¶ 36-37.) Cohen signed a Demand Note and other documents reflecting the loan ( *id.* ¶ 38), but Blech guaranteed the loan. ( *Id.* 39.)

Over the course of the next two years, Citibank maintained in Cohen's name a collateral account, a loan account, a regular checking account, and money market accounts. ( *Id.* 43.) From December 1992 through September 1994, Blech, DBC and Citibank transferred money into and out of Cohen's collateral account and various other accounts maintained by Citibank. ( *Id.* ¶¶ 47, 17-19.) With a few exceptions, Cohen, herself, never authorized these transfers. ( *Id.* ¶ 48.) In fact, Cohen alleges that the transfers were effected in order to further a parking and manipulation scheme between Citibank, Blech, and others to manipulate the market and bolster the value of the Blech Securities. ( *Id.* ¶¶ 51-53.) In this connection, Cohen maintains that the 1992 Advance was a "sham" constituting an unlawful extension of credit with the sole purpose of allowing Blech to acquire biotechnology securities. ( *Id.* ¶¶ 39-40, 77.) Accordingly, she states that Blech is the true obligor on the loan. ( *Id.*)

In the spring of 1994, the market value of the Blech Securities fell, causing Blech, DBC, and Citibank to experience financial problems. ( *Id.* ¶¶ 52 59.) Around that time, Citibank "looked to" Blech and DBC to provide it with additional securities in connection with and to pay interest on the 1992 Advance. ( *Id.* ¶¶ 59-60.)

In September 1994, with the prices of the Blech Securities falling, DBC began to collapse. ( *Id.* ¶ 63.) On September 22, 1994, Citibank declared the 1992 Advance due and informed Cohen of its intent to sell the collateral in her collateral account. ( *Id.* ¶ 67.) On April 12, 1995, Citibank sent a letter to Cohen reminding her of her obligations under the terms of the 1992 Advance and notifying her of its intent to seek legal redress if necessary. ( *Id.* ¶¶ 73-74.)

On June 27, 1995, Cohen filed (but did not serve) this federal action against Citibank, alleging that the 1992 Advance was illegally effectuated and seeking declaratory relief to that effect. On October 3, 1995, Citibank filed and served a motion for summary judgment in lieu of complaint in the Supreme Court for the State of New York, seeking a judgment in the amounts then due under the 1992 Advance. That day, Cohen served
624 Citibank with the complaint in this action. The *624 state court action is fully briefed and awaiting decision.

On November 13, 1995, Cohen filed an Amended Complaint in this case, adding Blech and DBC as defendants and asserting seventeen causes of action seeking declaratory and monetary relief against the defendants. Of those seventeen claims, thirteen are levied against Citibank, six of which assert federal causes of action under the 1934 Act.

## DISCUSSION

I. PARALLEL ACTIONS

Since there is a parallel action pending in state court, the threshold issue is whether this court should stay these proceedings until the state court action is resolved. *See Colorado River Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). In this connection, Citibank argues that the court should dismiss the complaint under the principles expressed by the Supreme Court in both *Colorado River*, 424 U.S. 800, 96 S.Ct. 1236, and *Wilton v. Seven Falls Co.,* ___ U.S. ___, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995). Cohen disagrees. For the following reasons, we decline to abstain at this time.

A. The *Colorado River* Abstention Doctrine

The Supreme Court in *Colorado River* held that district courts have a "virtually unflagging obligation" to exercise the jurisdiction conferred on them by Congress. *Colorado River,* 424 U.S. at 813, 96 S.Ct. at 1244; *accord Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Indeed, only "the clearest of justifications" constituting "exceptional circumstances" may temper this obligation. *Colorado River,* 424 U.S. at 813, 96 S.Ct. at 1244.

The Supreme Court has identified six nonexhaustive factors a district court should carefully balance in determining whether such "exceptional circumstances" exist. They are: (1) assumption by federal or state court of jurisdiction over any *res* or property; (2) whether the federal forum is any less convenient to the parties than the state forum; (3) whether there is a danger of piecemeal litigation; (4) the order of the two suits; (5) whether federal law provides the rule of decision on the merits; and (6) whether the state court is inadequate to protect the "plaintiff's rights." *Moses Cone* 460 U.S. 1, 14, 103 S.Ct. 927, 936; *Bernstein v. Hosiery Mfg. Corp. of Morganton, Inc.,* 850 F. Supp. 176, 182 (E.D.N.Y. 1994); *see also Will v. Calvert Fire Ins. Co.* 437 U.S. 655, 664, 98 S.Ct. 2552, 2558, 57 L.Ed.2d 504 (1978) (". . . the decision whether to defer to the concurrent jurisdiction of a state court is . . . a matter committed to the district court's discretion.")

Applying the principles of *Colorado River,* this Court finds that abstention is inappropriate here. First, despite Citibank's protestations to the contrary, this action began before the state proceeding. *See* Fed.R.Civ.P. 3 ("A civil action is commenced by *filing a complaint* with the court.") (emphasis supplied). Second, this case involves numerous allegations that defendant Citibank violated the federal securities laws. While the Court recognizes that state courts may properly consider federal claims raised as defenses to state actions, even where federal courts have exclusive jurisdiction, *Hathorn v. Lovorn,* 457 U.S. 255, 266 n. 18, 102 S.Ct. 2421, 2428-29 n. 18, 72 L.Ed.2d 824 (1982); *Andrea Theatres, Inc. v. Theatre Confections, Inc.,* 787 F.2d 59, 61 (2d Cir. 1986); *Banque Indosuez v. Pandeff,* 193 A.D.2d 265, 603 N.Y.S.2d 300, 302 (1st Dep't 1993), *lv. to appeal dismissed,* 83 N.Y.2d 907, 614 N.Y.S.2d 388, 637 N.E.2d 279 (1994), it also notes that state courts may not grant affirmative relief based on claims for which federal jurisdiction is exclusive, *Andrea Theatres, Inc.,* 787 F.2d at 61; *see also Canaday v. Koch,* 608 F. Supp. 1460, 1474 n. 24 (S.D.N.Y.) (even if case for abstention is very strong, "in certain suits" if jurisdiction over some claims is exclusively federal, court should sever the federal claims and decide them), *aff'd*, 768 F.2d 501 (1985). In this connection, if a state court rejects a federal defense, it is unsettled whether Cohen would be precluded from asserting the claim as the basis for affirmative relief in a federal suit. *Id.* (citing *Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 *625 (1985)). As a result, the Court finds that the state proceedings are an inadequate forum to protect the plaintiff's rights to seek affirmative relief pursuant to her federal causes of action. *See Will v. Calvert Ins. Co.,* 437 U.S. 655, 670, 98 S.Ct. 2552, 2561, 57 L.Ed.2d 504 (1978) (Brennan, J., dissenting) (state court decisions should not have preclusive effect over matters within exclusive federal court jurisdiction); Note, The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction, 91 Harv.L.Rev. 1281 (1978). Accordingly, in an effort to avoid future litigation over collateral issues and because the balance of factors tips in favor of refraining from abstention, the Court finds that the *Colorado River* doctrine does not counsel abstention in this case.

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B. Abstention Under *Wilton*

Citibank urges that even if this court refrains from abstention under the *Colorado River* doctrine, it should abstain under the standard articulated by the Supreme Court in *Wilton v. Seven Falls Co.,* ___ U.S. ___, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995). In *Wilton,* the court held that where a party seeks a declaratory judgment and a parallel state suit is pending, the issue of abstention is governed by the standard set forth in *Brillhart v. Excess Inc. Co. of America,* 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942), rather than the *Colorado River*

doctrine. ___ U.S. at ___, 115 S.Ct. at 2144. *Brillhart*, in turn, held that in deciding whether to dismiss a declaratory judgment action, where a parallel state proceeding exists the court should consider whether the issues in the federal suit could be better settled in the pending state suit. *See* 316 U.S. at 495, 62 S.Ct. at 1175-76. *Woodstock Resort Corp. v. Scottsdale Ins. Co.,* 921 F. Supp. 1202, 1204 (D.Vt. 1995).

Four of the federal claims at issue here seek declaratory relief, while two seek both declaratory relief and damages. Cohen argues that since some of the claims seek damages, *Wilton* does not apply. Citibank disagrees. Neither party cites any case law discussing *Wilton's* application where both declaratory relief and damages are sought. This court need not decide the issue, however. Even assuming *Wilton* applies, the court finds that the issues raised can be better settled here in federal court. Specifically, the Court finds that the decision here, given its nature, will not interfere with the state proceeding and that the issues concerning the plaintiff's claims for relief (as opposed to her defenses in the state court action) can be best dealt with in this forum. Accordingly, this Court refuses to abstain or dismiss this suit under *Wilton.*

II. LEGAL STANDARD

A motion to dismiss the complaint will not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. *Goldman v. Belden,* 754 F.2d 1059, 1065 (2d Cir. 1985). *Accord H.J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 249, 109 S.Ct. 2893, 2905-06, 106 L.Ed.2d 195 (1989); *Gagliardi v. Village of Pawling,* 18 F.3d 188, 191 (2d Cir. 1994). In determining the sufficiency of a pleading on a motion to dismiss, the court must treat all factual allegations in the complaint as true, *see LaBounty v. Adler,* 933 F.2d 121, 123 (2d Cir. 1991), and draw all reasonable inferences in plaintiff's favor, *see Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir. 1989). "The function 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.'" *Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities, Inc.,* 748 F.2d 774, 779 (2d Cir. 1984) (quoting *Geisler v. Petrocelli,* 616 F.2d 636, 639 (2d Cir. 1980)).

Using this standard, the Court turns to the legal sufficiency of plaintiff's claims.

III. PLAINTIFF'S FEDERAL CLAIMS AGAINST CITIBANK

Simply put, plaintiff's various federal claims against Citibank allege that the acts surrounding the 1992 Advance were committed in violation of both the Securities and Exchange Act of 1934 and the Glass-Steagall
626 Act, and that therefore the terms of the advance are unenforceable. *626

A. Claim 1: Section 29(b) of the 1934 Act

In her first claim for relief, plaintiff claims that the 1992 Advance (1) constituted an unlawful extension of credit in violation of Regulations U, 12 C.F.R. § 221 *et seq.,* and T, 12 C.F.R. § 220 224, which were promulgated under the 1934 Act's Section 7, 15 U.S.C. § 78g (imposing margin requirements). Additionally, plaintiff alleges that the advance "exceeded the maximum loan value of a loan used to acquire margin stocks and was secured, directly or indirectly, by margin stock." (Compl. ¶ 79.) As a result, plaintiff claims, the terms of the 1992 Advance are unenforceable and void pursuant to Section 29(b) of the 1934 Act, 15 U.S.C. § 78cc(b), which provides in relevant part that "every contract made in violation of any provision of [the 1934 Act] or of any rule or regulation thereunder . . . shall be void. . . ."

The Supreme Court in *Mills v. Electric Auto-Lite Company et al.,* 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), found that Section 29(b) renders contracts in violation of the 1934 Act "voidable *at the option of the innocent party.*" 396 U.S. at 385, 90 S.Ct. at 622. Nine years later, in *Transamerica Mortgage Advisors, Inc.*

*(TAMA) v. Lewis,* 444 U.S. 11, 19, 100 S.Ct. 242, 246-47, 62 L.Ed.2d 146 (1979), the Supreme Court reenforced this position, stating that *Mills* recognizes the "right to rescind" a contract made void under the criteria of Section 29(b).[2] *See also Royal Air Properties, Inc. v. Smith,* 312 F.2d 210, 213 (9th Cir. 1962) (finding that certain parties can void a contract under section 29(b) by "bring[ing] a suit to rescind."); *Pompano-Windy City Partners, Ltd. v. Bear Stearns Co., Inc.,* 794 F. Supp. 1265, 1288 (S.D.N.Y. 1992) (discussing right to void a contract under Section 29(b)); *Slomiak v. Bear Stearns Co.* 597 F. Supp. 676, 681-82 (S.D.N.Y. 1984) (Section 29(b) allows some plaintiffs to render illegal contracts void).[3]

2 *But see Bassler v. Central National Bank,* 715 F.2d 308, 311-313 (7th Cir. 1983) (finding that *TAMA* failed to make explicit its holding and concluding that section 29(b) did not confer a private right of action upon investment borrowers as against investment lenders).

3 Citibank maintains that *Bennett v. United States Trust, Co.,* 770 F.2d 308 (2d Cir. 1985), *cert. denied,* 474 U.S. 1058, 106 S.Ct. 800, 88 L.Ed.2d 776 (1986), forecloses Cohen's attempt to assert a Section 29(b) action because of an alleged Section 7 violation. In *Bennett,* the plaintiff sought money damages for, among other things, a violation of Section 7. 770 F.2d at 310. Agreeing with all the circuits that had considered the issue at the time, *Bennett* held in no uncertain terms that "no private right of action exists under Section 7." *Id.*

Yet, Bennett does not control this case. First, the plaintiffs in *Bennett* asserted a private cause of action under Section 7, not under Section 29(b) as is alleged here. Second, they sought monetary relief, not equitable relief like Cohen seeks. Lastly, Citibank's reading of the case would directly contradict the clear direction of *Mills* and *TAMA,* which counsel that a private litigant can sue under Section 29(b) to void a contract, *i.e.* obtain equitable relief. Accordingly, this Court finds that Section 7 may serve as the predicate for a private cause of action seeking equitable relief pursuant to Section 29(b). *See Koppers Co., Inc. v. American Express Co.,* 689 F. Supp. 1417 (W.D.Pa. 1988) (finding private cause of action seeking equitable relief under section 29(b) based on violation of the 1934 Act's margin regulations); *Rhoades v. Powell,* 644 F. Supp. 645, 664 (E.D.Cal. 1986), *aff'd,* 961 F.2d 217 (9th Cir. 1992) (finding that section 29(b) creates private right of action to void contract made in violation of the 1934 Act's section 15). *But see Bassler v. Central National Bank,* 715 F.2d 308, 310-13 (7th Cir. 1983) (affirming dismissal of suit brought by borrower against lender seeking judgment voiding loans under section 29(b) based on Regulation U violation, and holding that Congress did not intend "to confer a right of action upon investment borrowers as against investment lenders.")

However, in order to establish a violation under Section 29(b), a plaintiff must "show that (1) the contract involved a prohibited transaction, (2) he is in contractual privity with the defendant, and (3) he is in the class of persons the [1934] Act was designed to protect." *Pompano-Windy City Partners, Ltd.,* 794 F. Supp. at 1288 (quoting *Regional Properties, Inc. v. Financial and Real Estate Consulting Co.,* 678 F.2d 552, 559 (5th Cir. 1982)); *accord Pearlstein v. Scudder German,* 429 F.2d 1136, 1149 (2d Cir. 1970) (Friendly, J., dissenting), *cert. denied,* 401 U.S. 1013, 91 S.Ct. 1250, 28 L.Ed.2d 550 (1971; *In re Gas Reclamation, Inc. Securities*
627 *Litigation,* 733 F. Supp. 713, 719 (S.D.N.Y. 1990). *627

The plaintiff here cannot meet the first or third requirements of this test. With regard to the first prong, plaintiff alleges only that the monies lent in the 1992 Advance were used in violation of Section 7. She does not allege that the contract evidencing the loan was illegal. *See Slomiak,* 597 F. Supp. at 681-82 (discussing distinction between unlawful contracts and unlawful transactions in section 29(b) context). Additionally, plaintiff, an individual borrower, is not in the class of persons the 1934 Act was designed to protect and thus fails to meet the third prong necessary to assert her Section 29(b) claim. *See Bassler,* 715 F.2d at 310-11 (finding that the overriding purpose of margin regulations is not to protect any individual, but to safeguard the integrity of the markets and the nation's financial health) (holding that Congress did not intend "to confer a right of action upon investment borrowers as against investment lenders."); *Bennett,* 770 F.2d at 312 ("Section 7 was clearly not passed for the especial benefit of individual investors.") Accordingly, plaintiff's first claim is dismissed.

B. Claim II: Glass-Steagall Act

Count II of the Amended Complaint asserts that Citibank acted as the source of financing for the sale and distribution of the Blech Securities and therefore violated sections 16 and 21 of the Glass-Steagall Act, 12 U.S.C. § 24 378, which impose strict limitations on the authority of a bank to purchase, sell, issue, underwrite, distribute, or otherwise deal in stocks and securities. Plaintiff maintains that these violations allow her to void the agreement evidencing the 1992 Advance and render it unenforceable. Citibank argues that Cohen may not maintain a private cause of action under the Glass-Steagall Act.

There is no express statutory authorization for a private action to redress a violation of the Glass-Steagall Act. Additionally, neither the Supreme Court nor the Second Circuit has spoken on whether a private right of action for injunctive relief may lie under the act. Nevertheless, plaintiff argues that the District of Columbia Circuit recognized such an action in *New York Stock Exchange v. Bloom,* 562 F.2d 736 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 942, 98 S.Ct. 1520, 55 L.Ed.2d 538 (1978). Dismissing a Glass-Steagall claim on ripeness grounds, the *Bloom* court stated in *dictum* that "an implied right of action for injunctive relief would exist *for appropriate parties." Id.* at 742 (emphasis supplied).

Regardless of whether the claimed right of action exists,[4] plaintiff is without standing to bring such an action. As *Bloom* and *Russell v. Continental Ill. Nat'l Bank Trust Co. of Chicago,* 479 F.2d 131 (7th Cir.), *cert. denied,* 414 U.S. 1040, 94 S.Ct. 541, 38 L.Ed.2d 331 (1973), both found, a plaintiff would have standing to sue under Glass-Steagall only if she is part of the class intended to be protected by the act. *Bloom,* 562 F.2d at 742 n. 5; *Russell,* 479 F.2d at 133. In this connection, the *Bloom* court specifically states that companies competing with each other under the regulation of Glass-Steagall constitute such a class. 479 F.2d at 134 n. 10. *Russell* expands on this notion and states that case law supports the existence of a private right of action for "bank depositors whose deposits were placed at risk . . . and in competing companies operating other mutual funds." 479 F.2d at
628 133.[5] Cohen, however, is none of *628 these; she is a borrower of funds from a bank. Accordingly, there is no authority for her to bring a private action pursuant to the Glass-Steagall Act and the claim is thus dismissed.

4 Again, whether such a private right of action exists would be answered by the test set forth in *Cort v. Ash,* 422 U.S. at 78, 95 S.Ct. at 2087-88.

5 The Supreme Court in *Investment Company Institute v. Camp,* 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971), stated that in passing the Glass-Steagall Act, Congress was "concerned that bank depositors might suffer losses on investments that they purchased in reliance on the relationship between the bank and its affiliate. . . . There was also perceived the danger that when commercial banks were subject to the promotional demands of investment banking, they might be tempted to make loans to customers with the expectation that the loan would facilitate the purchase of stocks and securities." 401 U.S. at 631-32, 91 S.Ct. at 1099. However, as *Russell* makes clear, *Camp* only stands for the proposition that companies engaged in the business of operating mutual funds, and perhaps a bank's depositors or stockholders, have standing to bring certain actions under the act. 479 F.2d at 133-134. Investors in mutual funds and borrowers from a bank represent different interests from such entities. *See id.* Indeed, it is hard to imagine how either kind of party could be injured from a bank's entry into the kind of activity that the Glass-Steagall Act prohibits. *See id.* (stating that fund participants should *benefit* from a rule that would permit banks to engage in acts proscribed by Glass-Steagall).

C. Claim III: Section 11

Plaintiff's third claim for relief alleges that defendants extended, maintained, and arranged for the extension of credit for securities that were part of a new issue in which they participated as members of a selling group within thirty days prior to such transactions. Such actions, plaintiff states, violated the Securities Exchange

Act's section 11(d), 15 U.S.C. § 78k(d), which prohibits broker-dealers from extending credit in certain circumstances. In defense, Citibank once again argues that no private right of action exists for plaintiff to maintain this action. This Court agrees with Citibank.

Section 11(d) does not expressly provide for a private right of action. However, in certain situations courts have found implied remedies in favor of private parties within the class of persons intended to be protected by the statute. *See Russell,* 479 F.2d at 133 (providing examples). The inquiry is governed by the test set forth in *Cort v. Ash,* 422 U.S. 66, 78, 95 S.Ct. 2080, 2087-88, 45 L.Ed.2d 26 (1975), which directs courts to ask: first, is the plaintiff "one of the class for whose especial benefit the statute was enacted," that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent to create or deny a remedy? Third, would implication of a private remedy be consistent with the underlying purpose of the statute? And lastly, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law? 422 U.S. at 78, 95 S.Ct. at 2087-88. The Supreme Court has stated that the second factor, legislative intent, is entitled to the greatest weight in the calculus. *Touche Ross Co. v. Redington,* 442 U.S. 560, 575, 99 S.Ct. 2479, 2489, 61 L.Ed.2d 82 (1979). Indeed, a lack of evidence of legislative intent to create a private right of action can signify that a private right of action should not be implied. *Id.* at 571-76, 99 S.Ct. at 2486-89 ("Implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best.").

Applying these principles, I adopt the analysis outlined in *Sennett v. Oppenheimer Co., Inc.,* 502 F. Supp. 939 (N.D.Ill. 1980), and find that the balance of factors counsels against implying a private right of action under Section 11. First, the legislative history of the provision is completely devoid of Congress' intent to provide a private remedy under the section. Second, the regulatory framework of the securities laws makes it unnecessary to imply the right of action urged. Indeed, an investor in securities is not damaged by an act in contravention of Section 11 unless the security decreases in value, which would result regardless of the violation. Lastly, implying the right of action urged by plaintiff would be, at least in part, redundant, as Congress has already provided for a private right of action for wilful violations of Section 11 in Section 32, 15 U.S.C. § 78ff, of the 1934 Act.[6]

6 Plaintiff relies on *Hawkins v. Merrill, Lynch, Pierce, Fenner Beane,* 85 F. Supp. 104 (W.D.Ark. 1949), for the proposition that an implied right of action under section 11 exists. In *Hawkins,* decided forty-seven years ago, the Western District of Arkansas held that "it seems clear that a violation by one of the provisions of the Securities and Exchange Act of 1934 . . . or the regulations promulgated thereunder, will give rise to a civil suit for damages on the part of one injured by that violation." 85 F. Supp. at 121. Apparently, *Hawkins* is the only case in the 1934 Act's sixty-two year history to so hold. Since then, not only has the Supreme Court decided *Cort v. Ash, supra,* but also it has held in direct contradiction to *Hawkins* that there is no private right of action under section 17(a) of the 1934 Act, *see Touche Ross Co. v. Redington,* 442 U.S. 560, 567, 99 S.Ct. 2479, 2484-85, 61 L.Ed.2d 82 (1979). I thus refuse to follow the path urged by plaintiff and abandoned long ago by the federal courts.

D. Claim V: Section 9(a)

629 Plaintiff's fifth cause of action asserts that for the purpose of creating a false or *629 misleading appearance to the marketing and trading of the Blech Securities, Blech and DBC effected transactions in registered Blech securities in violation of the 1934 Act's Section 9(a), 15 U.S.C. § 78i(a), which prohibits certain transactions meant to manipulate securities' prices. For these reasons, Cohen states, Citibank may not enforce any obligation against her in connection with the 1992 Advance. Citibank, however, again demonstrates that plaintiff may not assert the private right of action claimed.

Unlike Section 11, Section 9 provides for a private right of action in certain circumstances. 15 U.S.C. § 78i(e). Such circumstances, however, are not present here. Rather, a private right of action under Section 9 accrues *only* to purchasers or sellers of securities at prices affected by acts or transactions in violation of section 9. *Id.; see Liberty National Ins. Holding Co. v. Charter Co., et al.,* 82 Civ. 233S, 1982 WL 1329 (N.D.Ala. 1982) ("the court is firm in its opinion that Congress neither expressly nor impliedly intended to create a private right of action under Section 9 for damages or injunctive relief other than that expressly created in Section 9(e) for the especial benefit of a purchaser or seller"). Plaintiff, however, does not allege that she, herself, is a buyer or seller of securities affected by acts committed in violation of Section 9. Accordingly, I find that she is without standing to assert a cause of action under Section 9.

E. Claims VI and VII: Sections 20(a) and (b) of the 1934 Act

In her sixth and seventh causes of action, plaintiff alleges that Citibank is liable as a control person under Sections 20(a) and (b) of the 1934 Act, 15 U.S.C. § 78t(a) and (b). Specifically, plaintiff claims that Citibank directly and indirectly controlled Blech and DBC, both actually engaging in, and in bad faith inducing Blech and DBC to engage in, the alleged unlawful acts that are the gravamen of her complaint. Citibank disagrees.

Section 20(a) states:

> Every person who, directly or indirectly, controls any person liable under any provision of [the 1934 Act] . . . shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t(a). Thus, the section provides for liability of persons who "control" those who violate the 1934 Act. *See Marbury Management, Inc. v. Kohn,* 629 F.2d 705, 716 (2d Cir.) (suggesting that *scienter* is not an element of a Section 20(a) violation), *cert. denied,* 449 U.S. 1011, 101 S.Ct. 566, 66 L.Ed.2d 469 (1980); *Morse v. Weingarten,* 777 F. Supp. 312, 318 (S.D.N.Y. 1991) (requiring *scienter*). In order to plead a Section 20(a) claim, a plaintiff must allege at least "control status." *Food Allied Serv. Trades v. Millfeld Trading,* 841 F. Supp. 1386, 1390-91 (S.D.N.Y. 1994). The Securities and Exchange Commission has defined the term as "the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a [violator], whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 240.12b-2. In this connection, a bare allegation that a person is a corporate officer, director, or shareholder is insufficient to allege "control." *See In re Par Pharmaceutica, Inc. Securities Litigation,* 733 F. Supp. 668, 679 (S.D.N.Y. 1990); *Hemming v. Alfin Fragrances, Inc.,* 690 F. Supp. 239, 245 (S.D.N.Y. 1988). Rather, the allegations must support a reasonable inference that the alleged violator had the potential power to influence and direct the activities of the primary violator. *Food Allied Serv. Trades,* 841 F. Supp. at 1391.

Absent conclusory statements, there is no allegation here supporting an inference that Citibank controlled or had the power to control Blech and DBC. Rather, plaintiff merely alleges that the 1992 Advance was used to finance the purchase of Blech Securities, suggesting that Citibank acted in concert with Blech and DBC in violating the 1934 Act. Thus, the complaint fails to plead sufficient facts to make out a Section 20(a) claim.

Plaintiff similarly fails to plead adequately a Section 20(b) violation. That section provides:

630 > It shall be unlawful for any person, directly or indirectly, to do any act or thing *630 which it would be unlawful for such person to do under the provisions of this title or any rule or regulation thereunder through or by means of any other person.

15 U.S.C. § 78t(b). Few reported cases discuss the applicability of Section 20(b), but it is clear that the section requires a showing that a "controlling person knowingly used the controlled person to commit the illegal act." *Moss v. Morgan Stanley,* 553 F. Supp. 1347, 1362 (S.D.N.Y.), *aff'd,* 719 F.2d 5 (1983), *cert. denied,* 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984). "Under section 20(b) there must be shown to have been knowing use of a controlled person by a controlling person before a controlling person comes within its ambit." *Securities Exchange Commission v. Coffey,* 493 F.2d 1304, 1317 (6th Cir. 1974), *cert. denied,* 420 U.S. 908, 95 S.Ct. 826, 42 L.Ed.2d 837 (1975). Again, however, plaintiff fails to plead the requisite "control." In addition, plaintiff fails to plead "knowing use." Accordingly, the complaint fails to plead facts sufficient to make out a Section 20(b) claim.

IV. REMAINING CLAIMS

Cohen also asserts two federal causes of action against Blech and DBC alone, as well as a bevy of state claims against all defendants. Given the changed posture of this case, all parties are directed to brief whether under *Colorado River, Wilton,* or any other doctrine this Court should continue to assert jurisdiction over the remaining claims. Additionally, plaintiff should specifically provide authority for the federal claims asserted against Blech and DBC alone, and, since Blech and DBC have yet to appear, discuss the possibility, if any, of issuing a default judgment against them. Briefs shall be due within 10 days of the date of this Memorandum and Order and may not exceed 15 pages each.

## CONCLUSION

For the foregoing reasons, Citibank's motion to dismiss plaintiff's federal causes of action against it is granted.

So ordered.

95 Civ. 4825 (SAS)
United States District Court, S.D. New York

# Rosenblatt v. Bivona Cohen, P.C.

946 F. Supp. 298 (S.D.N.Y. 1996)
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November 26, 1996.

Nathaniel B. Smith, Ranni Smith, New York City, for Plaintiff Theodore H. Rosenblatt.

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## *MEMORANDUM OPINION*

SCHEINDLIN, District Judge.

Plaintiff Theodore H. Rosenblatt, a white man, alleges that he was discharged from his employment as a lawyer because he is married to a black woman. He sues his employer, Bivona Cohen, P.C., for violating 42 U.S.C. § 2000e-2 ("Title VII"), 42 U.S.C. § 1981, and the New York State Executive Law. Defendant Bivona Cohen moves for summary judgment on the grounds that (1) plaintiff lacks standing to maintain a suit for relief under the foregoing civil rights statutes; and (2) plaintiff's filing with the Equal Employment Opportunity
299 Commission ("E.E.O.C.") was untimely, thereby depriving *299 this Court of subject matter jurisdiction over plaintiff's Title VII claims.[1]

[1] During the pre-motion conference, the defendant was instructed to limit its summary judgment motion to the sole issue of plaintiff's standing to sue under the civil rights statutes. Nonetheless, I will also consider whether plaintiff's E.E.O.C. filing was timely because both parties have fully briefed the issue. Additional grounds for summary judgment will not be addressed at this time, but may be raised in a separate summary judgment motion.

For the reasons set forth below, defendant's motion is denied.

## DISCUSSION

I. *Standing to Sue*

Rosenblatt, a white attorney, joined the law firm of Bivona Cohen in 1982 and was discharged twelve years later. He claims that his employment was terminated because he is married to a woman of a different race. Because the Second Circuit has not addressed whether a white person, allegedly discriminated against because of an interracial marriage, has standing to sue under the civil rights statutes, both parties have submitted extensive briefs.

A. *Title VII Claim*

Defendant argues that plaintiff lacks standing to sue under Title VII because plaintiff is alleging racial discrimination against his wife, not himself. Defendant relies on *Ripp v. Dobbs Houses Inc.,* 366 F. Supp. 205 (N.D.Ala. 1973), one of the first cases to address this subject. Ripp, who is white, claimed he was discharged because of his association with fellow black employees. The court found that the gravamen of Ripp's complaint was that his employer "abridged his freedom to associate with persons of his own choosing," a claim not cognizable under Title VII. *Id*. at 208. Because Ripp did not explicitly complain that he suffered discrimination based on his own race, the court concluded that he lacked standing.

*Adams v. Governor's Comm. on Postsecondary Educ.,* 1981 WL 27101 (N.D.Ga. Sept. 3, 1981), followed *Ripp,* holding that a white person allegedly discriminated against because of his wife's race lacked standing to sue under Title VII. The court focused on the wording of the statute and concluded that it only protects individuals discriminated against because of their *own* race, and not the race of their spouse.[2]

2 Title VII provides, in relevant part:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of *such individual's race,* color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (emphasis added). The *Adams* court reasoned that the words "such individual's race" as used above make clear that the statute does not cover discrimination against a person because of his relationship to persons of another race.

Several courts have rejected the highly restrictive holdings of *Ripp* and *Adams* and have instead followed the reasoning of *Whitney v. Greater New York Corp. of Seventh-Day Adventists,* 401 F. Supp. 1363 (S.D.N.Y. 1975). In holding that a white person, allegedly discharged because of her association with a black person, had standing to bring a Title VII action, the *Whitney* court stated:

> [I]f [plaintiff] was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend. Specifying as she does that she was discharged because she, a white woman, associated with a black, her complaint falls within the statutory language that she was "discharge[d] . . . because of [her] race."

*Id*. at 1366.

In *Parr v. Woodmen of the World Life Ins. Co.,* 791 F.2d 888, 892 (11th Cir. 1986), the Eleventh Circuit found the *Whitney* reasoning "irrefutable." The court held that discrimination based upon plaintiff's interracial marriage or association *by definition* is discrimination based on his race. The *Parr* court stressed its duty to "make sure that the [Civil Rights] Act works, and [that] the intent of Congress is not hampered by a
300 combination of strict construction of the statute *300 in a battle with semantics." *Id*. (quoting *Culpepper v. Reynolds Metals Co.,* 421 F.2d 888, 891 (5th Cir. 1970)).

Numerous district court opinions have adopted the *Whitney* and *Parr* reasoning and have found Title VII applicable to defendants who take adverse action against a white plaintiff because of his association with blacks. *See, e.g., Erwin v. Mister Omelet of America, Inc.,* 1991 WL 32248 at *3 (M.D.N.C. Jan. 15, 1991) (Title VII prohibits employment discrimination based upon a person's association with someone of another race); *Gresham v. Waffle House, Inc.,* 586 F. Supp. 1442 (N.D.Ga. 1984) (white plaintiff stated claim under

Title VII by alleging she was discharged by her employer because of her interracial marriage to a black man); *Holiday v. Belle's Restaurant,* 409 F. Supp. 904 (W.D.Pa. 1976) (the discharge of a white employee for associating with blacks is racial discrimination and violative of Title VII).

The weight of these cases is persuasive and their logic is convincing. Plaintiff has alleged discrimination as a result of his marriage to a black woman. Had he been black, his marriage would not have been interracial. Therefore, inherent in his complaint is the assertion that he has suffered racial discrimination based on his own race. As a result, plaintiff has standing to pursue his civil rights claims under Title VII.

B. *Section 1981 Claim*

Defendant argues that plaintiff does not have standing to sue under Section 1981 despite controlling case law to the contrary. It is well-settled that a claim of discrimination based on an interracial relationship or association is cognizable under Section 1981. *See, e.g., Parr v. Woodmen of the World Life Ins. Co.,* 791 F.2d 888, 890 (11th Cir. 1986) (a claim of discrimination based upon an interracial marriage is cognizable under Section 1981); *Fiedler v. Marumsco School,* 631 F.2d 1144, 1150 (4th Cir. 1980) (a white student expelled from school for allegedly dating a black student had standing to sue under Section 1981); *DeMatteis v. Eastman Kodak Co.,* 511 F.2d 306, 312 (2d Cir. 1975) (a white man who was discriminated against because he sold his house to a black person has standing to sue under Section 1981); and *Faraca v. Clements,* 506 F.2d 956 (5th Cir.), *cert. denied,* 422 U.S. 1006, 95 S.Ct. 2627, 45 L.Ed.2d 669 (1975) (Section 1981 proscribes discrimination based on an interracial marriage). Moreover, *Adams v. Governor's Comm. on Postsecondary Educ.,* 1981 WL 27101 at *3 (N.D.Ga. Sept. 3, 1981), a case relied on by defendant in its Title VII argument, held that plaintiff also had standing to sue under Section 1981. In light of the foregoing authority, defendant's argument that plaintiff lacks standing to sue under Section 1981 must fail.

C. *The New York State Human Rights Law*

Because the New York State Human Rights Law is applied in a fashion consistent with the federal civil rights laws, *see Tomka v. The Seiler Corp.,* 66 F.3d 1295, 1304 n. 4 (2d Cir. 1995), plaintiff's state law claim is also viable. In *State Division of Human Rights v. Village of Spencerport,* 78 A.D.2d 50, 434 N.Y.S.2d 52, 55 (4th Dep't 1980), the court noted that a complainant could sue under the state statute if the party charged "is motivated by some proscribed bias toward the spouse."

In sum, the weight of authority construing both the federal and state civil rights statutes is in the plaintiff's favor. Accordingly, defendant's motion for summary judgment on the ground that plaintiff lacks standing is denied.

II. *The E.E.O.C. Filing*

Before a Title VII action may be brought in federal court, a charge of discrimination must be timely filed with the E.E.O.C. Generally, a charge must be filed with the E.E.O.C. within 180 days after the alleged unlawful employment practice. *See* 42 U.S.C. § 2000e-5(e)(1). But in a state that has its own fair employment practices
301 agency, such as New York, the time limit is extended to 300 days.[3] The charge is not *301 deemed "filed" until 60 days after submission to the state agency or until the state agency terminates its proceedings by waiver or otherwise. *See Mohasco Corp. v. Silver,* 447 U.S. 807, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980); *E.E.O.C. v. Commercial Office Products Co.,* 486 U.S. 107, 111, 108 S.Ct. 1666, 1669, 100 L.Ed.2d 96 (1988). Therefore, to ensure a timely filing with the E.E.O.C. in New York, a claimant must submit a charge of discrimination

with the state or local agencies within 240 days of the alleged discrimination. *See Mohasco,* 447 U.S. at 814 n. 16, 100 S.Ct. at 2491 n. 16. If a claimant fails to do so, the charge will still be timely filed if the state or local agency terminates its proceedings before 300 days have passed.

[3] Before a complainant can benefit from this 120 day extension, he must "initially institute proceedings with a State or local agency." *See* 42 U.S.C. § 2000e-5(e)(1). Although plaintiff did not physically file a charge with the local or state agency, the "Charge of Discrimination" form filed with the E.E.O.C. was addressed to both the "New York Human Rights Commission" and the E.E.O.C. The form also contained a box which stated "I want this charge filed with both the E.E.O.C. and the State or local Agency, if any." In Section II(A) of the Worksharing Agreements between the E.E.O.C. and the New York City Commission on Human Rights ("N.Y.C.C.H.R.") and the New York State Division of Human Rights ("N.Y.S.D.H.R."), the state and local agencies have authorized the E.E.O.C. to accept charges on their behalf. *See* Worksharing Agreement between N.Y.C.C.H.R. and E.E.O.C. for fiscal year 1995 and Worksharing Agreement between N.Y.S.D.H.R. and E.E.O.C. for fiscal year 1995, Attached as Ex. A to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment. Therefore, plaintiff's filing with the E.E.O.C. constitutes a joint filing with the state or local agencies and satisfies Title VII's "initially instituted" requirement. *See Griffin v. City of Dallas,* 26 F.3d 610, 612-13 (5th Cir. 1994) (the E.E.O.C.'s acceptance of a discrimination charge satisfies the requirement for instituting proceedings with the state agency under the Title VII provision extending the statute of limitations to 300 days.).

Plaintiff submitted a discrimination charge to the E.E.O.C. and the local agencies 250 days after the last discriminatory act. Therefore, plaintiff's claim could only be timely filed if the state or local proceedings were terminated or waived within 50 days. Here, the proceedings were waived upon receipt of the submission. Because the New York City Commission on Human Rights ("N.Y.C.C.H.R.") and the New York State Division of Human Rights ("N.Y.S.D.H.R.") have waived their right to prosecute plaintiff's type of discrimination claim pursuant to worksharing agreements with the E.E.O.C., plaintiff's filing with the E.E.O.C. occurred within 300 days and thus was timely. *See* Worksharing Agreement between N.Y.C.C.H.R. and E.E.O.C. for fiscal year 1995 and Worksharing Agreement between N.Y.S.D.H.R. and E.E.O.C. for fiscal year 1995, Attached as Ex. A to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment.[4]

[4] The worksharing agreements provide, in relevant part:

> For charges originally received by the EEOC and/or to be initially processed by the EEOC, the [N.Y.C.C.H.R. and N.Y.S.D.H.R.] waives its rights of exclusive jurisdiction to initially process such charges for a period of 60 days for the purpose of allowing the EEOC to proceed immediately with the processing of such charges before the 61st day.
>
> In addition, the EEOC will initially process the following charges: — All Title VII charges received by the [N.Y.C.C.H.R. and N.Y.S.D.H.R.] 240 days or more after the date of violation.

Bivona Cohen, overlooking the foregoing waiver provisions, erroneously argues that plaintiff's local and state proceedings were not terminated or waived. As a result, defendant contends that the charge was deemed "filed" 60 days after submission to the E.E.O.C., 310 days after the last discriminatory act. Because the Second Circuit has held that these self-executing waivers effectively "terminate" state and local agency proceedings, *see Ford v. Bernard Fineson Dev. Ctr.,* 81 F.3d 304 (2d Cir. 1996), as a matter of law, plaintiff's charge was timely filed with the E.E.O.C. Accordingly, defendant's legal argument must fail.

## CONCLUSION

For the foregoing reasons, defendant's motion is denied. A pretrial conference is scheduled for December 20, 1996 at 4:30 p.m.

SO ORDERED.

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Civ. No. C-84-617-D
United States District Court, M.D. North Carolina, Durham Division

# Liggett Group v. Brown Williamson

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Civ. No. C-84-617-D.

345 August 27, 1990. *345

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## MEMORANDUM OPINION

BULLOCK, District Judge.

Liggett Group, Inc., ("Liggett") brought this private antitrust suit to recover treble damages against Brown Williamson Tobacco Corporation ("B W") alleging predatory price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a).[1] Liggett also charged that B
348 W *348 violated the unfair competition section of the Lanham Trade-Mark Act, 15 U.S.C. § 1125(a),[2] as well as various state common law and statutory unfair trade practices.[3]

[1] The Robinson-Patman Act states in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

2 Section 1125(a) states in relevant part:

> Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

3 Liggett's complaint alleges a statutory claim under the North Carolina unfair trade practices statute, N.C.Gen.Stat. § 75-1 *et seq.,* and state common law claims under the North Carolina common law of trademarks and the North Carolina common law of unfair competition. All these claims stem from B W's alleged infringement of Liggett's quality seal ("Q-seal") closure by B W's oval closure seal.

After a lengthy trial,[4] the jury returned a verdict in favor of Liggett on the Robinson-Patman Act claim in the amount of $49,600,000.00. When trebled pursuant to 15 U.S.C. § 15(a), Liggett's award totals $148,800,000.00, excluding post-judgment interest and attorneys' fees. The jury found that Brown Williamson was not liable to Liggett on the trademark and unfair competition claims.

4 The jury heard evidence and arguments for 115 days, and considered 2,884 exhibits, 85 deposition excerpts, and testimony from 23 live witnesses. The verdict was returned after nine days of deliberations. The court's instructions to the jury on the antitrust claim were generally consistent with the legal position and theory espoused by Liggett. Some of the same issues and contentions had been considered by the court at summary judgment and/or the directed verdict stage of the trial, and resolved in Liggett's favor. In a complex case such as this, however, development of a complete record is sometimes necessary in order for the court to have a thorough understanding of the issues and facts in controversy. An ever expanding court docket does not always provide an atmosphere conducive to pre-trial analysis of complex economic and legal issues.

B W has moved for judgment notwithstanding the verdict (JNOV) under Federal Rule of Civil Procedure 50(b) and, alternatively, for a new trial under Federal Rule of Civil Procedure 59 on the antitrust portion of the case.[5] Liggett has moved for a new trial under Federal Rule of Civil Procedure 59 on its trademark and unfair competition claims. After careful consideration, the court will set aside the antitrust verdict and grant B W's motion for judgment notwithstanding the verdict. The court will deny B W's alternative motion for a new trial.[6]
349 Liggett's motion for a *349 new trial on the trademark and unfair competition claims will be denied.

5 A different standard applies to a JNOV motion pursuant to Fed.R.Civ.P. 50(b), *see infra* p. 341, than to a motion for a new trial pursuant to Fed.R.Civ.P. 59, *see infra* p. 355.

6 A court may in its discretion grant a JNOV motion and deny an alternative motion for a new trial. *See* Fed.R.Civ.P. 50(c)(1); *Stone v. First Wyoming Bank,* 625 F.2d 332, 349-50 (10th Cir. 1980); *Reagin v. Terry,* 675 F. Supp. 297, 304-05 (M.D.N.C. 1986), *aff'd,* 829 F.2d 36 (4th Cir. 1987). The court's JNOV rulings on competitive injury, causation, and antitrust injury are based upon interpretations of the applicable law. If these interpretations are found to be erroneous and an appellate court applies legal standards more favorable to Liggett, this court does not believe that an examination of the weight of the evidence, the credibility of witnesses, and any alleged errors in the admission or rejection of evidence or instructions to the jury would justify granting B W a new trial. The only remaining significant issue concerns the sufficiency of Liggett's damage evidence. If antitrust injury is proven, courts are lenient in assessing the proof required to support a damage award. *See Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 265-66, 66 S.Ct. 574, 580-81, 90 L.Ed. 652 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 563-64, 51 S.Ct. 248, 250-51, 75 L.Ed. 544 (1931). Liggett presented two damage theories and extensive evidence from the testimony of two experts and other witnesses. The court believes there was sufficient evidence to support the jury's damage award.

## I. FACTS

The cigarette industry in the United States during the mid-1980's provides the setting for this dispute. Six major manufacturers form this industry.[7] Philip Morris and R.J. Reynolds Tobacco Corp. ("RJR") are the industry giants. The other cigarette manufacturers hold substantially smaller market shares. Liggett and B W compete for wholesale and retail customers across the United States. Both companies sell branded[8] and generic[9] cigarettes. At year-end 1985, B W's total cigarette sales in the United States were about double Liggett's, although Liggett still sold more generic cigarettes than B W.

7 The six major cigarette manufacturers are Philip Morris, Inc., R.J. Reynolds Tobacco Corp., B W, Lorillard, Inc., American Tobacco Co., and Liggett. A few other domestic and foreign firms have sold cigarettes in the United States during the 1980's, but none has attained any significance in the marketplace.

8 The term "branded cigarettes" describes full-price cigarettes targeted to the image-conscious cigarette consumer. Branded cigarettes are advertised heavily and packaged in containers with distinctive designs. Well-known branded cigarettes include Newport, Pall Mall, Kool, Winston, and, of course, Marlboro — America's most popular branded cigarette by a wide margin.

9 The term "generic cigarettes" refers to a catchall category of cigarettes priced significantly lower than branded cigarettes. Within this category, sometimes called the price-value category, there are different types of generic cigarettes. This dispute centers around one such type — black and white cigarettes. Black and white cigarettes are sold in plain-looking white packages with black lettering indicating the nature of the product contained within ( *e.g.,* "Filter Cigarettes"). These packages look like other generic products on the grocery shelf so that consumers can quickly identify them as lower-priced cigarettes. Another category of generic cigarettes is "branded generics." Branded generics are cigarettes in branded packaging but priced in the black and white cigarette range.

The market shares of both companies have declined in recent years. Since 1975 when its market share was nearly seventeen per cent (17%), B W's sales have steadily declined. Liggett has had even less success. Years ago, Liggett was a major force in the cigarette industry, enjoying market shares exceeding twenty per cent (20%). However, Liggett's sales declined precipitously for many years. By 1980, Liggett's market share stood at 2.33%, and the company was close to going out of business. Out of desperation, Liggett became the first major cigarette manufacturer to sell generic cigarettes.[10] Liggett encouraged its customers to buy large quantities of generic cigarettes by offering volume rebates so that the more a customer bought the less that customer paid on a per carton basis.

10 Liggett was not the first cigarette company to sell generic cigarettes. Both U.S. Tobacco Co. and G.A. George Georgopulo Co., smaller cigarette manufacturers with no significant market share, sold generic cigarettes prior to Liggett. However, once Liggett entered the generic category it became the dominant player and was responsible for the segment's initial growth.

Generic cigarettes were an unqualified success for Liggett. The segment grew steadily, and by mid-1984 generic sales accounted for 4.1% of the total United States cigarette business with Liggett holding ninety-seven per cent (97%) of the segment. The popularity of generic cigarettes attracted other major cigarette manufacturers. In 1983, both RJR and B W introduced "25's" in response to the success of generic cigarettes.[11] In May 1984, RJR also introduced "branded generics."[12] Later that month, B W announced it would start selling black and white cigarettes positioned to compete directly with Liggett. B W offered prospective customers volume rebates similar to Liggett's, only higher. Liggett responded by increasing its volume rebates.
350 The rebate war between *350 the companies continued for several more rounds. When the dust settled, B W's published volume rebates were greater than Liggett's published volume rebates.[13] This rebate activity took place before B W sold its first generic cigarette. B W began selling generic cigarettes in July 1984, giving rise to this lawsuit in which Liggett alleges that, until the end of 1985, B W engaged in a predatory pricing campaign designed to "kill" the generic cigarette category.

11 "Twenty-five's" ("25's") are cigarettes priced and packaged like branded cigarettes but with twenty-five cigarettes contained in each package instead of the standard twenty. RJR introduced Century and B W introduced Richland as entries in the "25's" category.

12 RJR repositioned Doral, a brand which had previously been unsuccessful competing with other branded cigarettes, by lowering the price to generic levels. Since May 1984, Doral's market share has grown considerably.

13 B W's published volume rebates from mid-1984 to the end of 1985 ranged from sixty to eighty cents per carton depending on the number of cartons a customer bought from the company. B W's rebate schedule on a per carton basis was as follows: 60¢ rebate for customers who bought 0-499 cases per quarter; 65¢ rebate for customers who bought 500-999 cases per quarter; 70¢ rebate for customers who bought 1,000-1,499 cases per quarter; 75cent; rebate for customers who bought 1,500-7,999 cases per quarter; and 80¢ rebate for customers who bought 8,000 or more cases per quarter.

Today generic cigarettes are a fixture in the cigarette market. Five of the six major cigarette companies have significant entries in the category[14] and growth has been steady. The growth of generic cigarettes has encouraged additional competition, primarily in the form of couponing and stickering,[15] on branded cigarettes.

14 Lorillard is the only major cigarette manufacturer without a significant presence in the generic cigarette segment.

15 Coupons are a form of price competition in which money-off vouchers on cigarette cartons and packs are distributed to consumers through newspapers and other mediums. Stickering is a form of price competition in which money-off stickers are attached to cigarette cartons, and sometimes even individual packs. Although the list price of couponed and stickered cigarettes does not change, the amount of money the consumer has to pay at the cash register is lessened by the value of the coupon or sticker.

## II. THE ANTITRUST ISSUES

B W's JNOV motion may be granted only if, taking all the evidence in the light most favorable to Liggett, there is no substantial evidence to support the jury's verdict. *Evington v. Forbes,* 742 F.2d 834, 835 (4th Cir. 1984). Evidence is substantial if it is "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the nonmoving party." *Wyatt v. Interstate Ocean*

*Transp. Co.,* 623 F.2d 888, 891 (4th Cir. 1980). However, a mere scintilla of evidence is insufficient to sustain a verdict. *Austin v. Torrington Co.,* 810 F.2d 416, 420 (4th Cir.), *cert. denied,* 484 U.S. 977, 108 S.Ct. 489, 98 L.Ed.2d 487 (1987). Therefore, in order to warrant JNOV, B W must show that Liggett has failed to prove an essential element of its claim.

Liggett's antitrust claim is a private, primary-line,[16] non-geographic[17] Robinson-Patman Act suit. Except for the issue of price discrimination, the jurisdictional elements are undisputed.[18] Despite the connotations of the term "discrimination," there is nothing illegal *per se* about a company discriminating in price. Price discrimination means price difference and nothing more. *See Texaco Inc. v. Hasbrouck,* ___ U.S. ___, 110 S.Ct. 2535, 2544, 110 L.Ed.2d 492 (1990). B W discriminated in price by charging different net prices[19] to different purchasers
351 via volume *351 rebates in actual black and white cigarette transactions. The other elements[20] — competitive injury, causation, and antitrust injury — have been vigorously contested throughout the entire litigation. The court believes that Liggett's evidence falls short in each of these categories.

16 In Robinson-Patman Act cases, courts distinguish the probable impact of the price discrimination upon competitors of the seller (primary-line injury), the favored and disfavored buyers (secondary-line injury), or the customers of either of them (tertiary-line injury). *See* 3 E. Kintner J. Bauer, *Federal Antitrust Law* § 20.9, at 127 (1983).

17 Non-geographic means that the United States is the relevant market as opposed to any particular city, state, or region.

18 The parties do not dispute that at least one of the sales of B W black and white cigarettes was made across a state line; that each pertinent sale of B W black and white cigarettes was for use and resale in the United States; that the black and white cigarettes sold by B W were physical items; that the black and white cigarette sales being compared were made by B W at about the same time; and that the B W black and white cigarettes involved in the sales being compared were of like grade and quality.

19 Net price equals list price minus all discounts to the customer.

20 Antitrust injury is a requirement in all antitrust actions for monetary damages brought by private parties. 15 U.S.C. § 15(a). The other elements of Liggett's claim are part of the Robinson-Patman Act. 15 U.S.C. § 13(a).

## A. *Competitive Injury*

The Robinson-Patman Act prohibits only price discrimination the effect of which "may be substantially to lessen competition." 15 U.S.C. § 13(a). This statutory language has been interpreted to proscribe only that price discrimination which has a reasonable possibility[21] of injuring competition in the relevant market. *Falls City Indus., Inc. v. Vanco Beverage, Inc.,* 460 U.S. 428, 434-35, 103 S.Ct. 1282, 1288-89, 75 L.Ed.2d 174 (1983). Prior to trial, the parties stipulated that the relevant market in which to examine competitive injury was the entire United States cigarette market. Therefore, Liggett must prove that B W's price discrimination in the sale of its black and white cigarettes had a reasonable possibility of injuring competition in the United States cigarette market as a whole.

21 A few courts have used a reasonable probability of injuring competition standard instead of reasonable possibility. *See, e.g., Holleb Co. v. Produce Terminal Cold Storage Co.,* 532 F.2d 29, 35 (7th Cir. 1976). This is a distinction of form over substance. *See International Air Indus., Inc. v. American Excelsior Co.,* 517 F.2d 714, 729 (5th Cir. 1975) ("any difference between the two formulations is trivial"), *cert. denied,* 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976). The Supreme Court in at least one case has used these standards interchangeably. *See Corn Prods. Refining Co. v. FTC,* 324 U.S. 726, 739, 742, 65 S.Ct. 961, 967-68, 969-70, 89 L.Ed. 1320 (1945).

The competitive injury requirement of the Robinson-Patman Act in the context of this primary-line, non-geographic claim is not fundamentally different from an attempted monopolization claim under Section 2 of the Sherman Act. 15 U.S.C. § 2. Of course, the standards to evaluate competitive injury are different. The Robinson-Patman Act requires a showing of reasonable possibility of injury to competition while the Sherman Act requires a dangerous probability that the attempt to monopolize will be successful. *See Indiana Grocery, Inc. v. Super Valu Stores, Inc.,* 864 F.2d 1409, 1413 (7th Cir. 1989). However, this difference affects only the quantum of proof needed to satisfy the respective statute's competitive injury requirements and not the type of evidence which furnishes that proof.[22] In the present case, the court believes that such evidence must consist of predatory pricing practices indicating a reasonable possibility of injury to competition and consumer welfare rather than evidence merely of injury to a competitor combined with bad intent. Absent some objective economic ability to injure competition conduct cannot be illegal no matter what the intent. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588-93, 106 S.Ct. 1348, 1356-59, 89 L.Ed.2d 538 (1986); *Henry v. Chloride, Inc.,* 809 F.2d 1334, 1344-45 (8th Cir. 1987).

22 A noted authority explained the parallel competitive injury requirements of the two statutes this way:

> Once a price is shown to be below the relevant costs its effect may be substantially to lessen competition, and it is condemned precisely because it has the potential to destroy competition and, if continued, the dangerous probability of doing so. If the price does not violate the relevant predatory pricing standard, it cannot tend to lessen competition or to have the dangerous probability of doing so.

P. Areeda H. Hovenkamp, *Antitrust Law* 720, at 618 (Supp. 1989).

Liggett fundamentally disagreed with this position at trial and argued numerous times, citing *Utah Pie Co. v. Continental Baking Co.,* 386 U.S. 685, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967), that some showing of injury to a competitor combined with bad intent satisfied the Robinson-Patman Act's competitive injury requirement. This court rejects that position in the context of Liggett's atypical primary-line, non-geographic Robinson-Patman
352 Act claim. *352

The typical primary-line Robinson-Patman Act case is much different from this one, pitting a small business with a limited product-line which competes only in a single geographic region against a large national manufacturer using predatory pricing tactics to displace the local competitor. *Utah Pie* is just such a case. In *Utah Pie,* several national manufacturers of frozen dessert pies challenged a small, family-operated dessert manufacturer which sold pies in the Salt Lake City area. The national manufacturers' strategy was to lower prices below cost on dessert pies in Salt Lake City, 386 U.S. at 696-97 n. 12, 698, 701, 87 S.Ct. at 1332-33 n. 12, 1333, 1335, and run the local competitor out of business. The national manufacturers could afford to do this due to profits obtained on the sale of dessert pies in other areas of the country. The local competitor could sell dessert pies only in Salt Lake City and was faced with the bleak prospect of either lowering prices to unprofitable levels or eventually losing its sales to the low-priced pies. It was in this factual setting that the Supreme Court last addressed the requirements of a primary-line Robinson-Patman Act claim.

Liggett's situation is much different. Liggett, as a national manufacturer of branded and generic cigarettes, is free to compete with B W in any area of the country over any line of cigarette products and in fact does so. It faces none of the competitive constraints of the local business in *Utah Pie.* [23] In primary-line, non-geographic, predatory pricing cases the Robinson-Patman Act's competitive injury analysis more closely mirrors Section 2 of the Sherman Act than *Utah Pie.* Whether brought under the Sherman Act or the Robinson-Patman Act, predatory pricing is predatory pricing.[24] After all, price cutting is the essence of any predatory pricing

campaign and, as the Supreme Court has warned, "mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita,* 475 U.S. at 594, 106 S.Ct. at 1360. Although the Fourth Circuit has not addressed this issue, many other circuits have held that the competitive injury analysis in a predatory pricing case is the same under either the Robinson-Patman Act or Section 2 of the Sherman Act.[25]

23 Because the factual differences between geographic and non-geographic primary-line Robinson-Patman Act claims are so striking, the Third Circuit limited *Utah Pie*'s competitive injury analysis to primary-line, geographic price discrimination cases. *O. Hommel Co. v. Ferro Corp.,* 659 F.2d 340, 351-52 (3d Cir. 1981), *cert. denied,* 455 U.S. 1017, 102 S.Ct. 1711, 72 L.Ed.2d 134 (1982).

24 *See* P. Areeda D. Turner, *Antitrust Law* 720, at 190 (1978) ("The basic substantive issues raised by the Robinson-Patman Act's concern with primary-line injury to competition and by the Sherman Act's concern with predatory pricing are identical.").

25 *See McGahee v. Northern Propane Gas Co.,* 858 F.2d 1487, 1493 n. 9 (11th Cir. 1988), *cert. denied,* ___ U.S. ___, 109 S.Ct. 2110, 104 L.Ed.2d 670 (1989); *Henry,* 809 F.2d at 1345; *D.E. Rogers Assocs., Inc. v. Gardner-Denver Co.,* 718 F.2d 1431, 1439 (6th Cir. 1983), *cert. denied,* 467 U.S. 1242, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984); *William Inglis Sons Baking Co. v. ITT Continental Baking Co.,* 668 F.2d 1014, 1041 (9th Cir. 1981), *cert. denied,* 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982); *O. Hommel,* 659 F.2d at 346-47; *Pacific Eng'g Prod. Co. v. Kerr-McGee Corp.,* 551 F.2d 790, 798 (10th Cir.), *cert. denied,* 434 U.S. 879, 98 S.Ct. 234, 54 L.Ed.2d 160 (1977); *International Air,* 517 F.2d at 720 n. 10. *But see A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.,* 881 F.2d 1396, 1404-06 (7th Cir. 1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 1326, 108 L.Ed.2d 501 (1990); *Monahan's Marine, Inc. v. Boston Whaler, Inc.,* 866 F.2d 525, 528-29 (1st Cir. 1989).

That this interpretation of the competitive injury requirement has been widely followed is not surprising since it best comports with basic antitrust principles. The antitrust laws' goal is to promote consumer welfare, not to discourage aggressive price competition. Liggett cannot satisfy the competitive injury requirement by showing simply that it was injured by B W's price discrimination. Injury to competition occurs only if a competitor is able to raise and maintain prices in the relevant market above competitive levels because this is the only situation where consumer welfare is threatened. So, in order to injure competition via price discrimination in
353 the United *353 States cigarette market, B W must be able to create a real possibility of both driving out rivals by loss-creating price cutting and then holding on to that advantage to recoup losses by raising and maintaining prices at higher than competitive levels. *See Matsushita,* 475 U.S. at 589, 106 S.Ct. at 1357.

With these principles in mind, there are fatal defects in both Liggett's theory and evidence of competitive injury. Liggett's theory of competitive injury was developed by its expert economist, William Burnett. Burnett concluded that B W's predatory pricing of black and white cigarettes had a reasonable possibility of injuring competition in the entire United States cigarette market. He based his analysis on numerous B W internal documents and his study of the structure and history of the cigarette industry. Burnett's theory is quite complicated and requires detailed explanation.

Central to Burnett's analysis is that the cigarette market is a highly concentrated oligopoly[26] and that predatory pricing schemes make sense in such markets. The starting point for this analysis is Burnett's opinion that all of the manufacturers in the cigarette industry, including Liggett, enjoy monopoly profits on the sale of their branded cigarettes. He bases this opinion on six factors: (1) the degree of concentration in the domestic cigarette industry; (2) the long-time industry pattern of list-price uniformity and price leadership — that is, when one manufacturer raises the price of its branded cigarette line the others follow and raise their prices to

the same level; (3) the relative price inelasticity[27] of cigarette demand; (4) the significant barriers to entry, including large capital costs and the television advertising ban, which prevent new companies from competing with the major cigarette manufacturers; (5) an analysis of the relationship between cigarette prices and costs which concluded that prices have risen in the industry during a period of declining costs; and (6) the degree to which tobacco industry accounting rates of return exceed those of companies in the domestic food and kindred products industry. Burnett thought this industry structure made it possible for the major cigarette manufacturers to tacitly coordinate[28] their prices at supracompetitive levels.

26 Oligopoly is the economic term for a market in which few producers are present. There is nothing illegal *per se* about an oligopoly.

27 Elasticity means the responsiveness of a dependent variable to changes in a causal factor. Burnett looked at what happened to consumer demand in the cigarette industry when prices rose. He concluded that demand for cigarettes was inelastic because consumer demand did not decrease very much despite steadily rising prices.

28 Burnett does not contend that the major cigarette manufacturers overtly engaged in price-fixing in a smoke-filled room. Instead, he believes the major manufacturers silently agreed that price uniformity was in their best interests and, therefore, priced in lock-step fashion.

According to Burnett, B W engaged in a campaign of predatory pricing against Liggett's black and white cigarettes to protect its monopoly profits on branded cigarettes. Burnett alleged that B W had great economic incentive to wage such a predatory campaign. His analysis was based on the following factors. First, consumer demand for cigarettes in the United States market was no longer growing and, due to health concerns, was unlikely to grow in the future. Thus, a cigarette manufacturer could increase its market share only at the expense of a rival competitor by getting existing cigarette consumers to switch their brand loyalty. Second, Liggett was a maverick — that is, Liggett was the only major cigarette manufacturer willing to compete for consumers by offering lower prices. Liggett was not worried about its black and white cigarettes cannibalizing its monopoly profits on branded cigarettes because its branded market share was so low. Third, B W was hurt by Liggett's entry into generic cigarettes more than the other major manufacturers. On a percentage basis, significantly more B W branded smokers were switching to Liggett generics than were smokers of brands of
354 other manufacturers. As a result, B W's market share and its alleged *354 monopoly profits were eroding quickly. This erosion gave B W its incentive to predate.

Burnett testified that B W came up with an ingenious scheme to kill the generic category and stop losing market share. This alleged scheme is as follows. B W entered the generic cigarette segment by offering a look-alike black and white package designed to confuse Liggett's existing generic smokers. B W did not want to fuel consumer demand for generic cigarettes so it focused exclusively on establishing its new business at the wholesale level. B W captured wholesaler loyalty through significant volume rebates, targeting Liggett's highest volume customers. These rebates made the price of black and white cigarettes to wholesalers well below B W's average variable cost.[29] B W encouraged the wholesalers to pocket these rebates instead of passing the savings on to consumers to prevent any new demand for black and white cigarettes.

29 Average variable cost equals the sum of all the variable costs divided by output. For a manufacturing firm such as a cigarette company, costs are divided into two categories — fixed and variable. Variable costs fluctuate with a firm's output while fixed costs are independent of output. Variable costs typically include items such as materials, fuel, labor, maintenance, licensing fees, and depreciation occasioned by use. Fixed costs generally include management expenses, overhead, interest on debt, and depreciation occasioned by obsolescence. A price below average variable cost causes a manufacturer to lose money on each unit of output of the product.

According to Burnett, B W's plan was a "win-win/lose-lose" strategy of predation since no matter what Liggett did in response B W's plan would be successful. Because Liggett had limited financial resources, if it matched B W's rebates it would have to cut back on its black and white consumer promotional campaign. This cutback in consumer advertising would slow the growth of the generic category and eventually, without advertising, demand for generic cigarettes would decline. If Liggett refused to offer rebates or offered less lucrative deals, its wholesale customers would abandon it in favor of B W, preventing Liggett from getting its product to the consumer. In a few years, B W could control prices in the generic cigarette category. Then it would narrow the price gap between branded and generic cigarettes. Price stimulated consumer demand for black and white cigarettes. By raising generic prices, B W would decrease the relative savings on black and white cigarettes, thus cutting off consumer demand.

Although predatory pricing schemes are typically very costly due to below-cost pricing, Burnett thought B W's plan was the exception because of simultaneous recoupment.[30] By entering the generic market in the above fashion, according to Burnett, B W slowed the growth of the generic cigarette segment and thereby slowed the rate at which B W branded smokers switched to generics. Thus, B W recovered predatory losses immediately by slowing the loss of sales of its branded cigarettes sold at monopoly prices.

30 Burnett's only theory of recoupment was simultaneous recoupment. He did not contend that B W's recoupment would come by raising the price of generic cigarettes.

Burnett's theory is buttressed by numerous B W documents written by top executives. These documents, indicating B W's anticompetitive intent, are more voluminous and detailed than any other reported case. This evidence not only indicates B W wanted to injure Liggett, it also details an extensive plan to slow the growth of the generic cigarette segment.[31]

31 Issues of corporate ethics and morality, or the lack thereof, are not appropriate subjects for consideration by the court unless they are also violative of the antitrust, trademark, and unfair competition claims alleged.

However, despite Burnett's complicated theory and the extensive documentary evidence, Liggett still has not satisfied the competitive injury requirement of the Robinson-Patman Act with any substantial evidence. As a matter of law, B W could not have had a reasonable possibility of injuring competition unless at the very least it
355 had the realistic prospect of obtaining market power over the generic segment *355 of the market[32] and an economically plausible way to recoup its losses.[33]

32 Many circuits have held that the competitive injury requirement of the Robinson-Patman Act cannot be satisfied unless the alleged predator has at least a reasonable prospect of obtaining market power. *See Stitt Spark Plug Co. v. Champion Spark Plug Co.,* 840 F.2d 1253, 1255-56 (5th Cir.), *cert. denied,* 488 U.S. 890, 109 S.Ct. 224, 102 L.Ed.2d 214 (1988); *Henry,* 809 F.2d at 1345; *D.E. Rogers,* 718 F.2d at 1436 (quoting *Richter Concrete Corp. v. Hilltop Concrete Corp.,* 691 F.2d 818, 823 [6th Cir. 1982]); *O. Hommel,* 659 F.2d at 348; *Janich Bros., Inc. v. American Distilling Co.,* 570 F.2d 848, 856 (9th Cir. 1977), *cert. denied,* 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978); *Pacific Eng'g,* 551 F.2d at 798. A few circuits have been hesitant to apply the market power concept to the Robinson-Patman Act, but this hesitance has always been in the context of geographic price discrimination claims factually distinct from the non-geographic claim alleged here. *See A.A. Poultry Farms,* 881 F.2d at 1404-05; *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.,* 588 F.2d 24, 28 (2d Cir. 1978), *cert. denied,* 440 U.S. 960, 99 S.Ct. 1502, 59 L.Ed.2d 773 (1979); *Lloyd A. Fry Roofing Co. v. FTC,* 371 F.2d 277, 284-85 (7th Cir. 1966). Most importantly, the Supreme Court has indicated that "[t]he success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." *Matsushita,* 475 U.S. at 589, 106 S.Ct. at 1357.

33 For a predatory pricing scheme to injure competition the predator must be able not only to recover its initial losses but also harvest some additional gain. *Matsushita,* 475 U.S. at 588-89, 106 S.Ct. at 1356-57. This additional gain is called recoupment, and it is only at the recoupment stage that consumer welfare is injured.

Market power is "the ability to raise prices above levels that would exist in a perfectly competitive market." *Consul, Ltd. v. Transco Energy Co.,* 805 F.2d 490, 495 (4th Cir. 1986), *cert. denied,* 481 U.S. 1050, 107 S.Ct. 2182, 95 L.Ed.2d 838 (1987). Without the power to control market prices, a firm that raises the price of a product cannot maintain that increase because other firms will offer consumers lower prices, thereby forcing the price-raising firm either to lower prices or lose sales. *See Matsushita,* 475 U.S. at 590-91, 106 S.Ct. at 1357-58 ("petitioners must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices"). An avowed predator with no prospect of controlling prices is a paper tiger unable to harm consumer welfare. Burnett's theory illustrates this point. According to Burnett, for B W's scheme to succeed it had to raise generic cigarette prices above competitive levels; otherwise, it could not narrow the price gap between branded and generic cigarettes. Without a narrowing of this gap there is no incentive for generic consumers to switch back to their old brands, and B W's alleged scheme necessarily fails.

With at most twelve per cent (12%) of the domestic cigarette market, B W as a matter of law could not exercise market power unilaterally in either the whole cigarette market or the generic segment. *See Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 119 n. 15, 107 S.Ct. 484, 494 n. 15, 93 L.Ed.2d 427 (1986). Even Burnett conceded this point, admitting that acting alone B W could not injure consumer welfare by narrowing the price gap between branded and generic cigarettes. However, Burnett argued B W was not acting unilaterally due to tacit collusion — that is, silent price coordination — among the major manufacturers regarding branded prices. According to Burnett, this tacit collusion effectively gave B W upwards of ninety-five per cent (95%) of the cigarette market.

Tacit collusion among the major cigarette manufacturers is a dubious theory of market power. In typical cases, market power analysis is straightforward and hinges on whether a company has a large enough market share to control prices in the relevant market. Under this traditional analysis, a company with twelve per cent (12%) of
356 the market cannot have market power.[34] *356 Burnett theorizes, however, that even a relatively small company like B W can exercise shared market power through tacit collusion with the other major cigarette manufacturers save Liggett. Liggett cites no Robinson-Patman Act or Sherman Act legal precedent which supports this theory of shared market power via tacit collusion. By contrast, the shared market power theory has been rejected several times in the Sherman Act context. *See H.L. Hayden Co. v. Siemens Medical Sys., Inc.,* 879 F.2d 1005, 1018 (2d Cir. 1989); *Consolidated Terminal Sys., Inc. v. ITT World Communications, Inc.,* 535 F. Supp. 225, 228-29 (S.D.N.Y. 1982); *In re Kellogg Co.,* 99 F.T.C. 8, 260 (1982). Furthermore, one circuit court considering a Section 2 Sherman Act claim frankly acknowledged that there is "no case support" for the shared monopoly theory. *Harkins Amusement Enters., Inc. v. General Cinema Corp.,* 850 F.2d 477, 490 (9th Cir. 1988), *cert. denied,* 488 U.S. 1019, 109 S.Ct. 817, 102 L.Ed.2d 806 (1989). Finally, a leading antitrust authority has noted that the scenario for predatory pricing by a firm possessing a small share of the market is "highly speculative" and "presses the potential for tacit price coordination very far." P. Areeda H. Hovenkamp, *Antitrust Law* 711.2c, at 538-39 (Supp. 1989).

34 *See, e.g., United Air Lines, Inc. v. Austin Travel Corp.,* 867 F.2d 737, 742 (2d Cir. 1989) (no market power with 10% of the local market and 31% of the national market); *Rutman Wine Co. v. E J Gallo Winery,* 829 F.2d 729, 736 (9th Cir. 1987) (no market power with about 33% of the national market and 25% of the local market); *Pennsylvania Dental*

*Ass'n v. Medical Serv. Ass'n,* 745 F.2d 248, 261 (3d Cir. 1984) (no market power with 32-35% of the relevant market), *cert. denied,* 471 U.S. 1016, 105 S.Ct. 2021, 85 L.Ed.2d 303 (1985).

Although there is little legal precedent supporting Burnett's shared market power theory, in rejecting it the court need not rule that this theory is insufficient as a matter of law. The only record evidence supporting such a theory was Burnett's opinion testimony which was contradicted by witnesses from the Liggett boardroom. Liggett's most senior executives, including the president of the company, K.V. Dye, unequivocally testified at trial that there was no tacit collusion on branded cigarette pricing decisions, that the cigarette industry has never been a collusive oligopoly, and that the industry does not reap excessive profits.

Liggett seeks to explain this obvious problem by arguing that the decision-makers at Liggett are not economists and do not understand economic terms such as oligopoly, tacit collusion, and monopoly profits. This argument was considered at the summary judgment stage since these executives gave basically the same testimony at their depositions. The court allowed the case to go to trial in part because the Liggett executives were not economists and in part because of affidavits from the Liggett executives stating that they were confused by the questions asked by B W lawyers and did not mean to contradict the testimony of Burnett. However, at trial, despite having consulted extensively with Burnett and having had adequate time to familiarize themselves with concepts such as tacit collusion, oligopoly, and monopoly profits, these Liggett executives again contradicted Burnett's theory. The court realizes that at the JNOV stage all reasonable inferences must be given to Liggett, the non-moving party. However, Burnett's expert opinion testimony on these issues cannot be considered substantial evidence sufficient to survive B W's JNOV motion in light of unequivocal and contradictory trial testimony from the senior executives at Liggett who made the pricing decisions. *See Newman v. Hy-Way Heat Sys., Inc.,* 789 F.2d 269, 270 (4th Cir. 1976) (experts may not "speculate in fashions unsupported by, and in this case indeed in contradiction of, the uncontroverted evidence in the case"); *Selle v. Gibb,* 567 F. Supp. 1173, 1182 (N.D.Ill. 1983) ("[T]he law does not permit the oath of credible witnesses, testifying to matters within their knowledge, to be disregarded, particularly where lay persons give testimony contradicting existence of the
357 ultimate fact to be inferred from the opinion of an expert."), *aff'd,* 741 F.2d 896 (7th Cir. 1984).[35] *357

35 *Accord Miller v. FDIC,* 906 F.2d 972, 975 (4th Cir. 1990) (plaintiff's contradictory testimony insufficient to create a genuine issue of fact); *Townley v. Norfolk W. Ry. Co.,* 887 F.2d 498, 501 (4th Cir. 1989) (a party may not create an issue of fact by contradicting own testimony); *Barwick v. Celotex Corp.,* 736 F.2d 946, 960 (4th Cir. 1984) (a party examined at length on deposition cannot raise an issue of fact simply by submitting an affidavit contradicting the prior testimony).

Even if Burnett's opinion testimony on tacit collusion was uncontradicted, competition could not be injured by B W unless it could raise generic cigarette prices, thereby narrowing the price gap between branded and generic cigarettes. Yet, even Burnett denied there was tacit collusion in the generic cigarette segment. Instead, his theory relied on the supposed motivations of the other major cigarette manufacturers. Burnett contended that there was an alignment of interest among these companies to protect their branded cigarette profits. Thus, they would not disrupt B W's attempts to slow the growth of the generic segment. If no such alignment of interest existed and any of the other major cigarette manufacturers were interested in promoting the sale of generic cigarettes, even Burnett admitted that successful predation by B W would be impossible.

No substantial record evidence supports Burnett's alignment of interest theory. Even before B W began selling black and white cigarettes, RJR had entered the generic segment by repositioning Doral at generic prices. Burnett conceded that RJR had no anticompetitive intent and that Doral's entry expanded the generic segment. The evidence is uncontroverted that RJR's motive for selling generic cigarettes was to regain its number one position in the cigarette industry from Philip Morris. In order to do this, RJR had to sell a lot of generic

cigarettes. Furthermore, there is no evidence that any of the other major cigarette companies had an interest in slowing the growth of generic cigarettes. Today, five of the six major manufacturers sell generic cigarettes in one form or another. Most importantly, in late 1985 B W tried to raise the price of its generic cigarettes. Neither Liggett nor RJR followed with price increases, and B W was forced to retract its price increase — exactly what is supposed to happen when a company without market power unilaterally raises its price above competitive levels. Had there been an alignment of interest, RJR would have followed B W's lead.

Not only is there no substantial evidence of market power, the testimony of Liggett's decision-makers that there were no monopoly profits obtained on branded cigarettes and that branded cigarette prices were fair to consumers totally undermines any plausible theory of economic recoupment for B W. Without some likelihood of recoupment there is no reasonable possibility of injury to competition. Typically, recoupment happens after the predatory objective has been achieved and the predator has the ability to control prices. As explained earlier, Burnett's theory of simultaneous recoupment departed from this model. However, if there were no monopoly profits from branded cigarettes then B W could not simultaneously recoup its losses from below-cost pricing.

Even apart from this testimony, there is another problem with Burnett's recoupment analysis. There is no substantial evidence in the record indicating that wholesalers would not promote the sale of generic cigarettes. Burnett's simultaneous recoupment theory depends on wholesalers pocketing B W's volume rebates instead of promoting generic cigarettes; otherwise, there is no mechanism to slow the growth of the segment. Yet it makes no sense for wholesalers to pocket all of these rebates. Unlike branded cigarettes, there were no guarantees for wholesalers when they bought B W's generic cigarettes. If the wholesalers did not sell all the generic cigarettes they bought, they were stuck with the product. B W's volume rebates were lucrative to them only if they could sell their generic cigarette allotment; otherwise, they lost money. Therefore, there was no alignment of interest between B W and the wholesalers with respect to generic cigarettes. To the extent that wholesalers wanted to sell generics to consumers, and the only record evidence at trial indicates that they did, B W could not slow the growth of the category and consumer welfare could not be injured.

Similarly, documentary evidence alone is not substantial evidence sufficient to satisfy the competitive injury requirement of the Robinson-Patman Act absent some showing of market power and the possibility of
358 recoupment. *See Henry,* *358 809 F.2d at 1345. A company with anticompetitive intent cannot injure consumers unless it has at least a reasonable possibility of obtaining market power and recouping its losses. B W could not achieve either of these objectives and, therefore, it does not matter what the documents say concerning its hopes and plans.

Finally, Liggett did not provide any substantial evidence of actual injury to competition via market analysis. Obviously, without even the realistic prospect of obtaining market power it is impossible for a firm to actually injure competition since prices cannot be increased above competitive levels. Furthermore, even Liggett admits that the generic cigarette segment has grown. Five of the six major cigarette companies have significant entries in the generic category, and growth has increased from about four per cent (4%) when Liggett was alone in the segment to fifteen per cent (15%). The success of generic cigarettes has even encouraged some price competition on branded cigarettes. This court is aware of no Robinson-Patman Act verdict upheld solely on market analysis grounds. Liggett's market analysis evidence is not compelling enough for this court to become the first.[36]

36 Much of Liggett's market analysis focuses on the steady decline of the market share of black and white cigarettes. This decline has not injured consumers because of the steady growth of branded generic cigarettes sold at the same price as black and white cigarettes. Overall, the generic segment has grown with consumers preferring branded generic cigarettes to black and white cigarettes. The rest of Liggett's market analysis is equally unconvincing. Liggett contends that B W caused the price differential between branded and generic cigarettes to decrease. Yet, the percentage price differential has remained about thirty per cent (30%), and B W quickly retracted the only generic cigarette price increase that it initiated because the competition did not follow. Liggett also alleges that B W's pricing forced it to reduce its advertising, thereby slowing the segment. Still, the generic cigarette category continued to grow, fueled in part by RJR's aggressive promotion of Doral. Finally, Liggett argues that the military market provides empirical evidence of actual injury to consumers. The generic segment now accounts for over thirty per cent (30%) of the military market, as compared to approximately fifteen per cent (15%) of the civilian market. However, the age, income, and image differences in the military and the civilian sectors make such inferences suspect; the market for generic cigarettes has grown in both sectors; and without any realistic prospect of obtaining market power B W's conduct cannot be the cause of the different market shares in the two sectors.

## B. *Causation*

The Robinson-Patman Act is aimed only at price discrimination. Liggett must prove that the reasonable possibility of injury to competition was "the effect of" price discrimination, 15 U.S.C. § 13(a), in order to establish "the necessary causal relationship between the difference in prices and the alleged competitive injury." *Borden Co. v. FTC,* 381 F.2d 175, 180 (5th Cir. 1967).[37]

In a typical primary-line Robinson-Patman Act case, the injury alleged is the result of geographic price discrimination. As the Supreme Court has explained, the Clayton Act, as amended by the Robinson-Patman Act, "was born of a desire by Congress to curb the use by financially powerful corporations of localized price-cutting tactics which had gravely impaired the competitive position of other sellers." *FTC v. Anheuser-Busch, Inc.,* 363 U.S. 536, 543, 80 S.Ct. 1267, 1271, 4 L.Ed.2d 1385 (1960) (footnote omitted).[38] Proof of causation is straightforward when the price discrimination is geographic. In these cases, a national firm can supplant local competitors confined to a specific geographic market by charging below-cost prices in that market. The local competitor is necessarily limited to competing for customers who can buy at the below-cost price offered by
359 *359 the national company. The national firm can subsidize its losses in the local market through profits from sales in other geographic areas. Therefore, since the national firm can remain profitable while the local competitor cannot, the difference between the national firm's below-cost prices and its profitable prices has a reasonable possibility of injuring competition. However, Liggett's primary line, non-geographic claim differs from this scenario, and the geographic causation rationale discussed above has no persuasive force. Both B W and Liggett competed for generic sales throughout the United States, and Liggett competed in all the markets in which B W offered the discriminatory prices.

38 *Accord Stephen Jay Photography, Ltd. v. Olan Mills, Inc.,* 903 F.2d 988, 991 n. 5 (4th Cir. 1990); *O. Hommel,* 659 F.2d at 350; *Marty's Floor Covering,* 604 F.2d at 270; *International Air,* 517 F.2d at 720-21.

Because this claim is non-geographic, Liggett has not proven causation by any substantial evidence. The Robinson-Patman Act does not proscribe low prices. B W's net prices were generally lower than Liggett's at every volume level. Yet, if there was any reasonable possibility of injury to competition from B W's conduct it came from the low prices that B W offered to its customers and not from the fact that these low prices varied depending on volume. *See O. Hommel,* 659 F.2d at 350-51 (when price discrimination occurs only in the same geographic market in which the predator and the target compete "[s]elective price-cutting cannot possibly be

more harmful to small competitors than a general price reduction to the same level") (quoting Areeda Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 Harv.L.Rev. 697, 725-26 [1975]).[39]

39 *Accord Official Publications, Inc. v. Kable News Co.,* 884 F.2d 664, 667-68 (2d Cir. 1989); *Borden,* 381 F.2d at 180.

Even if B W's low prices created a reasonable possibility of injuring competition by displacing Liggett and making it possible for B W to raise generic cigarette prices, the fact that those prices varied gave B W no advantage over Liggett. Liggett was free to compete for sales to B W's low-volume generic customers, as well as those customers getting the best deals from B W. Liggett was not excluded from any markets. As a result, Liggett was not disadvantaged any more by B W's volume rebates than it would have been by one uniform low price. Liggett's complaint is that B W was selling generic cigarettes for a lower price than it could at all volume levels. Consequently, Liggett has not met its burden of causation because low prices, not price discrimination, provide the only possible linkage to competitive injury.

Liggett disagrees. It contends that the price discrimination was a central component of B W's predatory plan enabling B W to make its scheme cost effective and inducing wholesalers to buy generic cigarettes exclusively from B W. The court will consider these arguments in turn.

Liggett contends that price discrimination made B W's plan feasible by making it less costly than if B W offered only one low price. It cites several documents indicating that B W wanted to "put the money where the volume was." There are no primary-line, non-geographic cases, that this court is aware of, in which cost efficiency satisfied the Robinson-Patman Act's causation requirement. Such an argument if accepted would read any meaningful causation requirement out of the Act. As opposed to one low price set at B W's high-volume rate, volume rebates certainly saved the company money. However, the same is true of any price discrimination by any firm since price discrimination by definition requires a higher and a lower price. Furthermore, although it may have been more cost efficient for B W, price discrimination also meant that it would cost less for Liggett to match B W's prices. Since Liggett and B W had access to the same customers and markets, B W could not inflict greater injury on Liggett by charging different prices than by charging a lower uniform price. If Liggett was not injured more by the price discrimination then neither was competition, since
360 Burnett's competitive injury theory hinges on *360 B W replacing Liggett as the generic price leader.

Liggett also argues that B W's discriminatory rebates encouraged wholesalers to buy generic cigarettes exclusively from B W. According to Liggett, the volume rebates acted as a magnet enticing customers to buy more B W generic cigarettes to get to the next rebate level; because higher volume purchases entitled customers to higher discounts, customers opting to allocate a portion of their generic cigarette purchases to Liggett would in effect be penalized; to avoid this penalty customers would buy exclusively from B W; the more exclusive relationships B W could cement with former Liggett wholesale customers the faster B W could displace Liggett and increase generic prices.

Again, Liggett cites no primary-line, non-geographic cases which support its analysis that encouraging exclusivity satisfies the Robinson-Patman Act's causation requirement. Volume discounts do not hurt Liggett, and hence competition, more than any other incentive since both companies compete for the same customers and the same markets. Liggett could respond to B W's volume rebates by allocating the majority of its own incentives to its high-volume customers, a practice it had followed even before B W's entry. Furthermore, the only advantage to a wholesaler from getting into B W's highest volume category is receiving the lowest price available on generic cigarettes. Yet, even at the lowest volume levels, B W's net prices were below Liggett's, obviously an incentive for a customer to buy only from the manufacturer offering the lowest price on the same

product. Therefore, the magnet enticing customers to buy generic cigarettes exclusively from B W was that B W's net prices were below Liggett's at every volume level and not that B W's competitive offer to customers took the form of volume rebates.

## C. *Antitrust Injury*

In a private treble damage action brought under Section 4 of the Clayton Act,[40] there is an additional causation requirement — antitrust injury. Not only must Liggett prove that B W's price discrimination had a reasonable possibility of injuring competition, Liggett also must prove that B W's price discrimination caused its complained-of damages.

[40] Section 4 of the Clayton Act is a remedial provision that makes treble damages available to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a).

A private plaintiff like Liggett may not recover damages simply by showing "injury causally linked to an illegal presence in the market." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). Instead, Liggett must prove it was injured by conduct violating the Robinson-Patman Act. *See* 15 U.S.C. § 15(a). That is, Liggett must prove the existence of "`antitrust injury, which is to say injury of the type the *antitrust* laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Allegheny Pepsi-Cola Bottling Co. v. Mid-Atlantic Coca-Cola Bottling Co.,* 690 F.2d 411, 414 (4th Cir. 1982) (quoting *Brunswick,* 429 U.S. at 489, 97 S.Ct. at 697-98). Therefore, Liggett cannot recover damages unless it is "able to show a causal connection between the price discrimination in violation of the Act and the injury suffered." *Perkins v. Standard Oil Co.,* 395 U.S. 642, 648, 89 S.Ct. 1871, 1874, 23 L.Ed.2d 599 (1969).

Subsequent to the completion of this trial, the Supreme Court decided a case clarifying the requirements of antitrust injury. The Supreme Court held:

> Antitrust injury does not arise for purposes of § 4 of the Clayton Act until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct; in the context of pricing practices, only predatory pricing has the requisite *anticompetitive* effect. Low prices benefit consumers regardless
> 361 of how those prices are set, and so long as they are above predatory levels, they do *361 not threaten competition. Hence, they cannot give rise to antitrust injury.

*Atlantic Richfield Co. v. USA Petroleum Co.,* ___ U.S. ___, 110 S.Ct. 1884, 1892, 109 L.Ed.2d 333 (1990) (citations and footnotes omitted). In the context of the present case, *Atlantic Richfield* makes clear that only evidence of predatory pricing is sufficient to prove antitrust injury. Neither incriminating documentary evidence nor an allegedly distorted market proves antitrust injury unless accompanied by proof of predatory pricing. *Id.* 110 S.Ct. at 1891 n. 7 ("a firm cannot claim antitrust injury from nonpredatory price competition on the asserted ground that it is ruinous").

Liggett, of course, disagrees with this interpretation of *Atlantic Richfield,* arguing that the Supreme Court's antitrust injury analysis applies only to vertical maximum resale price-fixing cases and that the decision illustrates only that Sherman Act principles are different from Robinson-Patman Act principles. It cites as proof the fact that the Supreme Court in *Atlantic Richfield* did not dismiss the Robinson-Patman Act claim since it was "misconduct not relevant here." 110 S.Ct. at 1887. In *Atlantic Richfield,* plaintiff sued defendant under various legal theories including the Sherman Act, the Robinson-Patman Act, and state law unfair competition statutes. Defendant moved for summary judgment on the Section 1 Sherman Act claim and the district court granted the motion. On appeal, both the Ninth Circuit and the Supreme Court considered only the issue of

whether dismissing plaintiff's Section 1 Sherman Act claim was proper. The Robinson-Patman Act claim was not relevant to the Supreme Court's decision because that claim was not before it. This language of the Supreme Court cannot be construed to mean that antitrust injury principles under the Robinson-Patman Act are fundamentally different from those under the Sherman Act.

Liggett's interpretation of *Atlantic Richfield* is legally insupportable for several reasons. First, Liggett alleges a primary-line, non-geographic Robinson-Patman Act claim analytically similar to a Section 2 Sherman Act attempted monopolization claim. The goal of both statutes is to maximize competition. Second, Liggett's interpretation is anticompetitive since it protects Liggett from non-predatory price competition by B W despite the fact that such activity cannot injure competition. In *Atlantic Richfield,* the Supreme Court reiterated that "`cutting prices in order to increase business often is the very essence of competition,'" *id.* at 1891 (quoting *Matsushita,* 475 U.S. at 594, 106 S.Ct. at 1360), and Liggett has provided no theoretical justification for distinguishing between straight price cuts and volume rebates. Also, the Supreme Court has held on numerous occasions that the Robinson-Patman Act should be conformed if at all possible to the standards governing the other antitrust laws. *See Great Atl. Pac. Tea Co. v. FTC,* 440 U.S. 69, 80, 99 S.Ct. 925, 933, 59 L.Ed.2d 153 (1979); *United States v. United States Gypsum Co.,* 438 U.S. 422, 458-59, 98 S.Ct. 2864, 2884-85, 57 L.Ed.2d 854 (1978); *Automatic Canteen Co. v. FTC,* 346 U.S. 61, 63, 73 S.Ct. 1017, 1019, 97 L.Ed. 1454 (1953). Third, Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides the antitrust injury standard for both the Sherman Act and the Robinson-Patman Act. It would be odd indeed to interpret the same language of Section 4 one way under the Sherman Act and another way under the Robinson-Patman Act. Fourth, and most importantly, Liggett's interpretation requires this court to ignore the plain language of *Atlantic Richfield* in which the Supreme Court clearly stated that non-predatory pricing behavior cannot give rise to antitrust injury "regardless of the type of antitrust claim involved." 110 S.Ct. at 1892.

Liggett also argues that *Atlantic Richfield* does not apply to Robinson-Patman Act claims because it is price discrimination rather than predatory prices which must cause the antitrust injury. Liggett's position is correct as far as it goes. In Robinson-Patman Act cases the price discrimination must be linked with the antitrust injury. However, this does not mean that predatory pricing is not relevant. For that position to have merit there would
362 *362 have to be some anticompetitive aspect of price discrimination other than the fact that one or all of the prices charged were predatory. Yet, the only anticompetitive aspect to B W's volume rebates is that they were allegedly below cost. Burnett's theory is that B W's below-cost, volume rebates were designed to drive Liggett out of the generic cigarette segment. The below-cost aspect of these rebates was crucial since this forced Liggett to either lose money on the sale of generic cigarettes or lose customers to B W. For these reasons this court is convinced that in a primary-line, non-geographic price discrimination case predatory pricing is the only type of evidence which satisfies the antitrust injury requirement.

The court must examine whether Liggett has presented any substantial evidence of antitrust injury. The Supreme Court has stated that "predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." *Cargill,* 479 U.S. at 117, 107 S.Ct. at 493. But the Court has never defined what "cost" is relevant. *Id.* at 117 n. 12, 107 S.Ct. at 493 n. 12. Given this Supreme Court guidance, most circuits presume that pricing below reasonably anticipated marginal cost is predatory.[41] Because marginal costs cannot be determined easily from conventional accounting methods, average variable cost is used as a surrogate. Most cases of predatory pricing focus on average variable cost evidence, and this one is no different.[42]

41 *See, e.g., Northeastern Tel. Co. v. AT T Co.,* 651 F.2d 76, 88 (2d Cir. 1981) (citations collected therein), *cert. denied,* 455 U.S. 943, 102 S.Ct. 1438, 71 L.Ed.2d 654 (1982).

42 This court used average variable cost because Liggett's evidence of predatory pricing centered on this measure; average variable cost is a conservative measure unlikely to penalize the competitive pricing activities of a more efficient competitor; and many circuits use some variant of the average variable cost test to isolate predatory pricing.

Liggett's predatory pricing evidence consisted of expert testimony that B W priced its generic cigarettes below average variable cost. B W countered with its chief financial officer who admitted that B W lost money on the sale of generic cigarettes but stated prices were never below average variable cost. He explained that most companies lose money when they introduce a new product and that there was nothing exceptional about that. Furthermore, he stressed that B W's overall line of cigarettes — generic plus branded — was very profitable.

In order to evaluate Liggett's predatory pricing evidence, this debate need not be resolved. The court believes that Liggett's predatory pricing evidence must show that B W lost money in the relevant market stipulated to by the parties prior to trial — the market for all cigarettes in the United States. Liggett has not and cannot do this. The evidence is uncontroverted that B W made money on its overall cigarette sales — branded and generic — during the alleged predatory period.

The parties have stipulated that the relevant market is the entire cigarette market in the United States. Upon close examination, this court believes that there is no substantial economic evidence that generic cigarettes are sufficiently distinct from branded cigarettes to justify applying the average variable cost test to generic cigarettes alone.[43] Markets are determined by the substitutability of goods, and market definition turns on these
363 goods' cross-elasticity of demand and supply. Cross-elasticity *363 of demand is the extent to which products are "reasonably interchangeable by consumers for the same purposes." *United States v. E.I. du Pont de Nemours Co.,* 351 U.S. 377, 395, 76 S.Ct. 994, 1007, 100 L.Ed. 1264 (1956). Cross-elasticity of supply is "the capability of other production facilities to be converted to produce a substitutable product." *Rothery Storage Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210, 218 (D.C. Cir. 1986), *cert. denied,* 479 U.S. 1033, 107 S.Ct. 880, 93 L.Ed.2d 834 (1987). There is obviously high cross-elasticity of demand between branded and generic cigarettes. In fact, Liggett's theory hinges on consumers substituting generic for branded cigarettes because the alleged reason for predating was that B W branded smokers were switching to Liggett's generic cigarettes. There is also high cross-elasticity of supply between branded and generic cigarettes because the same machines that make branded cigarettes can easily produce generic cigarettes.

43 Since Liggett and B W are full-line competitors who compete for market share across all cigarette product lines, this court instructed the jury that they could consider Liggett's below-cost pricing evidence only if they determined that generic cigarettes formed a well-defined submarket based on the practical indicia test of *Brown Shoe Co. v. United States,* 370 U.S. 294, 325, 82 S.Ct. 1502, 1524, 8 L.Ed.2d 510 (1962). The court used this concept to aid the jury in determining whether generic cigarettes were sufficiently distinct from branded cigarettes to justify applying the average variable cost test to generic cigarettes, and not as a means of deciding the appropriate market in which to evaluate competitive injury. If there are no significant economic differences between the two products there is no reason to analyze their price-cost relationship separately.

Because there is no question that generic and branded cigarettes compete with each other for the favor of consumers, there is no economic justification for analyzing one separately from the other. Where there is nothing economically distinct about a particular product line, the average variable cost test should not be applied to it. Dr. Philip Areeda, one of the fathers of that test, explains that where the predator and the target sell the same line of products the average variable cost test should be applied to an alleged predator's entire product line instead of to a particular product because "rivals generally can hardly be ruined so long as prices for the product line as a whole are compensatory." P. Areeda H. Hovenkamp, *Antitrust Law* 1715.1a, at 592

(Supp. 1989). Numerous courts, in cases like this one where the parties are full product line competitors, have refused to apply the average variable cost test to a single product line because there could be no competitive injury in the relevant market even if that product line was priced below cost.[44]

44 *See Morgan v. Ponder,* 892 F.2d 1355, 1361-62 (8th Cir. 1989) (court refuses to apply a price-cost test solely to legal advertising as opposed to all commercial advertising); *Stitt Spark Plug,* 840 F.2d at 1256-57 (a relevant predatory pricing analysis must include defendant's entire line of spark plugs and not just its original equipment line); *Directory Sales Management Corp. v. Ohio Bell Tel. Co.,* 833 F.2d 606, 614 (6th Cir. 1987) (although a telephone company gave away free first listings in its telephone book, they engaged in predatory pricing only if their "overall charges for advertising space in their yellow pages are priced below cost"); *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.,* 824 F.2d 582, 597-98 (8th Cir. 1987), *cert. denied,* 484 U.S. 1010, 108 S.Ct. 707, 98 L.Ed.2d 658 (1988) (court refused to apply below-cost pricing test to only four of the 180 common items that competing specialty food stores sold); *Bayou Bottling, Inc. v. Dr. Pepper Co.,* 725 F.2d 300, 305 (5th Cir.), *cert. denied,* 469 U.S. 833, 105 S.Ct. 123, 83 L.Ed.2d 65 (1984) (where both parties are full-line competitors, 32-ounce bottles not a relevant product to apply average variable cost test to); *Janich Bros.,* 570 F.2d at 856 (half-gallon containers of gin and vodka are not relevant products for predatory pricing analysis); *Sewell Plastics, Inc. v. Coca-Cola Co.,* 720 F. Supp. 1196, 1228 (W.D.N.C. 1988) (three-liter bottles not a relevant product for predatory pricing analysis).

During the alleged predatory period, Liggett and B W were both profitable, full product line competitors with access to the same customers and markets. Due to these facts, applying the average variable cost test solely to B W's generic cigarettes would be inappropriate. An examination of price-cost relationships should be made only in reference to the dangers posed by predatory pricing. *Henry,* 809 F.2d at 1344 ("the issue of `predatory intent' should focus on what the defendant did and whether it could lead to the evil feared"). Under Liggett's theory, the danger posed by B W's predatory pricing was that B W would obtain control of the generic segment, raise prices, and thereby kill-off the only low-price alternative to branded cigarettes to the disadvantage of consumers. Even assuming that this danger was real, consumer welfare could not be injured if Liggett responded by switching emphasis to its line of branded cigarettes and decreasing their price, thus charging consumers a fair price instead of a monopolistic one. This would prevent injury to both Liggett and the
364 consumer. Liggett's market share would increase to *364 offset its lost monopoly profits and consumers would still have a low-price cigarette alternative. Furthermore, B W could not recoup if Liggett decreased branded prices because cost-conscious consumers would switch to the low-price Liggett brands instead of other branded cigarettes priced at monopoly rates. If the average variable cost test is applied solely to generic cigarettes and antitrust injury is inferred from this below-cost pricing, then Liggett is unjustly rewarded for failing to compete on price with its branded cigarettes. Under this scenario, Liggett's antitrust injury would come from its unwillingness to charge a competitive price for its branded cigarettes and not from B W's price discrimination. Since Liggett has failed to introduce substantial evidence of predatory pricing to meet the antitrust injury requirement, this provides another ground for granting B W's JNOV motion.

## III. THE TRADEMARK ISSUES

Liggett has made a motion for a new trial pursuant to Rule 59, Fed.R.Civ.P., on the trademark and unfair competition claims arising from B W's alleged infringement of Liggett's quality seal trademark. Liggett contends that the court should order a new trial on these issues because (1) the jury verdict was clearly against the weight of the evidence, (2) B W repeatedly relied upon prejudicial, inadmissible, and improper evidence which tainted the jury process, and (3) Liggett was precluded from using evidence which could have countered B W's prejudicial and misleading arguments. The court finds these contentions to be without merit, and Liggett's motion will be denied.

A motion for a new trial is governed by a different standard than a JNOV motion. *Gill v. Rollins Protective Servs. Co.,* 773 F.2d 592, 594 (4th Cir. 1985), *modified on other grounds,* 788 F.2d 1042 (4th Cir. 1986). Recently, the Fourth Circuit has reiterated the trial court's duty in ruling on a Rule 59 motion for a new trial. In *Poynter by Poynter v. Ratcliff,* 874 F.2d 219, 223 (4th Cir. 1989), the court explained that:

> Under Rule 59 of the Federal Rules of Civil Procedure, a trial judge may weigh the evidence and consider the credibility of the witnesses and, if he finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, he must set aside the verdict, even if supported by substantial evidence, and grant a new trial.

*See also Wyatt,* 623 F.2d 888, 891-92; *Williams v. Nichols,* 266 F.2d 389, 392 (4th Cir. 1959). A new trial may also be granted if the court believes it has erred in the admission or rejection of evidence, or improperly instructed the jury. *Montgomery Ward Co. v. Duncan,* 311 U.S. 243, 251, 61 S.Ct. 189, 194, 85 L.Ed. 147 (1940).

To establish trademark infringement a plaintiff must prove that there is a "likelihood of confusion" between its mark and the defendant's mark. *Pizzeria Uno Corp. v. Temple,* 747 F.2d 1522, 1527 (4th Cir. 1984). Both parties presented evidence from which a reasonable jury could have found in favor of that party on the trademark and unfair competition issues. The jury ruled for B W. From the evidence introduced on the seven likelihood of confusion factors outlined in *Pizzeria Uno,* [45] the verdict cannot be considered contrary to the clear weight of the evidence.

[45] The seven factors are: (1) the strength or distinctiveness of the mark; (2) the similarity of the two marks; (3) the similarity of the goods/services identified by the marks; (4) the similarity of the facilities the two parties use in their businesses; (5) the similarity of the advertising used by the two parties; (6) the defendant's intent; (7) actual confusion.

The cornerstone of Liggett's position is its contention that B W's stipulation of the validity of Liggett's quality seal trademark precluded any evidence or argument by B W that consumers were not aware of the quality seal. Liggett couples this argument with the contention that B W's repeated references to the results of Liggett's Conway Milliken Report, a telephone survey of consumers conducted by Liggett, as proof of lack of consumer
365 recognition of the quality seal, were improper *365 and contrary to the court's *in limine* ruling.

Liggett's contention that the stipulation of validity of the quality seal trademark precluded evidence and argument by B W that most consumers were not aware of the mark is contrary to the position taken by Liggett's counsel at trial. Liggett's counsel conceded on the record at the charge conference that the strength of the mark was a question for the jury, that B W could argue that it was not recognized, and that Liggett could argue that it was recognized. Evidence of the extent of consumer awareness of a mark obviously helps a jury determine the scope of protection to be afforded the mark. However, the court clearly instructed the jury that Liggett had valid federal trademark registrations for the quality seal and that the jury must accept the quality seal as a valid trademark.

Furthermore, Liggett's argument that the stipulation of validity precludes evidence that consumers were not aware of the mark is simply not the law. *See Miss World (U.K.) Ltd. v. Mrs. America Pageants,* 856 F.2d 1445, 1449 (9th Cir. 1988) ("[A]n incontestable status does not alone establish a strong mark."); *Oreck Corp. v. U.S. Floor Sys., Inc.,* 803 F.2d 166, 171 (5th Cir. 1986) (incontestable status does not preclude defendant from arguing mark is weak and not infringed; "Incontestable status does not make a weak mark strong."), *cert. denied,* 481 U.S. 1069, 107 S.Ct. 2462, 95 L.Ed.2d 871 (1987); *see also Munters Corp. v. Matsui America, Inc.,*

730 F. Supp. 790, 795-96 (N.D.Ill. 1989), *aff'd,* 909 F.2d 250 (7th Cir. 1990); *Cullman Ventures, Inc. v. Columbian Art Works, Inc.,* 717 F. Supp. 96, 121 (S.D.N.Y. 1989); 2 J. McCarthy, *Trademarks and Unfair Competition* § 32:44D (2d ed. 1984 Supp. 1989).

Liggett's emphasis on B W's questions to witnesses and arguments about Liggett's Conway Milliken study is also misplaced. The court explained on numerous occasions during the trial that Liggett's extensive testimony and evidence concerning the promotion of its quality seal opened the door to cross-examination and evidence of the effectiveness of that promotion. The court then allowed Liggett to present additional evidence about what the study was designed to determine, how it was conducted, and the significance of the results. Furthermore, Liggett's counsel had ample opportunity in closing arguments to counter any arguments by B W's counsel concerning the significance of the Conway Milliken Report.[46]

46 Liggett also contends that B W improperly took advantage of the court's pre-trial rulings which prevented Liggett from calling consumers who had confused B W's black and gold lion closure seal, a seal which was not the basis of Liggett's claim in this case, with the Liggett quality seal trademark. Liggett further contends that it was tricked or prevented from calling Saul Lefkowitz, a former chairman of the United States Trademark Trial and Appeal Board, who would have testified that registration of the quality seal was proper, a fact B W conceded. Other proposed testimony by Mr. Lefkowitz sought to instruct the jury on the law, a matter within the province of the court. The court is satisfied that its initial position concerning these witnesses was correct.

Liggett's other arguments concerning the use of prejudicial, inadmissible, and improper evidence are based almost exclusively on B W's closing argument. However, Liggett failed to object during closing argument to most of the statements which it now claims were so prejudicial as to warrant a new trial. The Fourth Circuit has emphasized that "[i]t is the universal rule that during closing argument counsel `"cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial."'" *Dennis v. General Elec. Corp.,* 762 F.2d 365, 366-67 (4th Cir. 1985) (quoting *United States v. Elmore,* 423 F.2d 775, 781 [4th Cir.], *cert. denied,* 400 U.S. 825, 91 S.Ct. 49, 27 L.Ed.2d 54, and *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 239, 60 S.Ct. 811, 851-52, 84 L.Ed. 1129). Liggett had every opportunity in its rebuttal argument to clarify any arguments which it
366 believed were misleading on the part of B W. The alleged improprieties *366 in B W's closing argument do not involve any exceptional circumstances which would impair "the public reputation and integrity of the judicial proceeding." Dennis, 762 F.2d at 367; *see also Socony-Vacuum Oil,* 310 U.S. at 239, 60 S.Ct. at 851-52.

For the foregoing reasons, Liggett's motion for a new trial on the trademark and unfair competition claims will be denied.

An order and judgment in accordance with this memorandum opinion shall be entered contemporaneously herewith.

## ORDER and JUDGMENT

For the reasons set forth in a memorandum opinion filed contemporaneously herewith,

IT IS ORDERED AND ADJUDGED that Defendant's motion for judgment notwithstanding the verdict pursuant to Rule 50(b), Federal Rules of Civil Procedure, be, and the same hereby is, GRANTED, and that the jury verdict and judgment in favor of the Plaintiff be, and the same hereby is, SET ASIDE, and judgment entered for the Defendant; and

IT IS FURTHER ORDERED that Defendant's alternative motion for a new trial pursuant to Rule 59, Federal Rules of Civil Procedure, be, and the same hereby is, DENIED; and

IT IS FURTHER ORDERED that Plaintiff's motion for a new trial pursuant to Rule 59, Federal Rules of Civil Procedure, be, and the same hereby is, DENIED.

373 *373