Exhibit D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., Petitioner for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules - against - BILL DE BLASIO, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF NEW YORK, CITY OF NEW YORK, JAMES P. O'NEILL, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK CITY POLICE DEPARTMENT, and NEW YORK CITY POLICE DEPARTMENT, Respondents.	Index No. 150181/2018 Hon. Shlomo S. Hagler

[PROPOSED] AFFIRMATION OF THOMAS B. SULLIVAN

THOMAS B. SULLIVAN, an attorney admitted to practice law before the courts of the State of New York, and not a party to the above-titled cause, affirms the following to be true under penalty of perjury pursuant to CPLR 2106:

1. I am an attorney duly admitted to the bar of the State of New York and associated with the law firm Ballard Spahr LLP, counsel to News Media Intervenors Reporters Committee for Freedom of the Press, Hearst Corporation, The Associated Press, Buzzfeed, Cable News Network, Inc., The Center for Investigative Reporting, Daily News, LP, Dow Jones & Company, Inc., Gannett Co., Inc., Gizmodo Media Group, LLC, New York Public Radio, The New York

Times Company, NYP Holdings, Inc., and Spectrum News NY1 ("News Media Intervenors"). I submit this affirmation in support of News Media Intervenors' Proposed Memorandum of Law in Opposition to the Petition and to Petitioner's Motion for a Temporary Restraining Order.

2. Pursuant to Rule 14(a) of the Rules of the Justices of the Supreme Court, Civil Branch, New York County, attached as Exhibit 1 to this Affirmation are true and correct copies of decisions not officially published or readily available to the Court.

3. Attached as Exhibit 2 to this Affirmation is a true and correct copy of a June 18, 1976 letter from PBA President John Maye to Governor Hugh L. Carey.

Dated: March 1, 2018
New York, NY

Thomas B. Sullivan

THOMAS B. SULLIVAN

Exhibit 1

1997 WL 52434
Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Mark BALDUZZI, Plaintiff,
v.
CITY OF SYRACUSE, Syracuse Police Department, James Foody, Daniel Boyle, Michael Kerwin, Robert Featherstone, Mark McArdle, John Falge, Dennis Duval, and Steven Thompson, in individual and official capacities, jointly and severally, Defendants.

No. 96-CV-824.
|
Feb. 4, 1997.

Attorneys and Law Firms

Mark David Blum, Manlius, New York, for Plaintiff.

Office of Corporation Counsel, Syracuse, New York, for Defendants; Brian J. Lauri, of counsel.

Opinion

MEMORANDUM-DECISION AND ORDER

HOWARD G. MUNSON, Senior District Judge.

INTRODUCTION

***1** Presently before the court is defendants' motion for summary judgment. The court heard oral argument concerning this motion on December 13, 1996. At that time, the court reserved decision pending the parties' submission of additional documentation. The court has now received and reviewed these additional documents, and the following constitutes the court's disposition of this motion.

BACKGROUND

Plaintiff, Mark Balduzzi, commenced this action against the City of Syracuse ("City"), the City of Syracuse Police Department ("SPD"), and several officers of the Syracuse Police Department in their individual and official capacities by filing a summons and complaint on May 21, 1996. [1] Mr. Balduzzi asserts that this court has jurisdiction over his complaint pursuant to 42 U.S.C. §§ 1983, 1988; 28 U.S.C. §§ 1331, 1343, 1441, and 1443; and pendant jurisdiction over his state law tort claims. [2]

1 The individual defendants are James T. Foody, Chief of Police; Daniel Boyle, Deputy Chief of Police; Michael Kerwin, Lieutenant, City of Syracuse Police Department; Robert Featherstone, Captain, City of Syracuse Police Department; Mark McArdle, Lieutenant, City of Syracuse Police Department; Dennis Duval, Deputy Chief of Police; John Falge, Deputy Chief of Police; and Steven Thompson, Deputy Chief of Police.

2 "Pendant" jurisdiction is now codified as "supplemental" jurisdiction pursuant to 28 U.S.C. § 1367.

Plaintiff's complaint contains eight causes of action. The first two are federal causes of action brought pursuant to § 1983 for alleged violations of certain of plaintiff's constitutional rights. The third through seventh causes of action are state law tort claims; and the eighth cause of action is entitled "Municipal Liability." Plaintiff seeks compensatory and punitive damages of "not less than" $750,000 for each of his causes of action. The City and SPD are named in only the first and eighth causes of action. The other causes of action assert illegal conduct by some, if not all, of the individual defendants

Plaintiff's first cause of action against the City, SPD, Foody, and Boyle, "jointly and severally" alleges a violation of plaintiff's First Amendment right to freedom of speech. The gravamen of this claim is that plaintiff was disciplined and ultimately terminated from his employment because he testified pursuant to a subpoena before the Citizens Review Board ("CRB").

Mr. Balduzzi's second cause of action against Foody, Falge, Duval, Boyle and Thompson, jointly and severally, alleges a denial of his due process in violation of the Fifth and Fourteenth Amendments. The gravamen of this claim is that the named defendants violated his privacy rights, protected by § 50-a of New York Civil Rights Law, by meeting with the editorial board of the *Syracuse Herald Journal* in April 1996 and disclosing to editors and others portions and contents of plaintiff's personnel records. *See* Complaint at ¶¶ 34-36.

Plaintiff's third through seventh causes of action allege various state law tort claims. His third cause of action against Foody, Falge, Boyle, Featherstone, Kerwin and McArdle asserts a claim for tortious interference with contractual relations. His fourth cause of action against Foody, Falge, Boyle, Featherstone and McArdle, jointly and severally, asserts a claim for defamation. His fifth cause of action against Foody, Boyle and Falge, jointly and severally, asserts claims for malicious prosecution and abuse of process. His sixth cause of action against Foody, Boyle, Falge, Kerwin, Featherstone and McArdle, jointly and severally, asserts a claim for intentional infliction of emotional distress. His seventh cause of action against Foody, Boyle, Kerwin, Featherstone and McArdle, jointly and severally, asserts a claim for prima facie tort.

***2** Plaintiff's so-called eighth cause of action against the City, SPD and Foody in his professional capacity asserts a claim for municipal liability. At oral argument, plaintiff's counsel explained that the intent of this cause of action was to allege that the individual defendants' actions against plaintiff were taken pursuant to a custom or practice of the City. In other words, this eighth cause of action provides the basis for plaintiff's claim against the City for alleged violations of his constitutional rights as set forth in his first and second causes of action. As such these allegations are derivative of plaintiff's federal claims and do not constitute a separate cause of action upon which relief can be granted. Accordingly, the court grants defendants' motion for summary judgment with respect to plaintiff's eighth cause of action.

Defendants' present motion for summary judgment rests upon three grounds. First of all, they assert that the doctrine of collateral estoppel requires dismissal of the state law tort claims against the City. Secondly, they contend that plaintiff has failed to state a claim upon which relief can be granted. Finally, they argue that the court should abstain from exercising jurisdiction over the federal claims because of several pending arbitration proceedings and a state court action which, according to defendants, are based upon the very same claims. Plaintiff opposes this motion in its entirety.

DISCUSSION

I. State Law Tort Claims

A. Notice of Claim

As a preliminary matter, the court notes that pursuant to New York law, a condition precedent to the commencement of a tort action against a municipality or any of its employees is the service of a notice of claim upon the municipality. *See* N.Y. Gen. Mun. Law § 50-e(1)(a) (McKinney 1986).[3] Likewise, when an action involves a police officer, General Municipal Law § 50-j requires that an action shall not be commenced or maintained against a municipality or said officer unless a notice of claim has been served upon the municipality. *See* N.Y. Gen. Mun. Law § 50-j(3) (McKinney 1986). This notice shall set forth, *inter alia,* the nature of the claim. *See* N.Y. Gen. Mun. Law § 50-e(2) (McKinney 1986). The purpose of the notice of claim requirement is to put the municipality on notice of the nature of the claims against it and its employees so that it has the opportunity to investigate the merits of the claims before the commencement of litigation. *See Messina v. Mazzeo,* 854 F. Supp. 116, 145 (E.D.N.Y. 1994) (citing *Annis v. New York City Transit Auth.,* 108 A.D.2d 643, 644, 485 N.Y.S.2d 529, 530-31 (1st Dep't 1985)).

3 New York General Municipal Law § 50-e provides, in pertinent part, that

> [i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; ...

N.Y. Gen. Mun. Law § 50-e(1)(a) (McKinney 1986).

In their original submissions to the court in support of and in opposition to the present motion, neither party raised the "notice of claim" issue. It was only when the court inquired of counsel at oral argument whether plaintiff had served a notice of claim upon the City that defendants responded in the affirmative. At the instruction of the court, defendants submitted the notices of claim for the court's review. Together with this submission, defendants, for the first time, asserted that plaintiff's claims for tortious interference with contract, malicious prosecution/abuse of process, and prima facie tort should be dismissed because none of them were mentioned in plaintiff's notices of claim. Plaintiff does not dispute the fact that these

particular tort claims were not set forth in the notices of claim he served upon the City.

***3** Plaintiff served two notices of claim upon the City dated March 7, 1995, and March 27, 1996, respectively. The first of these notices provides that the nature of the claim is an

> [a]ction for the recovery of damages due to injuries sustained by the claimant caused solely by the negligence of the City of Syracuse in improperly retaining, failing to supervise the respondents [Robert Featherstone and Mark McArdle] in their actions against the claimant and in negligently inflicting emotional distress on the claimant.

See Lauri Affidavit, Exhibit F attached thereto at ¶ 2.

The second Notice of Claim states that the nature of the claim is "[d] efamation, libel and slander, invasion of privacy, [and] intentional infliction of emotional distress." *See id.,* Exhibit E attached thereto at ¶ 2. This second notice certainly provided the City with adequate notice of plaintiff's claims for defamation and intentional infliction of emotional distress. There is nothing in either of these notices, however, that would have put the City on notice of plaintiff's claims for tortious interference with contract, malicious prosecution/abuse of process, or prima facie tort. Absence of such notice and plaintiff's failure to comply with the requirements of General Municipal Law §§ 50-e and 50-j require dismissal of these claims. *See Hilow v. Rome City School Dist.,* No. 91-CV-567, 1994 WL 328625, *8 (N.D.N.Y. June 29, 1994) (McCurn, J). Accordingly, the court grants defendants' motion for summary judgment with respect to plaintiff's third, fifth, and seventh causes of action.

B. Collateral Estoppel

Before discussing the merits of plaintiff's remaining state law tort claims for defamation and intentional infliction of emotional distress, the court will address defendants' argument that the doctrine of collateral estoppel precludes plaintiff from asserting these claims against the City.

In his original state court complaint, plaintiff sued the City, Featherstone, and McArdle. His first cause of action against all three defendants was based upon New York Labor Law § 740 - New York's "Whistle Blower" statute. *See* Haber Affidavit, Exhibit K attached thereto (hereinafter referred to as "Complaint I"). The gravamen of this claim was that defendants McArdle and Featherstone engaged in retaliatory actions against him for making reports about their allegedly improper and unlawful actions. *See* Complaint I at ¶¶ 27, 28. In his second cause of action, plaintiff sought damages against the individual defendants, McArdle and Featherstone, for intentional infliction of emotional distress. As a basis for this cause of action, plaintiff alleged that Featherstone and McArdle engaged in the retaliatory conduct deliberately and intentionally to cause him severe emotional distress and that such conduct was wilful, wanton and outrageous. *See id.* at ¶¶ 31-33.

Plaintiff then sought a preliminary injunction to enjoin the City from enforcing its directive that plaintiff, as a result of a disciplinary proceeding, attend supervisory school for two weeks. In a decision rendered from the bench on March 3, 1995, and signed on March 10, 1995, Justice Hurlbutt noted as a preliminary matter that Labor Law § 740 pertains only to employees in the private sector and that its public employee counterpart is New York Civil Service Law § 75-b. *See* Haber Affidavit, Exhibit N attached thereto at 3 (hereinafter referred to as "March 10th Decision"). Justice Hurlbutt then went on to explain that any public employee who is protected under a collective bargaining agreement or who has rights under section 75 of the Civil Service Law may rely only upon § 75-b for redress. *See* March 10th Decision at 5. In this regard, he stated that § 75-b

> ***4** affords the employee only a shield and not a sword. It is available to the employee in the context and course of either disciplinary proceedings under Civil Service Law Section 75 or under the disciplinary proceedings under the collective bargaining agreement and arbitration, but is not available to the public employee under Labor Law 740.

See id. at 7.

Based upon this finding, Justice Hurlbutt concluded that plaintiff could not meet the first prong of the preliminary injunction test; i.e., probable success on the merits, and, therefore, denied his motion. *See id.* Moreover, based upon the existence of the collective bargaining agreement between the City and the Police Benevolent Association which provided for arbitration rights, Justice Hurlbutt granted the City's cross-motion and dismissed the first cause of action against all defendants insofar as it sought relief under Labor Law § 740. *See id.* at 7-8.

On the same day that this decision was signed, plaintiff filed an amended summons and complaint against the same defendants.[4] Basically, this complaint contained the same two causes of action as the original complaint, with the difference being that the first cause of action now relied upon Civil Service Law § 75 rather than Labor Law § 740 and added allegations that the City was negligent in training, supervising and retaining the individual defendants. *See* Haber Affidavit, Exhibit O attached thereto. The defendants moved for dismissal on the grounds of lack of jurisdiction, res judicata, and exclusivity of remedy with respect to the first cause of action and for failure to state a claim as to the second cause of action. *See* Haber Affidavit, Exhibit Q attached thereto at 1 (hereinafter referred to as "July 10th Decision").

4 Although defendants refer to this as a "second state court action," it is clear from Judge Hurlbutt's July 10, 1995, decision that he considered it to be merely a continuation of the pending action.

In a decision dated July 10, 1995, Justice Hurlbutt noted that the Labor Law § 740 claim had been dismissed against the City by his previous decision and that because the City was not named in the second cause of action, the action had, therefore, been dismissed against the City. *See* July 10th Decision at 2. He went on to explain that "[i]n the absence of a new action having been commenced, no jurisdiction over the City can be obtained by the mere filing of an amended summons and complaint in the same action." *See id.* Therefore, Justice Hurlbutt granted the defendants' motion and dismissed the action as against the City upon the ground of a lack of jurisdiction. *See id.* Alternatively, Justice Hurlbutt granted the defendants' motion as to the City on the ground that General Municipal Law § 207-c and Workers' Compensation Law §§ 11 and 29(6) provided plaintiff with his exclusive remedy against the City. *See id.*

Justice Hurlbutt then went on to address the issue of whether plaintiff's complaint, as amplified by his affidavit dated May 17, 1995, stated a facially valid claim against the individual defendants. *See* July 10th Decision at 2. Noting that the question of whether the individual defendants' conduct could support a jury award for intentional/reckless infliction of emotional distress was an extremely close one, Justice Hurlbutt found, after a review of the relevant case law, that plaintiff had alleged enough to defeat the defendants' motion to dismiss for facial insufficiency. *See id.* at 2-4 He, therefore, denied defendants' motion to dismiss this second cause of action.

***5** Under New York law, the doctrine of collateral estoppel "'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same.'" *Burgos v. Hopkins,* 14 F.3d 787, 792 (2d Cir. 1994) (quoting *Ryan v. New York Telephone Co.,* 62 N.Y.2d 494, 478 N.Y.S.2d 823, 826, 467 N.E.2d 487 (1984)). In order to apply the doctrine of collateral estoppel to bar litigation of an issue,

> "(1) the issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and actually decided, (3) there must have been a full and fair opportunity for litigation in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits."

Levy v. Kosher Overseers Ass'n of Am., Inc., No. 96-7051, 1997 WL 7687, *3 (2d Cir. Jan. 9, 1997) (quoting *Gelb v. Royal Globe Ins. Co.,* 798 F.2d 38, 44 (2d Cir. 1986); citing *Central Hudson Gas & Elec. Corp. v. Empressa Naviera Santa S.A.,* 56 F.3d 359, 368 (2d Cir. 1995)).

Applying this test to the present case, it is clear that defendants' reliance upon the doctrine of collateral estoppel is misplaced. With respect to the identity of issue requirement, defendants assert that the issue which was necessarily decided in the state action and which is decisive of the present action is whether General Municipal Law § 207-c is plaintiff's sole remedy against the City. A careful reading of Justice Hurlbutt's two decisions, however,

makes clear that this was not an issue which necessarily was decided in the previous action. First of all, in his March 10th Decision Justice Hurlbutt did not address the issue of the applicability of General Municipal Law § 207-c to the facts in front of him. In his July 10th Decision, although he did address the relevance of this statute, this discussion was not necessary to his decision to dismiss the complaint against the City. Justice Hurlbutt clearly dismissed the action for lack of jurisdiction and only alternatively on the ground that § 207-c provided plaintiff with his exclusive remedy against the City. Accordingly, because defendants have failed to satisfy the first requirement for the application of collateral estoppel, the court concludes that this doctrine does not bar the court's consideration of plaintiff's remaining state law tort claims.

C. Defamation (Foody, Falge, Boyle, Featherstone & McArdle)

With respect to plaintiff's fourth cause of action, defendants assert that plaintiff's complaint fails to state a claim for defamation with the necessary particularity. *See* Defendants' Memorandum of Law at 12. Specifically, defendants contend that plaintiff has not identified to whom Foody made the alleged defamatory statement and to which newspaper Boyle is alleged to have written his defamatory letter. *See id.* at 13. Moreover, defendants claim that plaintiff has not identified the specific words Hanna used in his purportedly defamatory letter to the *Syracuse Herald Journal* and similarly fails sufficiently to allege to whom the alleged defamatory statements placed in his personnel file were published. *See id.*

***6** In addition to this lack of particularity, defendants assert that this claim must fail because plaintiff has not demonstrated actual malice, a necessary element of plaintiff's claim because he is a public figure. *See* Defendants' Memorandum of Law at 13. In this regard, they allege that his statements are conclusory and insufficient to show actual malice. *See id.* at 14-15.

Finally, defendants argue that plaintiff has failed to set forth any actionable defamatory words. *See id.* at 15. To support this argument, defendants assert that these allegedly defamatory statements were made only after plaintiff was terminated and only after he sought the attention of the media regarding his dismissal, claiming that his dismissal was in direct retaliation for his testimony before the CRB. *See id.* at 16. Viewed in this context, defendants assert that the average person would construe these statements as the opinions of his former employers about his work performance and commentary by his supervisors about the claims plaintiff made to the media. *See id.*

In response to defendants' motion, plaintiff has submitted an affidavit with attached exhibits which more precisely set forth the allegedly defamatory statements and the newspapers in which they were published. In addition, he contends that defendants had full knowledge of the falsity of the statements they made because of their access to his confidential personnel file. *See* Plaintiff's Memorandum of Law at 19. Despite this knowledge, plaintiff claims that defendants made these statements to support their unwarranted dismissal of him. *See id.* Finally, plaintiff asserts that because these statements were made by people in the position to have more reliable information about plaintiff's personnel record than the average person, any statement they made would be more likely to be viewed as factual information rather than an opinion about plaintiff's work record. *See id.* at 19-20.

Pursuant to New York law "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, ..." N.Y. Civ. Prac. L. & R. 3016(a), as well as "the time, manner and persons to whom the publications were made." *Vardi v. Mutual Life Ins. Co. of N. Y.,* 136 A.D.2d 453, —, 523 N.Y.S.2d 95, 98 (1st Dep't 1988) (citing *Geddes v. Princess Properties International, Ltd.,* 88 A.D.2d 825, 451 N.Y.S.2d 150 (1st Dep't 1982)). Moreover, "'any qualification in the pleading thereof by use of the words "to the effect", "substantially", or words of similar import generally renders the complaint defective.'" *Geddes v. Princess Properties Int'l, Ltd.,* 88 A.D.2d 835, —, 451 N.Y.S.2d 150, 151 (1st Dep't 1982) (quoting *Gardner v. Alexander Rent-A-Car, Inc.,* 28 A.D.2d 667, 280 N.Y.S.2d 595) (other citation omitted)).

In addition, because Mr. Balduzzi is a public official he must satisfy the standard set forth in *New York Times Co. v. Sullivan,* 376 U.S. 254, 280, 84 S. Ct. 710, 726, 11 L.Ed.2d 686 (1964), in order to recover damages for defamation. *See Derrig v. Quinlan,* 125 A.D.2d 777, —, 508 N.Y.S.2d 952, 953 (3d Dep't 1986). Pursuant to this standard, a plaintiff may recover only when the statements were made with actual malice, "[d]efined as statements made by defendant with knowledge that they were false

or with reckless disregard of whether they were false." *Id.* (citation omitted).

***7** It is also well-settled that "[p]ure opinion - however misguided or vituperative - is entitled to the absolute protection of the State and Federal constitutional free speech guarantees." *Immuno AG. v. Moor-Jankowski,* 74 N.Y.2d 548, 555, 549 N.Y.S.2d 938, 941, 549 N.E.2d 129, —— (1989) (citation omitted). Whether a statement is an expression of fact or opinion is a question of law for the court. *See Miller v. Richman,* 184 A.D.2d 191, 592 N.Y.S.2d 201 (4th Dep't 1992). In making this determination, the New York Court of Appeals has recognized as helpful the following four factors identified by the plurality in *Ollman v. Evans,* 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied,* 471 U.S. 1127, 105 S. Ct. 2662, 88 L.Ed.2d 278 (1985):

> (1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might "signal to readers or listeners that what is being read or heard is likely to be opinion, not fact."

Immuno AG., at 557, 549 N.Y.S.2d at 942 (quoting *Steinhilber v. Alphonse,* 68 N.Y.2d, at 292, 508 N.Y.S.2d 901, 501 N.E.2d 550 (quoting in turn *Ollman,* 750 F.2d, at 979)).

In *Miller,* a case similar to the present one in that the complained of comments were made in the context of an employer-employee relationship, the plaintiff's supervisor allegedly told another supervisor that the plaintiff was "one of the worse [sic] secretaries at the firm," that her "work habits are bad," her "performance is bad," and that the plaintiff "is not what you are looking for." *Miller,* 184 A.D.2d at ——, 592 N.Y.S.2d at 202. The court found that these statements criticizing the plaintiff's performance were, as a matter of law, nonactionable expressions of opinion. *Id.* at ——, 592 N.Y.S.2d at 203 (and cases cited therein). The court explained that the unfavorable assessments of the plaintiff's work were "'incapable of being objectively characterized as true or false.'" *Id.* at ——, 592 N.Y.S.2d at 203 (citing *Park v. Capital Cities Communications,* 181 A.D.2d at 196, 585 N.Y.S.2d 902; *Amodei v. New York State Chiropractic Ass'n,* 160 A.D.2d 279, 553 N.Y.S.2d 713, *aff'd,* 77 N.Y.2d 890, 568 N.Y.S.2d 909, 571 N.E.2d 79).

Applying these standards to the various statements about which plaintiff complains in his fourth cause of action, the court concludes that none of them are sufficient to support a claim for defamation. First of all, with respect to plaintiff's allegation that defendants knowingly and intentionally published false and contrived allegations against him by inserting the same in his personnel file, the court finds that plaintiff's complaint lacks the particularity required to support a claim for defamation. *See* Plaintiff's Complaint at ¶ 65. This is so because plaintiff fails to allege to whom these statements were published and, in addition, fails to set forth the exact words complained of in these statements.

***8** With respect to Chief Foody's March 18, 1996, statement to a reporter from the *Post Standard* that "Sgt. Balduzzi has a problem getting along with all of his superiors," the court finds that plaintiff has met the requirement that he plead with particularity. He has provided the exact words about which he complains, who published the statement, to whom it was published, and when it was published. Nonetheless, this statement is insufficient to serve as a basis for plaintiff's defamation claim because it is no more than a statement of opinion. The meaning of this statement is certainly indefinite and ambiguous and, like the statements at issue in *Miller,* it is not capable of being objectively characterized as true or false.

In paragraph 62 of his complaint, plaintiff refers to a letter which Deputy Chiefs of Police Boyle, Falge, Duval, and Thompson wrote to the *Syracuse Herald Journal* and which was published on March 18, 1996. This letter states, inter alia, that

> Mr. Balduzzi's 14-year history of poor performance, coupled with incidents of serious misconduct and inferior judgment, led to this department's request for his dismissal. It was preceded by 14 substantiated acts of serious misconduct, including the distribution and sale of electronic "stun guns" to fellow officers and the indiscriminate spraying of pepper spray at three young girls in a southwest housing project.

> These described incidents, along with numerous others, point to a pattern of serious deviation from acceptable police-officer conduct.

See Complaint at ¶ 62; Balduzzi Affidavit, Exhibit 5 attached thereto.

This letter was published in the *Syracuse Herald Journal* under the heading "In Your Opinion" and apparently was written in response to an earlier editorial which had been published in the same paper. The court is convinced that, as a matter of law, this statement clearly fits within the definition of opinion which the New York Court of Appeals has said is entitled to absolute protection however misguided or vituperative. *See Immuno AG.,* 74 N.Y.2d at 555, 549 N.Y.S.2d at 941, 549 N.E.2d at —.

This conclusion is supported by the New York Court of Appeals' discussion in *Immuno AG.* concerning the three major types of journalistic activity: news reporting, commentary or criticism, and letters to the editor. *See Immuno AG.,* 74 N.Y.2d at 557, 549 N.Y.S.2d at 942. The "In Your Opinion" letter at issue here is a prime example of this third category. As the Court of Appeals noted about such letters, "'[t]he common expectation of a letter to the editor is not that it will serve as a vehicle for the rigorous and comprehensive presentation of factual matter but as one principally for the expression of individual opinion.'" *Immuno AG.,* 74 N.Y.2d at 558, 549 N.Y.S.2d at 943 (quoting 145 A.D.2d, at 129, 537 N.Y.S.2d 129).

The final statement about which plaintiff complains is one which Lieutenant W.J. Hanna III, who is not a defendant in this action, made in a letter to the *Syracuse Herald Journal* on March 22, 1996.[5] Plaintiff does not set forth the exact words of this statement in his complaint. He merely asserts that Lieutenant Hanna, as an agent for the City and SPD, "[p]resented the Plaintiff in a false light, namely, that the Plaintiff has had a 14-year disciplinary problem and was not a model employee." *See* Complaint at ¶ 64. This allegation, therefore, lacks the particularity required for a claim of defamation.

[5] A notation on Exhibit 6 attached to Balduzzi's Affidavit states that this statement was published in the *Post Standard.*

***9** Moreover, a review of this document makes clear that it is not defamatory. This letter reads, in pertinent part, that "You [the newspaper] have taken an internal disciplinary matter which has spanned 14 years and made it appear as though a model employee suddenly has fallen from grace and has been 'persecuted,' as you call it." *See* Balduzzi Affidavit, Exhibit 5 attached thereto. No one who read this statement could objectively believe that it was a criticism of Mr. Balduzzi. At most it is a criticism of the newspaper's editorial coverage of Mr. Balduzzi's dismissal. Therefore, the court finds that this statement cannot form the basis for plaintiff's defamation claim.

For the reasons set forth above, the court concludes that none of the statements referred to in plaintiff's fourth cause of action are sufficient to maintain a claim for defamation. Accordingly, the court grants defendants' motion for summary judgment with respect to plaintiff's fourth cause of action.

D. Intentional Infliction of Emotional Distress (Foody, Boyle, Falge, Kerwin, Featherstone & McArdle)

Defendants assert that plaintiff's allegations are woefully inadequate to sustain a claim for intentional infliction of emotional distress. *See* Defendants' Memorandum of Law at 18. In this regard, they contend that plaintiff's claims that he was falsely accused, disciplined and embarrassed fall far short of the type of outrageous conduct required to allege a claim of intentional infliction of emotional distress. *See id.* To the contrary, defendants characterize these claims as nothing more than common disagreements endemic to supervisor-employee disputes. *See id.* at 18-19.

In response, plaintiff contends that defendants' actions toward him were designed for one purpose - to injure him mentally and physically until he was terminated from SPD. *See* Plaintiff's Memorandum of Law at 18. He also asserts that defendants have made false claims against him to the general public and his peers and have disciplined him for no rational reason, all in retaliation for his testimony at the CRB. *See id.*

Under New York law, in order to maintain a cause of action for intentional infliction of emotional distress, a plaintiff

> [m]ust satisfy the rule set out in Restatement of Torts, Second, which we adopted in *Fischer v. Maloney,* 43

N.Y.2d 553, 557, 402 N.Y.S.2d 991, 373 N.E.2d 215, that "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress" (§ 46, subd. [1]). Comment d to that section notes that: "Liability 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".

Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 303, 461 N.Y.S.2d 232, 236, 448 N.E.2d 86, —— (1983).

***10** Plaintiff relies upon *Kaminski v. United Parcel Serv.,* 120 A.D.2d 409, 501 N.Y.S.2d 871 (1st Dep't 1986), to support his contention that his complaint alleges conduct which meets this standard. In *Kaminski,* the plaintiff, a driver for UPS who had been a former prison guard at Riker's Island, was accused of not having reported the receipt of cash payment for a package. The plaintiff denied the charge. The individual defendants, employees of UPS, told the plaintiff that he had been identified as the thief by two eyewitnesses. They then allegedly began to threaten the plaintiff with a criminal prosecution and a prison term at Riker's Island if he did not admit stealing the money, agree to return the money, resign, and waive his rights to all health, hospital and pension benefits. The plaintiff alleged that for three hours he was subjected to these threats which were accompanied by loud, aggressive, profane and obscene language and gestures. In addition, the plaintiff asserted that at all times one of the defendants blocked the door to the office. Finally, under duress and still denying the accusation, the plaintiff signed resignation papers and documents relinquishing his pension plan and health and hospital benefits and a statement admitting his guilt.

There is no doubt that the conduct complained of in *Kaminski,* if true, constituted outrageous conduct. Mr. Balduzzi's allegations, however, fall far short of this standard and certainly do not approach the kind of outrageous conduct that was present in *Kaminski.* Basically, the allegations contained in the complaint in this action concern certain negative comments defendants allegedly made to the public about Mr. Balduzzi's job performance, certain allegedly discriminatory and harassing employment actions defendants took against him, and certain allegedly false claims defendants made against him in order to have him terminated. Although this conduct allegedly continued for an extended period of time, and if true is certainly unprofessional and inappropriate, the court concludes that these actions and comments are not "beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Murphy,* 58 N.Y.2d at 303, 461 N.Y.S.2d at 236, 448 N.E.2d at ——. Accordingly, the court grants defendants' summary judgment motion with respect to plaintiff's sixth cause of action.

II. Federal Constitutional Claims

A. First Amendment - Freedom of Speech (City, SPD, Foody & Boyle)

Defendants concede, at least for purposes of this motion, that plaintiff has stated a cause of action for which relief can be granted with respect to his First Amendment claim. *See* Defendants' Memorandum of Law at 9. Nonetheless, defendants contend that the court should abstain from exercising its jurisdiction over this claim as well as plaintiff's second cause of action pursuant to *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971), in view of the pending arbitration proceedings and state court action and the state statutory remedies available to plaintiff. *See id.* at 20.

***11** In support of this argument, defendants assert that this case easily satisfies the three prong test for *Younger* abstention set forth in *Thomas v. New York City,* 814 F. Supp. 1139 (E.D.N.Y. 1993). Pursuant to this test, the court must determine "(1) whether a state civil proceeding is pending at the time the federal litigation is commenced, (2) the magnitude of the state's interest in adjudicating the matter, and (3) whether the plaintiffs are able to raise the same claims raised in the federal action in the state forum." *Id.* at 1149 (citing *Christ the King Regional High School v. Culvert,* 815 F.2d 219, 224 (2d Cir.), *cert. denied,* 484 U.S. 830, 108 S. Ct. 102, 98 L.Ed.2d 63 (1987)) (other citations omitted).

Defendants assert that this case easily satisfies the first prong of this test because there is currently pending a state court action against McArdle and Featherstone which was commenced prior to this action, which involves the same incidents that form the basis of plaintiff's complaint in this action, and in which plaintiff could have included all of the defendants and all the claims present in the instant action. *See* Defendants' Memorandum of Law at 20. In addition, defendants note that there are ten separate

arbitration proceedings pending which challenge every act that plaintiff raises in his complaint. *See id.*

With respect to the second prong of this test, defendants assert that New York has a compelling interest in cases that involve employer-employee relationships. *See id.* at 21. Moreover, defendants contend that New York by enacting Civil Rights Law §§ 75 and 75-b has created a comprehensive scheme to regulate the removal and discipline of persons in the civil service and to provide a remedy for retaliatory action by public employers. *See id.*

Finally, defendants assert that the third prong of this test is met because the constitutional right that plaintiff seeks to vindicate is protected by New York's statutory scheme. *See* Defendants' Memorandum of Law at 21-22. In this regard, defendants assert that New York Civil Service Law § 75-b provides that where an employee is subjected to a collective bargaining agreement provision for final and binding arbitration to resolve an alleged violation of the agreement and the employee believes that the employer took a personnel action against him in retaliation for a disclosure made by the employee, "the arbitrator shall consider the claim and determine merits and shall, if a determination is made that such adverse personnel action is [retaliatory], take such action to remedy the violation as is permitted by the collectively negotiated agreement." *See id.* at 22 (quoting N. Y. Civ. Serv. Law § 75-b (McKinney 1996)). Finally, defendants assert that under this statutory scheme should the arbitrator find that defendants retaliated against plaintiff, the arbitrator could award plaintiff reinstatement and back pay, a remedy which would make him whole and provide him with a more complete remedy than § 1983. *See id.*

***12** In response to this motion, plaintiff raises three issues. First, he asserts that neither the state court action nor the pending arbitration proceedings concern the acts complained of in his federal complaint. *See* Plaintiff's Memorandum of Law at 4-5. In this regard, plaintiff asserts that the events at issue in the present action occurred some time during the first part of October 1995 and continue to the present whereas the state court action and arbitration proceedings concern events which occurred at least seven months earlier. *See id.* at 4.

Second, in response to defendants' contention that New York has a statutory scheme in place to handle complaints such as his, plaintiff asserts that abstention would be improper for three reasons: (1) the state process itself has been called into question; (2) the arbitrator can neither provide plaintiff with complete relief nor can she prevent a reoccurrence of the offensive behavior; and (3) the law does not limit the commencement of a civil action for damages suffered as a result of an intentional tort. *See id.* at 5.

With respect to the state process itself, plaintiff asserts that even if the necessary predicates for abstention are met, the court should not abstain if the state proceedings were undertaken in bad faith or for the purposes of harassment or if extraordinary circumstances exist. *See* Plaintiff's Memorandum of Law at 6. In this case, plaintiff argues that defendants have undertaken proceedings against him for purposes of harassment by retaliating against him. *See id.* Moreover, plaintiff alleges that defendants brought the termination proceedings against him in bad faith to cover up and attempt to validate through informal proceedings their wrongful activities. *See id.* (citing Complaint at ¶ 75-77, 81). To support this contention, plaintiff relies upon the alleged statement of Deputy Chief Boyle that "If any of you talk to the CRB Board or the press, you're marked men." *See id.* (citing Balduzzi Affidavit, Exhibit 3 attached thereto).

With respect to the issue of whether the state process can fully compensate him for his injuries, plaintiff asserts that because all the arbitrator can award is plaintiff's return to work, back pay, and the direction that plaintiff receive medical treatment for physical injuries, plaintiff would not be fully compensated. *See* Plaintiff's Memorandum of Law at 7. Moreover, plaintiff contends that the arbitrator would not be able to compensate plaintiff for his injured and destroyed reputation, both professional and personal. *See id.* Most importantly, asserts plaintiff, the arbitrator could not vindicate plaintiff, clear his name publicly and professionally, or return him to the position of trust and leadership he once held in his profession and in the community. *See id.*

With regard to whether the state statutory scheme is a bar to this action, plaintiff contends that under this scheme there is no express limitation against commencement of actions involving intentional torts. *See* Plaintiff's Memorandum of Law at 7. To support this contention, he states that nothing in either § 75-b(4) nor in General Municipal Law § 207-c expressly limits commencement of a civil action for intentional tort. *See id.* at 7-8.

***13** Finally, plaintiff argues that abstention is improper in cases which involve First Amendment claims. *See id.* at 8. In this regard, plaintiff contends that his First Amendment claims "cannot and should not be resolved by an arbitrator." *See id.* at 9. Rather, he asserts that a fundamental right such as this one deserves to be heard in federal court.

Although the parties assert various arguments in support of and in opposition to abstention, they fail to address a very fundamental issue -- whether *Younger* abstention is appropriate in a federal case such as the present one in which the only relief sought is money damages. Neither the Supreme Court nor the Second Circuit has addressed this issue directly, but recent case law in both forums leads this court to conclude that *Younger* abstention is not appropriate in such cases, absent some very extraordinary circumstances.

In the recent case of *Tribune Co. v. Abiola,* 66 F.3d 12 (2d Cir. 1995), the Second Circuit addressed the issue of whether a district court may abstain from exercising its jurisdiction pursuant to *Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S. Ct. 1098, 87 L.Ed. 1424 (1943), when a plaintiff asserts claims only for money damages. The court noted, as a preliminary matter, that there is little consensus among the circuits about this issue. *See Abiola,* 66 F.3d at 16. However, it found significant the fact that in *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 109 S. Ct. 2506, 105 L.Ed.2d 298 (1989) ("NOPSI"), the Supreme Court carefully traced the origin of abstention doctrines to the federal court's discretion to withhold equitable relief. *Abiola,* 66 F.3d at 16. The court concluded that the Court's decision in *NOPSI* left little doubt that *Burford* abstention is generally appropriate only in cases where equitable relief is sought. *Id.*

In *NOPSI,* the case upon which the Second Circuit relied in *Abiola,* the Supreme Court addressed the applicability of both *Burford* and *Younger* abstention to the record before it. There, the plaintiff sought declaratory and injunctive relief in the federal court on the grounds that the defendant's rate order was pre-empted by federal law. The district court abstained on the grounds that both *Younger* and *Burford* applied. The Fifth Circuit upheld this decision. The Supreme Court disagreed. The Supreme Court began its analysis by noting that although "[t]here are some classes of cases in which the withholding of authorized equitable relief because of undue interference with state proceedings is 'the normal thing to do,' ... [abstention] remains "'the exception not the rule."'" *NOPSI,* 491 U.S. at 359, 109 S. Ct. at 2513, 105 L.Ed.2d at —— (quoting *Younger v. Harris,* 401 U.S. at 45, 91 S. Ct. at 751; *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 236, 104 S. Ct. 2321, 2327, 81 L.Ed.2d 186 (1984) (quoting in turn *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813, 96 S. Ct. 1236, 1244, 47 L.Ed.2d 483 (1976))).

***14** With these principles in mind, the Court found that because NOPSI's facial pre-emption claim could be resolved without venturing beyond the four corners of the Council's rate order, federal adjudication of that claim would not unduly intrude into state governmental process or undermine the state's ability to maintain the desired uniformity in the treatment of essentially local problems. Therefore, the Court held that *Burford* abstention was not appropriate. *See NOPSI,* 491 U.S. at 363, 109 S. Ct. at 2515, 105 L.Ed.2d at ——. In addition, the Court found that *Younger* abstention was, likewise, inappropriate because the Council's proceedings were not judicial in nature since ratemaking was essentially a legislative act. *See id.* at 371-72, 109 S. Ct. at 2519-20, 105 L.Ed.2d at ——.

Recently the district court for the District of Connecticut reviewed the holdings of both *Abiola* and *NOPSI* and concluded that *Younger* abstention did not apply to the action for monetary damages before it, although the court left open the possibility that there might be a money damages case in which *Younger* abstention would be appropriate. *DeLoreto v. Ment,* No. 3:96 CV 00859, 1996 WL 633844 (D. Conn. Aug. 2, 1996).

In *DeLoreto,* the plaintiffs, eleven former employees of the State of Connecticut Judicial Department, brought a civil action under § 1983 asserting that their termination from employment violated their constitutional rights to procedural due process and equal protection under the Fourteenth Amendment and their First Amendment rights to freedom of speech and freedom of association. They sought compensatory damages, punitive damages, attorney's fees and costs pursuant to § 1988 and a temporary and permanent injunction requiring the defendants to reinstate them with full back pay and benefits. A few weeks prior to commencing their federal action, the plaintiffs in *DeLoreto* had initiated grievance

proceedings through their union raising some of the same issues. Like defendants in this case, the defendants in *DeLoreto* asserted that *Younger* abstention barred the plaintiffs' action.

The court began its analysis with the proposition that "[o]nly under 'exceptional circumstances' may federal courts eschew their duty to exercise jurisdiction over all cases properly before them." *DeLoreto,* 1996 WL 633844, at *3 (citing *Colorado River Conservation District v. United States,* 424 U.S. 800, 813, 817-18, 96 S. Ct. 1236, 1244, 1246-47, 47 L.Ed.2d 483 (1976)). The court noted, however, that in *Younger,* the Supreme Court had enunciated the principle that where there is an ongoing state criminal proceeding, a federal court should abstain from enjoining the criminal proceeding except in the very unusual situation where an injunction was necessary to prevent great and immediate irreparable injury. *See id.* The court also noted that the Supreme Court had extended *Younger* to include civil proceedings in which important state interests are involved and state administrative proceedings in which important state interests are vindicated as long as the plaintiff would have a full and fair opportunity to litigate her constitutional claims. *See id.*

***15** With these principles in mind, the *DeLoreto* court went on to address the issue of whether *Younger* abstention is appropriate in federal cases in which only money damages are sought. It noted that although neither the Supreme Court nor the Second Circuit had directly addressed this issue, the Second Circuit had recently held with respect to *Burford* abstention that "except possibly 'in highly unusual circumstances, not now foreseeable,' abstention is generally appropriate only in cases where equitable relief is sought." *Id.* at *4 (quoting *Tribune Co. v. Abiola,* 66 F.3d 12, 16 (2d Cir. 1995)). Although noting that *Abiola* concerned abstention under *Burford* rather than *Younger,* the *DeLoreto* court found significant the fact that the Second Circuit's decision was based in large part upon *NOPSI. DeLoreto,* 1996 WL 633844, at *4 (citing *NOPSI,* 491 U.S. at 359, 109 S. Ct. at 2513-14).

Based upon both *Abiola* and *NOPSI,* the *DeLoreto* court concluded that abstention was inappropriate in a federal action seeking only money damages, at least on the facts of the case before it. In support of this conclusion, the court explained that the case before it arose in a different context than the vast majority of cases in which *Younger* abstention had been applied. In this regard, the court noted that the plaintiffs were not asking to enjoin a state proceeding or to declare unconstitutional any state procedures or laws involved in the proceedings. Nor were they seeking a declaratory judgment with respect to the grievances pending in the state proceedings. Rather, the plaintiffs' action was for "garden-variety monetary damages resulting from their terminations allegedly in violation of their constitutional rights." *DeLoreto,* 1996 WL 633844, at *4.

The present case is remarkably similar to *DeLoreto.* Here, as in *DeLoreto,* plaintiff seeks only monetary damages, both compensatory and punitive, alleging that his termination by defendants violated his First Amendment right to freedom of speech. He has not asked the court for any equitable relief. Moreover, he asserts that the actions complained of in this proceeding are separate and distinct from those which form the basis of his state court action and the arbitration proceedings. Under these circumstances, the court agrees with the *DeLoreto* court that *Younger* abstention is inappropriate. Accordingly, the court denies defendants' request that it abstain from adjudicating plaintiff's federal claims.

B. Fifth & Fourteenth Amendments - Denial of Due Process (Foody, Falge, Duval, Boyle & Thompson)

In his complaint, plaintiff states that he has a privacy interest in his police department personnel file pursuant to § 50-a of New York Civil Rights Law. *See* Complaint at ¶ 34. He contends that in April 1996, defendants Foody, Falge, Boyle, Duval and Thompson violated this right to privacy by meeting with the editorial board of the *Syracuse Herald Journal* and disclosing to them portions and contents of his personnel records which are used to evaluate his performance toward continued employment or promotion without his consent or court mandate. *See id.* at ¶¶ 36-38.

***16** In his memorandum of law, plaintiff attempts to change the focus of his due process claim. Rather than claiming that defendants violated his "privacy" interest in his personnel records, he asserts that they violated his "property" interest in the privacy of these same records. *See* Plaintiff's Memorandum of Law at 14. Moreover, he contends that New York Civil Rights Law § 50-a provides him with a property interest in his police department personnel file. *See id.* at 12.

In support of their assertion that plaintiff has failed to state a due process claim under § 1983, defendants argue that plaintiff has failed to identify a federal statutory or constitutional right violated by the alleged disclosure of his personnel files. *See* Defendants' Memorandum of Law at 10. Moreover, they argue that violation of a state law is not sufficient to establish a claim under § 1983. *See id.* Finally, defendants assert that plaintiff's second cause of action is, in essence, one for defamation, and that the Supreme Court has expressly rejected a § 1983 cause of action for defamation. *See id.* at 11.

Whether plaintiff claims a property interest or a privacy interest in his personnel files, his reliance upon New York Civil Rights Law § 50-a as the basis for his due process claim is not supportable. New York courts that have addressed similar arguments have unanimously concluded that there is no private right of action on the part of police officers for violations of § 50-a. *See Reale v. Kiepper,* 204 A.D.2d 72, 611 N.Y.S.2d 175 (1st Dep't 1994), *leave to appeal denied,* 84 N.Y.2d 813, 647 N.E.2d 121, 622 N.Y.S.2d 915 (1995); *Poughkeepsie Police Benevolent Ass'n, Inc. v. City of Poughkeepsie,* 184 A.D.2d 501, 584 N.Y.S.2d 168 (2d Dep't 1992); *Simpson v. New York City Transit Authority,* 112 A.D.2d 89, 491 N.Y.S.2d 645 (1st Dep't), *aff'd,* 66 N.Y.2d 1010, 499 N.Y.S.2d 396, 489 N.E.2d 1298 (1985). Nor does New York recognize any common law right to privacy. *See Simpson,* 112 A.D.2d at ——, 491 N.Y.S.2d at 646 (citations omitted).

Absent any support in either state common law or statutory law, plaintiff has failed to establish any basis for his constitutional due process claim. Accordingly, the court grants defendants' motion for summary judgment with respect to plaintiff's second cause of action.

CONCLUSION

For the reasons stated above, the court GRANTS defendants' motion for summary judgment with respect to plaintiff's second, third, fourth, fifth, sixth, seventh, and eighth causes of action. The court, however, DENIES defendants' motion to abstain from exercising its jurisdiction over plaintiff's first cause of action.

IT IS SO ORDERED.

All Citations

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29 Misc.3d 1216(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Supreme Court, New York County, New York.

BANK OF AMERICA, N.A., as Trustee for the Registered Holders of Wachovia Bank Commercial Mortgage Trust 2007–C30, acting by and through its Special Servicer, CWCapital Asset Management LLC, Bank of America, N.A., as Trustee for the Registered Holders of Cobalt CMBS Commercial Mortgage Trust 2007–C2, acting by and through CWCapital Asset Management LLC pursuant to the authority granted under that certain Amended and Restated Co–Lender Agreement dated March 12, 2007 and U.S. Bank National Association, as Trustee for the Registered Holders of Wachovia Bank Commercial Mortgage Trust 2007–C31, MLCFC Commercial Mortgage Trust 2007–5 and MLCFC Commercial Mortgage Trust 2007–6, acting by and through CWCapital Asset Management LLC pursuant to the authority granted under that certain Amended and Restated Co–Lender Agreement dated March 12, 2007, Plaintiffs,

v.

PSW NYC LLC, Defendant.

No. 651293/10.
|
Sept. 16, 2010.

Attorneys and Law Firms

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Opinion

RICHARD B. LOWE, J.

***1** In this action, plaintiffs Bank of America, N.A. and U.S. Bank National Association seek to enforce their rights under an Amended and Restated Intercreditor Agreement dated February 16, 2007 (Intercreditor Agreement). The two-count complaint asserts one cause of action for a declaration of plaintiffs' rights under the Intercreditor Agreement, and one cause of action for injunctive relief preventing defendant PSW NYC LLC (PSW) from acquiring or selling certain equity collateral without first paying plaintiffs outstanding indebtedness under a senior loan, and from causing the commencement of bankruptcy proceedings while the senior loan is outstanding.

Plaintiffs now move, by order to show cause, for a preliminary injunction that enjoins PSW from the conduct complained of in the second cause of action.

Facts [1]

[1] The material facts on this motion, which are not disputed by the parties, are taken from the following documents: the complaint; the affidavit of Andrew Hundertmark (Hundertmark), senior vice president of CWCapital Asset Management LLC (CWCAM), which is the entity acting as "Special Servicer" of the loan and mortgage that are the subject of this action; the affidavit of Michael Ashner (Ashner), the chairman and chief executive officer of Winthrop Realty Trust, an indirect owner and administrative manager of PSW; and the exhibits submitted with these papers. PSW does not dispute Hundertmark's assertion that CWCAM is responsible for administering the Senior Loan on behalf of the Senior Lenders (as these terms are defined below), and that CWCAM has the exclusive right and obligation to administer, service and make all decisions and determinations regarding the Senior Loan and to enforce the documents relating to the Senior Loan, including the Intercreditor Agreement.

In 2007, non-party Tishman Speyer Development Corp. (Tishman) purchased from non-party Metropolitan Tower Life Insurance Company the residential housing development known as Peter Cooper Village and Stuyvesant Town (Property) for $5.4 billion. Tishman created various related entities to complete the

transaction, with PCV ST Owner LP and ST Owner LP (together, Borrowers) serving as the entities holding title to the Property. To finance the purchase, the Borrowers secured a loan in the amount of $3 billion (Senior Loan) from Wachovia Bank, N.A. (Wachovia) and Merrill Lynch Mortgage Lending, Inc. (Merrill). The terms of the Senior Loan are stated in an Amended and Restated Loan and Security Agreement, dated February 16, 2007 (Senior Loan Agreement), entered into by Borrowers, and by Wachovia and Merrill as co-lenders (together, Senior Lenders). On the same day, the Borrowers executed and delivered to the Senior Lenders six notes evidencing their indebtedness of $3 billion under the Senior Loan (Notes), each of which is currently held in a mortgage securitization trust (Trust). The plaintiffs are the trustees of those Trusts. The Borrowers also executed a First Amendment to Mortgage, Security Agreement, Assignment of Rents and Fixture Filing, whereby they granted to the Senior Lenders a security interest in the Property (Amended Mortgage).

In order to secure an additional $1.4 billion in financing, the direct and indirect parents of the Borrowers (Junior Borrowers) pledged their direct and indirect ownership interests in the Borrowers and their respective general partners in exchange for 11 mezzanine loans (Junior Loans) issued by various lenders (Junior Lenders), with priority running in sequential order from Junior 1 Loan, as most senior, to Junior 11 Loan, as most junior.[2] Each of the Junior Loans was governed by a separate Mezzanine Loan Agreement (Mezzanine Loan Agreement), dated February 16, 2007. In addition, pursuant to separate Pledge and Security Agreements, also dated February 16, 2007, each Junior Lender was granted a first priority security interest in the corresponding Junior Borrower's ownership interest in the respective subsidiary Borrower or Junior Borrower and that entity's general partner (Equity Collateral). The Junior Lenders were not granted a security interest in the Property and are not creditors of the Borrowers.

[2] Under the Intercreditor Agreement, Wachovia, Merrill and non-party Gramercy Warehouse Funding I LLC were "Junior Lenders." Intercreditor Agreement, Hundertmark Aff., Ex. E, at 1 and 11. Wachovia and Merrill were the original Junior Lenders on, among others, Junior Loans 1–3, each of which was in the original principal amount of $100 million. Thus, Wachovia and Merrill were both Senior Lenders and Junior Lenders. Hundertmark states that Junior Loans 1–3 were owned by non-parties AIB Debt Management Limited, Deutsche Genossenschafts–Hypothekenbank AG, Hartford Fire Insurance Company, Hartford Life Insurance Company, Concord Real Estate CDO 2006–1 LTD, and Wachovia.

***2** Also on February 16, 2007, Wachovia and Merrill, in their capacities as Senior and Junior Lenders, entered into the Intercreditor Agreement. Plaintiffs identify several provisions of the Intercreditor Agreement that are relevant to their motion for a preliminary injunction. Section 9 is titled "*Subordination of Junior Loans and Junior Loan Documents.*" Intercreditor Agreement, at 59 (emphasis in original). Subsection 9(a) provides, in pertinent part, as follows:

> Each Junior Lender hereby subordinates and makes junior the Junior Loan held by such Junior Lender, the related Junior Loan Documents and the liens and security interests created thereby, and all rights, remedies, terms and covenants contained therein to (i) the Senior Loan and the applicable Senior Junior Loans, (ii) the liens and security interests created by the Senior Loan Documents and the applicable Senior Junior Loan Documents.... *Id.* at 59–60.

Section 6 is titled "*Foreclosure of Separate Collateral.*" *Id.* at 54 (emphasis in original). Subsection 6(d) provides as follows:

> *To the extent that any Qualified Transferee acquires the Equity Collateral pledged to a Junior Lender pursuant to the Junior Loan Documents in accordance with the provisions and conditions of this Agreement* (including, but not limited to *Section 12* hereof), *such Qualified Transferee shall acquire the same subject to (i) the Senior Loan and the terms, conditions and provisions of the Senior Loan Documents* and (ii) the applicable Senior Junior Loans and the terms, conditions and provisions of the applicable Senior Junior Loan Documents, in each case for the balance of the term thereof, which shall not be accelerated by Senior Lender or the related Senior Junior Lender solely due to such acquisition and shall remain in

> full force and effect; *provided, however, that* (A) such Qualified Transferee shall cause, within ten (10) days after the transfer, (1) Borrower and (2) the applicable Senior Junior Borrowers, in each case to reaffirm in writing, subject to such exculpatory provisions as shall be set forth in the Senior Loan Documents and the related Senior Junior Loan Documents, as applicable, all of the terms, conditions and provisions of the Senior Loan Documents and the related Senior Junior Loan Documents, as applicable, on Borrower's or the applicable Senior Junior Borrower's, as applicable, part to be performed and *(B) all defaults under (1) the Senior Loan and (2) the applicable Senior Junior Loans, in each case which remain uncured or unwaived as of the date of such acquisition have been cured by such Qualified Transferee* or in the case of defaults that can only be cured by the Junior Lender following its acquisition of the Equity Collateral, the same shall be cured by the Junior Lender prior to the expiration of the applicable Extended Non–Monetary Cure Period.

Id. (emphasis added).

Section 11(d) is titled "*Bankruptcy* " (*id.* at 66 [emphasis in original]), and subsection (ii) provides, in pertinent part, as follows:

> ***3** *For as long as the Senior Loan shall remain outstanding, none of the Junior Lenders shall solicit, direct or cause Borrower or any other entity which Controls Borrower ... or any other Person to: (1) commence any Proceeding against Borrower* or any SPE Constituent Entity; (2) institute proceedings to have Borrower or any SPE Constituent Entity adjudicated a bankrupt or insolvent; (3) consent to, or acquiesce in, the institution of bankruptcy or insolvency proceedings against Borrower ... or (9) *take any action in furtherance of any of the foregoing.* The terms and provisions of this *Section 11(d)* apply to each Junior Lender solely in its respective capacity as a Junior Lender. If any Junior Lender commences an Equity Collateral Enforcement Action against any Junior Borrower, and pursuant to such Equity Collateral Enforcement Action, such Junior Lender takes title to the Equity Collateral of such Junior Borrower, from and after the date title to such Equity Collateral is vested in such Junior Lender (as applicable), such Junior Lender shall be bound by the terms and provisions of the respective organizational documents of such Junior Borrower regarding bankruptcy and all matters requiring the vote of the independent directors/managers/members of such Junior Borrower.

Id. (emphasis added).

On January 8, 2010, the Borrowers defaulted on the Notes by failing to pay the monthly installments required thereunder (Default). By letter dated January 8, 2010, CWCAM notified the Borrowers of the Default and demanded that they pay all unpaid amounts then due. Also on January 8th, CWCAM notified the Junior Lenders of the Default, which afforded the Junior Lenders the opportunity to cure under section 12(a) of the Intercreditor Agreement (*id.* at 68), but none of the Junior Lenders exercised their rights to cure the Default. By letter dated January 29, 2010, CWCAM notified the Borrowers and the Junior Lenders that the unpaid debt outstanding under the Notes was accelerated, making all amounts immediately due and payable, for failure to cure the Default (Acceleration). As a result of the Default and Acceleration, the full outstanding principal balance of the Senior Loan, all accrued and unpaid interest thereon and all other sums owing under the Senior Loan documents became due and payable.

On February 16, 2010, CWCAM, on behalf of the Senior Lenders, filed a complaint (as amended by the filing of an amended complaint on February 18th) in the United States District Court for the Southern District of New York, seeking foreclosure of the Property. On June 21, 2010, the District Court entered a Judgment of Foreclosure and Sale of the Property, in favor of the Senior Lenders, in the amount of $3,666,734,464.70, which is the amount due and owing to plaintiffs under the Notes, the Amended Mortgage, and the related Senior Loan documents (Indebtedness). *Bank of America, N.A. et al. v. PCV ST Owner LP et al.,* 10–Civ–1178 (SD NY, June 21, 2010).

***4** By letter dated August 6, 2010, Wells Fargo, as successor by merger to Wachovia, notified, among others, the Senior Lenders, that it transferred its interest in Junior Loans 1–3 to PSW (Hundertmark Aff., Ex. K), thereby placing PSW directly behind the Senior Lenders in structural priority and entitling PSW to receive any value of the Property above the amounts owed on the Senior Loan (PSW Opp. Brief, at 6; Ashner Aff., ¶ 8). The Wells Fargo notice certified that PSW is a "Qualified Transferee" as that term is defined in the Intercreditor Agreement. *Id.* As discussed above, these loans have a

combined face value of $300 million but were acquired by PSW for $45 million. Also on August 6th, PSW executed a "REPRESENTATION CERTIFICATE," whereby it notified, among others, the Senior Lenders, that it "agree[d] to be bound by [the] Intercreditor Agreement" with respect to Junior Loans 1–3, stating that PSW "does hereby remake, for the benefit of the Senior Lenders and the Junior Lenders, each of the representations in the Intercreditor Agreement which are applicable to the Mezzanine 1 Loan, Mezzanine 2 Loan and Mezzanine 3 Loan...." *Id.,* Ex. M.

The next day, August 7th, PSW notified, among others, the Senior Lenders, that it intended to sell the Equity Collateral at a UCC public sale on August 25, 2010. On August 8th, the New York Times published a "NOTICE OF PUBLIC SALE OF COLLATERAL" for Junior Loans 1–3, scheduled for August 25, 2010, and in these notices PSW "reserve[d] the right to credit bid at the auction and to assign its bid," and "to adjourn, continue or cancel the auction without further notice" (UCC Sale). *Id.,* Ex. Q.

By letter dated August 10, 2010, counsel for the Senior Lenders requested that PSW provide support for its conclusion that it is a "Qualified Transferee" under the Intercreditor Agreement, and that PSW confirm that it will cure the Senior Loan Default as a condition to any acquisition or transfer of the Equity Collateral, as required under section 6(d) of the Intercreditor Agreement. In a response letter dated August 11th, PSW characterized the Senior Lenders' statements about section 6(d) as "ludicrous," and informed the Senior Lenders that section 6(d) "of the Intercreditor Agreement does not require the payment of the Senior Loan as a condition to a transferee acquiring the Equity Collateral." *Id.,* Ex. T. Thereafter, plaintiffs filed the instant motion for a preliminary injunction.

Discussion

"The three prerequisites for obtaining a preliminary injunction are likelihood of success on the merits, irreparable injury in the absence of such injunctive relief, and balancing of the equities." *Seitzman v. Hudson Riv. Assoc.,* 126 A.D.2d 211, 213, 513 N.Y.S.2d 148 (1st Dept 1987); *Alexandru v. Pappas,* 68 A.D.3d 690, 691, 890 N.Y.S.2d 593 (2d Dept 2009) (plaintiffs need only make "a prima facie showing" of their right to relief).

Likelihood of Success

Plaintiffs seek a declaration that, pursuant to sections 6(d)(B)(1) and (2) of the Intercreditor Agreement, PSW, or any purchaser of the auctioned Equity Collateral, is required to cure all Senior Loan defaults prior to acquiring the Equity Collateral. Plaintiffs also seek a declaration that section 11(d)(ii) of the Intercreditor Agreement prohibits PSW from orchestrating a Borrower's bankruptcy unless the Senior Loan is paid off in full. PSW counters that section 6(d) does not impose a pre-condition to the acquisition of Equity Collateral, but rather, applies only after the acquisition; that section 6(d) pertains to acceleration of the Senior Loan, which is irrelevant because that loan has already been accelerated and PSW is not seeking to prevent acceleration; and that the collateral it intends to sell at the UCC Sale consists of its equity ownership in the Senior Borrowers, which is different from the collateral—that is, the Property itself—that secures the Senior Loan, and that because there is no overlap in collateral, there can be no breach of the Intercreditor Agreement.

***5** "[T]he primary purpose of declaratory judgments is to adjudicate the parties' rights before a wrong' actually occurs in the hope that later litigation will be unnecessary" (*NY County Lawyers' Assn. v. State of New York,* 294 A.D.2d 69, 74, 742 N.Y.S.2d 16 [1st Dept 2002] [internal quotation marks and citation omitted]), and to accomplish "the complete and final settlement of the rights and legal relations of the parties with respect to the matters in controversy" (*Barry v. Ready Reference Pub. Co.,* 25 A.D.2d 827, 269 N.Y.S.2d 665 [1st Dept 1966]). To succeed on its cause of action for a declaratory judgment, plaintiffs must demonstrate that "an actual controversy exists, i.e ., that they have a valid interest in securing a declaration and present, in an adversary context, *a controversy with the [defendant]* concerning that interest." ' *Matter of Guild of Admin. Officers of Suffolk County Community Coll. v. County of Suffolk,* 126 A.D.2d 725, 728, 510 N.Y.S.2d 914 (2d Dept 1987) (emphasis in original). "A declaratory judgment action may be an appropriate vehicle for settling justiciable disputes as to contract rights and obligations." *Kalisch–Jarcho, Inc. v. City of New York,* 72 N.Y.2d 727, 731, 536 N.Y.S.2d 419, 533 N.E.2d 258 (1988); *see also M & A Oasis, Inc. v. MTM Assocs., L.P.,* 307 A.D.2d 872, 872–73, 764 N.Y.S.2d 9 (1st Dept 2003) ("[a] preliminary injunction enjoining defendants from selling the Property was properly granted to assure the efficacy of any declaratory judgment").

"[W]here the language [of a contract] is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language," and the "writing should as a rule be enforced according to its terms." *R/S Assoc. v. New York Job Dev. Auth.,* 98 N.Y.2d 29, 32, 744 N.Y.S.2d 358, 771 N.E.2d 240 (2002) (internal quotation marks and citations omitted). "Unless the court finds ambiguity, the rules governing the interpretation of ambiguous contracts do not come into play." *Id.* at 33, 744 N.Y.S.2d 358, 771 N.E.2d 240. "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing ." *Vermont Teddy Bear Co. v. 538 Madison Realty Co.,* 1 N.Y.3d 470, 475, 775 N.Y.S.2d 765, 807 N.E.2d 876 (2004) (internal quotation marks and citation omitted). "Interpretation of the contract is a legal matter for the court." *805 Third Ave. Co. v. M.W. Realty Assoc.,* 58 N.Y.2d 447, 451, 461 N.Y.S.2d 778, 448 N.E.2d 445 (1983).

Here, the Intercreditor Agreement is unambiguous. Its plain language obligates PSW to cure all Senior Loan defaults if PSW acquires the Equity Collateral, which includes the $3.6 billion Indebtedness resulting from the Default. Specifically, section 6(d) provides that,

> [t]o the extent that any Qualified Transferee acquires the Equity Collateral pledged to a Junior Lender pursuant to the Junior Loan Documents in accordance with the provisions and conditions of this Agreement ..., *such Qualified Transferee shall acquire the same subject to (i) the Senior Loan and the terms, conditions and provisions of the Senior Loan Documents* ....Intercreditor Agreement, at 54. Subsection (ii) goes on to require that any such acquisition is also subject to any applicable Senior Junior Loans, and states that neither the Senior Lender nor any Senior Junior Lender may accelerate outstanding loans solely as a result of a Qualified Transferee's acquisition of Equity Collateral. *Id.* Subsection 6(d)(A) conditions the acquisition of Equity Collateral upon the Qualified Transferee affirming that it is bound by the Senior and related Senior Junior Loan Documents. *Id.* Subsection 6(d)(B) conditions the acquisition of Equity Collateral upon the Qualified Transferee curing "*all defaults under (1) the Senior Loan and (2) the applicable Senior Junior Loans, in each case which remain uncured or unwaived as of the date of such acquisition,*" but allowing "defaults that can *only* be cured by the Junior Lender following its acquisition of the Equity Collateral" to "be cured by the Junior Lender prior to the expiration of the applicable Extended Non–Monetary Cure Period." *Id.* (emphasis added). Because the Default existing under the Senior Loan is not a default that can "*only* be cured ... following [PSW's] acquisition of the Equity Collateral," PSW must cure the Default "as of the date of [its] acquisition" of the Equity Collateral. *Id.* Thus, PSW's argument that section 6(d) is not a pre-condition to acquisition of Equity Collateral is undermined by the plain language of the contract.

***6** This interpretation is confirmed by section 10 of the Intercreditor Agreement. Section 10 is titled "*Payment Subordination* " (*id.* at 61, 461 N.Y.S.2d 778, 448 N.E.2d 445 [emphasis in original]), and section 10(d) states that "a Junior Lender may, in its sole and absolute discretion without Senior Lender's or any Senior Junior Lender's consent, take any Equity Collateral Enforcement Action or Separate Collateral Enforcement Action," but this provision is expressly "[s]ubject to the terms and provisions of *Section 6,*" above (*id.* at 63, 461 N.Y.S.2d 778, 448 N.E.2d 445 [emphasis in original]).

PSW, a Junior Lender under the Intercreditor Agreement, has made clear its intention to acquire the Equity Collateral at the UCC Sale. In addition, in its letter dated August 11, 2010, counsel for PSW characterized its obligations under section 6(d) as "ludicrous" and expressly notified plaintiffs' counsel that "the Intercreditor Agreement does not require the payment of the Senior Loan as a condition to a transferee acquiring the Equity Collateral." Hundertmark Aff., Ex. T. This letter evidences PSW's renouncement of any intent to cure the Senior Loan defaults. Therefore, plaintiffs have "show[n] a likelihood of success on the merits by showing that [their] claims have prima facie merit." *Matter of Witham v. VFinance Invs., Inc.,* 52 A.D.3d 403, 403, 860 N.Y.S.2d 98 (1st Dept 2008).

PSW's argument that section 6(d) is designed to prevent the Senior Lenders from accelerating the Senior Loans due to a transfer of the Equity Collateral is not grounded in the terms of the Intercreditor Agreement. The last clause of section 6(d)(ii) prevents the Senior Lender and the related Senior Junior Lender from accelerating the Senior Loan or outstanding Senior Junior Loans solely due to a Qualified Transferee's acquisition of Equity Collateral. However, nothing in section 6(d) suggests that

this provision is focused solely, or even primarily, upon acceleration. Rather, the clause relating to acceleration in section 6(d) merely harmonizes the Intercreditor Agreement with the Senior Loan Agreement, which provides in section 9.02 that "a Transfer in connection with an exercise of remedies by a Mezzanine Lender shall not be prohibited hereunder, provided such Transfer is done in accordance with any intercreditor agreement that such Mezzanine Lender and Lender are party to in connection with the Loan and the Mezzanine Loan." [3] Senior Loan Agreement, Hundertmark Aff., Ex. B, at 89. Contrary to PSW's argument, this interpretation is consistent with the plain language of the Intercreditor Agreement, and it is the only reasonable interpretation of this agreement.

[3] Indeed, section 9.02 of the Senior Loan Agreement clarifies the Senior Lenders' reliance upon "the expertise of the Borrower ... in owning and operating properties such as the Property in agreeing to make the Loan" and plaintiffs' continuing reliance "on Borrower's ownership of the Property as a means of maintaining the value of the Property as security for repayment of the Debt...." Senior Loan Agreement, Hundertmark Aff., Ex. B, at 89. This is consistent with section 6(d) of the Intercreditor Agreement, which requires the Senior Lenders to be paid-that is, for any defaults to be cured-prior to transfer of the Equity Collateral, thereby protecting the priority interests of the Senior Lenders.

PSW's argument concerning the doctrine of the last antecedent does not support a different result. The last antecedent doctrine provides that "[r]elative or qualifying words or clauses ... ordinarily are to be applied to words or phrases immediately preceding, and are not to be construed as extending to others more remote, unless the intent clearly indicates otherwise." *Duane Reade, Inc. v. Cardtronics, LP,* 54 A.D.3d 137, 141, 863 N.Y.S.2d 14 (1st Dept 2008). PSW argues that the acceleration language in section 6(d) immediately precedes the conditions of reaffirmation in section 6(d)(A) and cure in 6(d)(B), and that, therefore, these conditions are limited in applying solely to acceleration. In other words, PSW argues that "cure is a pre-condition to *preventing acceleration* and is not a pre-condition to acquisition of the Equity Collateral." PSW's Opp. Brief, at 15 (emphasis in original). However, section 6 pertains to "*Foreclosure of Separate Collateral,*" as its heading suggests, not to acceleration. Intercreditor Agreement, at 52–54. PSW's reading of section 6(d) cherry-picks the acceleration language while ignoring all of the additional language preceding the semicolon, which applies more generally to an acquisition of Equity Collateral. PSW's interpretation of section 6(d) was clearly not intended by the parties.

***7** PSW argues that subsection 6(d)(A), which allows a Qualified Transferee to wait 10 days after the transfer to reaffirm its obligations under the Senior Loan Documents, supports the conclusion that section 6(d) is not a pre-condition to the UCC Sale. However, subsections 6(d)(A) and (B) are written in the conjunctive, requiring that both provisions be satisfied. In other words, the fact that (A) allows a Qualified Transferee 10 days to reaffirm does not vitiate the past-tense requirement in (B) that all defaults under the Senior Loan "as of the date of such acquisition *have been* cured." *Id.* at 54, 863 N.Y.S.2d 14 (emphasis added). Therefore, PSW's argument is unpersuasive.

While the Senior Loan and PSW's Junior Loan are secured by different collateral, nothing contained in the Intercreditor Agreement permits PSW to acquire its Equity Collateral without complying with section 6(d). For example, PSW cites the Intercreditor Agreement in support of its argument that its "right ... to foreclose on [its] separate collateral finds expression in many provisions, including Sections 2(n) and 9(a)(A)." PSW's Opp. Brief, at 16. However, section 2(n) merely prohibits the Senior Loan from constituting a lien on the separate collateral that secures a Junior Loan, and prevents a Senior Lender from declaring any such interest in the separate collateral. In this regard, section 2(n) confirms that the Senior and Junior Loans are secured by different collateral. However, plaintiffs are not asserting a lien on, or a security interest in, PSW's collateral. Significantly, nothing contained in section 2(n) exempts PSW from section 6(d). Section 9(a) generally reinforces that Junior Lenders' loans are subordinate to the Senior Loan. And although section 9(a)(A) permits a Junior Lender to "exercise ... remedies and realization upon such Separate Collateral," this subsection is expressly subject to section 6(b) (Intercreditor Agreement, at 60 [stating terms of subsection 9(a)(A), "except as set forth in *Section 6(b)* " (emphasis in original)]), which states that "[n]othing contained herein shall limit or restrict the right of any Junior Lender to exercise its rights and remedies, in law or in equity, or otherwise, in order to realize on any of its Separate Collateral *that is not Equity Collateral* " (*id.* at

53, 863 N.Y.S.2d 14 [emphasis added]). Here, PSW seeks to foreclose on its Equity Collateral, which is governed by section 6(d), as discussed above.

PSW argues that section 6(a) of the Intercreditor Agreement recognizes the right of a Junior Lender to foreclose upon its Equity Collateral, and that, if the parties had so intended, section 6(a) would have expressly stated that curing a default on the Senior Loan was a pre-condition to a Junior Lender's foreclosure. Section 6(a) requires a Junior Lender to comply with seven requirements before "complet[ing] a foreclosure or otherwise realiz[ing] upon any of its Equity Collateral...." *Id.* at 52, 863 N.Y.S.2d 14. However, as discussed above, section 6 pertains to "*Foreclosure of Separate Collateral,* " and none of the subsections to section 6 are individually titled. *Id.* at 52–54, 863 N.Y.S.2d 14. In substance, all of these subsections relate to foreclosure of separate collateral, and each subsection includes different obligations, conditions and rights. The fact that the requirements of subsection (d) are stated in their own subsection, rather than in subsection (a), does not serve to vitiate subsection (d). If anything, the implication is that the parties considered subsection (d) worthy of treatment in its own subsection. Therefore, PSW's argument is contradicted by the plain language of the Intercreditor Agreement.

***8** PSW also argues that sections 10(a) and (d) "provide that a Junior Lender's rights to foreclose upon its own Equity Collateral is exempted from the general provisions regarding payment subordination that CWCAM cites in its papers." PSW Opp. Brief, at 16; PSW's Sur–Reply Brief, at 6. However, the first clause of section 10(a) states, "Except (i) as otherwise expressly provided in this Agreement," and, as discussed above, the first clause of section 10(d) makes this subsection "[s]ubject to the terms and provisions of *Section 6,*" thereby undermining PSW's argument. PSW also ignores that section 10 deals generally with "*Payment Subordination,*" as its title suggests, and section 10(b)(ii) provides, in pertinent part, as follows:

> *If ... there shall have occurred and be continuing an Event of Default under the Senior Loan Documents,* after giving effect to Junior Lender's cure rights pursuant to *Section 12,* except as expressly otherwise provided herein, *Senior Lender shall be entitled to receive payment and performance in full of all amounts due or to become due to Senior Lender before any Junior Lender is entitled to receive any payment* (including any payment which may be payable by reason of the payment of any other indebtedness of Borrower being subordinated to the payment of the Junior Loans) on account of any Junior Loan.
>
> Intercreditor Agreement, at 61 (emphasis added). Here, the Senior Loan is indisputably in default. The court recognizes the distinction between the separate collateral securing the parties' investments, and that the Intercreditor Agreement permits PSW to foreclose on its own collateral. However, plaintiffs have made a prima facie showing that PSW must comply with section 6(b) of the Intercreditor Agreement before doing so.

PSW argues that there is no justiciable controversy, that the complaint impermissibly seeks an advisory opinion as to whether PSW is in violation of the Intercreditor Agreement based upon a series of contingencies which have not yet and may not occur, such as PSW being the winning bidder at the UCC Sale and PSW forcing the Borrowers into bankruptcy or taking actions consistent therewith. However, at a minimum, PSW has expressly renounced the applicability of section 6(d) in its letter dated August 11, 2010, claiming that this section does not require a purchaser of the Equity Collateral to pay off the Senior Loan and describing any such obligation as "ludicrous." Hundertmark Aff., Ex. T. PSW's intention to acquire the Equity Collateral, notwithstanding the requirements of section 6(d), is also evidenced by PSW's public notices of the UCC Sale and the formation of six shell entities, on August 18, 2010, for which plaintiffs submit the Certificates of Formation certified by the Delaware Secretary of State. Hundertmark Supplemental Aff., Ex. C. Thus, there is clearly a justiciable controversy here, where plaintiffs are seeking "to adjudicate the parties' rights before a wrong' actually occurs in the hope that later litigation will be unnecessary [internal quotation marks and citation omitted]." *NY County Lawyers' Assn.,* 294 A.D.2d at 74, 742 N.Y.S.2d 16; *see also Swift & Co. v. U.S.,* 276 U.S. 311, 326, 48 S.Ct. 311, 72 L.Ed. 587 (1928) ("a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated"); *Kalisch–Jarcho, Inc.,* 72 N.Y.2d at 731, 536 N.Y.S.2d 419, 533 N.E.2d 258 ("[a] declaratory judgment action may be an appropriate vehicle for settling justiciable disputes as to contract rights and obligations"); *M & A Oasis, Inc.,* 307 A.D.2d

at 872–73, 764 N.Y.S.2d 9 ("[a] preliminary injunction enjoining defendants from selling the Property was properly granted to assure the efficacy of any declaratory judgment"); *Highland Park CDO I Grantor Trust, Series A v. Wells Fargo Bank, N.A.*, 2009 WL 1834596, *5, 2009 U.S. Dist LEXIS 53272 (S.D.N.Y.2009) (granting senior lender injunctive relief against junior mezzanine holder, concluding that "Intercreditor Agreement bars [junior lender] from recovering on the mezzanine loan until the senior loan is repaid in full").

***9** With respect to plaintiffs' cause of action for a declaration that section 11(d)(ii) of the Intercreditor Agreement prohibits PSW from orchestrating a Borrower's bankruptcy unless the Senior Loan is paid off in full, plaintiffs claim that PSW has retained Kirkland & Ellis LLP as bankruptcy counsel to represent the Borrowers once the UCC Sale is complete. However, PSW admits in its opposition brief that "presently, and so long as it is a Junior Lender, its ability to solicit, direct or cause the Senior Borrowers to institute bankruptcy proceedings is restricted by Section 11(d)(ii)...." PSW Opp. Brief, at 17 n. 13; *see also* PSW Sur–Reply Brief, at 1 (conceding that PSW "does not now speak for or control the Borrowers, nor has it retained [nor could it retain] anyone on their behalf"); and PSW Sur–Reply Brief, at 12–13 (stating that "PSW does not speak for, does not control and cannot and has not retained anyone on behalf of any of the Borrowers [whether Senior Borrowers or Junior Borrowers]"). This is consistent with the last sentence of section 11(d)(ii), which pertains to the situation where a Junior Lender acquires title to the Equity Collateral of a Junior Borrower, thereby becoming "bound by the terms and provisions of the respective organizational documents of such Junior Borrower regarding bankruptcy and all matters requiring the vote of the independent directors/managers/members of such Junior Borrower." In other words, PSW's argument focuses on what it could do as an owner of the Borrowers once a transfer of the Equity Collateral occurs, claiming that, thereafter, "PSW would no longer be subject to the restrictions set forth in Section 11(d)(ii)" (*id.* at 17) and that, "if PSW were to successfully complete the UCC Sale and thereby acquire title to the Equity Collateral, the Intercreditor Agreement would terminate with respect to PSW" (*id.* at 18). Moreover, according to Ashner, PSW has not retained Kirkland & Ellis, but has merely "communicated with K & E's attorneys about this matter." Ashner Supp. Aff., ¶ 6. The Intercreditor Agreement does not prevent PSW, as a Junior Lender, from seeking legal advice or planning for future contingencies. Plaintiffs fail to make a prima facie showing that PSW has taken any action in violation of section 11(d)(ii).

Furthermore, there has been no transfer of Equity Collateral. Nor could there be without PSW's compliance with section 6(d), as discussed above. In short, PSW concedes that, as a Junior Lender, it must comply with the restrictions set forth in section 11(d)(ii) of the Intercreditor Agreement. Given PSW's admission, and the fact that the court is granting plaintiffs' motion for preliminary injunctive relief with respect to section 6(d), plaintiffs' request to enjoin PSW concerning section 11(d)(ii) of the Intercreditor Agreement is moot, and the purported hazard posed by plaintiffs is "speculative and abstract," and, therefore, nonjusticiable. *Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council, 82, AFSCME, AFL–CIO v. Cuomo*, 64 N.Y.2d 233, 240, 485 N.Y.S.2d 719, 475 N.E.2d 90 (1984) ("[w]here the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract"). Accordingly, plaintiffs' motion for a preliminary injunction is denied with respect to section 11(d)(ii) of the Intercreditor Agreement.

Irreparable Harm

***10** "Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. To prevail, the movant must establish not a mere possibility that it will be irreparably harmed, but that it is *likely* to suffer irreparable harm if equitable relief is denied." *Natsource LLC v. Paribello*, 151 F.Supp 2d 465, 469 (S.D.N.Y.2001) (internal citations and quotation marks omitted); *see also Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442, 628 N.Y.S.2d 375 (2d Dept 1995) ("the irreparable harm must be shown by the moving party to be imminent, not remote or speculative").

In appropriate circumstances, the loss of a bargained-for contractual right of control can constitute irreparable harm. *See CanWest Global Communications Corp. v. Mirkaei Tikshoret Ltd.*, 9 Misc.3d 845, 872, 804 N.Y.S.2d 549 (Sup Ct, N.Y. County 2005); *see also Wisdom Imp. Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101, 114–15 (2d Cir.2003) ("[c]onduct that unnecessarily frustrates efforts to obtain or preserve the right to participate in the management of a company may also constitute

irreparable harm"); *Citibank, N.A. v. Nyland (CF8) Ltd.*, 839 F.2d 93, 97 (2d Cir.1988) (finding irreparable harm if bank was unable to appoint a receiver to control and manage the subject property, pursuant to a contractual provision, after the default of a mortgage loan).

For example, in *Oracle Real Estate Holdings I LLC v. Adrian Holdings Co. I, LLC* (582 F.Supp 2d 616 [SD N.Y.2008]), the parties entered into a contract to develop real estate. When the defendant defaulted on its loan obligations, the plaintiff moved for a preliminary injunction directing the defendant, pursuant to the parties' agreement, "to transfer 100% of its ownership interests in [Adrian II, a defendant entity that held ownership interests in the relevant properties], including the right to select the management of the Company, during the pendency of this action." *Id.* at 624. The court granted the preliminary injunction to enforce the plaintiff's "unique, bargained-for contractual remedy: the right to meaningful control of Adrian II," and the court concluded that "this injury would constitute irreparable harm." *Id.* at 625. The court reasoned that "the contract right ha[d] intrinsic value' that cannot easily be quantified," thereby permitting "the bargained-for provisions [to] provide a basis for injunctive relief." *Id.* The court was also persuaded by the fact that "the value of control over Adrian II is almost entirely a function of the skill and resources of the party who exercises control." *Id.* at 626.

Here, plaintiffs have shown that the Property is owned by single-purpose entities that own no other assets, and the plaintiff trustees can look only to the Property to recover the $3.6 billion Indebtedness. Significantly, the Property is comprised of approximately 11,000 units, 25,000 residents, and 550 employees. Hundertmark Aff., ¶ 46. According to Hundertmark, the 550 employees at the Property include 350 union employees represented by seven unions, some of which have expired collective bargaining agreements, and an 80–person private security force that is integrated with the New York City Police Department. Hundertmark Supplemental Aff., ¶ 3. Millions of dollars have been spent rebuilding the information technology systems at the Property, which plaintiffs claim is critical to the preservation of rent records, the administration of repairs and maintenance, and oversight of the private security force. *Id.* According to plaintiffs, months have been consumed and hundreds of thousands of dollars spent recruiting a new senior management team to replace the employees that will be redeployed away from the Property, and seven months have been spent evaluating and working through environmental issues at the Property. *Id.* In short, plaintiffs have spent nine months and millions of dollars working with the Borrowers to ensure a smooth transition of the Property. *Id.*

***11** The Senior Lenders bargained for the right to control the management of the Property, and they have spent the last nine months working with the Borrowers to transition management of the Property, which impacts tens of thousands of New York City residents. As discussed above, section 9.02 of the Senior Loan Agreement expressly acknowledges the Senior Lenders' reliance upon "the expertise of the Borrower ... in owning and operating properties such as the Property in agreeing to make the Loan" and acknowledges plaintiffs' continuing reliance "on Borrower's ownership of the Property as a means of maintaining the value of the Property as security for repayment of the Debt...." Senior Loan Agreement, at 89. Indeed, the element of irreparable harm dovetails with the analysis of section 6(d) of the Intercreditor Agreement, above, in that the Senior Lenders expressly bargained for this contractual provision, which prohibits Junior Lenders like PSW from acquiring ownership and control of the Equity Collateral unless they pay any outstanding indebtedness under the Senior Loan, thereby ensuring that ownership and control over the Equity Collateral is not transferred from the Junior Borrowers to the Junior Lenders at a time when the Senior Loan is in default. Any loss of control is in violation of the Intercreditor Agreement and would constitute irreparable harm to plaintiffs.

Section 34 of the Intercreditor Agreement reinforces this conclusion. This section is titled "*Injunction* " and provides as follows:

> Each party to this Agreement acknowledges (and waives any defense based on a claim) that monetary damages are not an adequate remedy to redress a breach by the other hereunder and that a breach by any party hereunder would cause irreparable harm to any other party to this Agreement. Accordingly, each party to this Agreement agrees that upon a breach of this Agreement by

> any other party, the remedies of injunction, declaratory judgment and specific performance shall be available to such non-breaching party.

Intercreditor Agreement, at 103 (emphasis in original). PSW's "REPRESENTATION CERTIFICATE" expressly notified, among others, the Senior Lenders, that PSW "agree[d] to be bound by Intercreditor Agreement" with respect to Junior Loans 1–3 (Hundertmark Aff., Ex. M), thereby evidencing that PSW contemplated the irreparable harm that would result from a breach of the Intercreditor Agreement and agreed that monetary damages would not serve as an adequate remedy at law. Thus, the parties "set down their agreement in a clear, complete document," and, therefore, "their writing should ... be enforced according to its terms." *Vermont Teddy Bear Co. v. 538 Madison Realty Co.,* 1 N.Y.3d 470, 475, 775 N.Y.S.2d 765, 807 N.E.2d 876 (2004). This rule has "special import in the context of real property transactions, where commercial certainty is a paramount concern, and where ... the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length." ' *Id.* at 475, 775 N.Y.S.2d 765, 807 N.E.2d 876. New York courts have routinely enforced nearly identical contractual provisions. *See e.g. Highland Park CDO I Grantor Trust, Series A,* 2009 WL 1834596, at *5, 2009 U.S. Dist LEXIS 53272 (granting injunctive relief "as provided for under Section 33 of the Intercreditor Agreement," the terms of which are nearly identical to contractual provision in the instant action); *Roswell Capital Partners LLC v. Alternative Constr. Tech.,* 2009 WL 222348, *17, 2009 U.S. Dist LEXIS 7690 (S.D.N.Y.2009) ("terms throughout the contracts at issue specify that a default constitutes irreparable harm entitling Plaintiffs to injunctive relief to cure breaches," which, "[w]hile not dispositive, [may be viewed by] courts ... as evidence of an admission that irreparable harm has occurred"). For the foregoing reasons, plaintiffs have shown that they will suffer irreparable harm if injunctive relief is not granted.

Balancing of the Equities

***12** In balancing the equities, the court must weigh the harm suffered by the plaintiff if the injunction were denied against the harm suffered by the defendant if the injunction were granted. *Edgeworth Food Corp. v. Stephenson,* 53 A.D.2d 588, 385 N.Y.S.2d 64 (1st Dept 1976) (court balanced "convenience and relative hardship —the harm to plaintiff from denial of the injunction as against the harm to defendant from granting it"). "Further, when the court balances the equities in deciding upon injunctive relief, it must consider the enormous public interests involved [citation omitted]." ' *Seitzman v. Hudson Riv. Assoc.,* 126 A.D.2d at 214, 513 N.Y.S.2d 148.

Here, the balance clearly tips in favor of plaintiffs, who merely seek to hold PSW, as a Junior Lender, to its contractual obligations under the Intercreditor Agreement. *See Gramercy Co. v. Benenson,* 223 A.D.2d 497, 498, 637 N.Y.S.2d 383 (1st Dept 1996) ("balance of the equities tilts in favor of plaintiffs, who merely seek to maintain the status quo"). In contrast, PSW's position will not be changed, as it will remain bound by the terms of the Intercreditor Agreement as it applies to the rights of Junior Lenders. Moreover, the public interest is served by maintaining stability in what PSW concedes "is the largest residential property in Manhattan and home to a significant portion of the city's moderate income housing." PSW Opp. Brief, at 23. "This result is entirely consistent with the recognition that subordinated loans are inherently more risky than their senior counterparts-a reality of which [the Junior Lender], as a sophisticated party, was no doubt aware when it acquired the mezzanine loan here." *Highland Park CDO I Grantor Trust, Series A,* 2009 WL 1834596, at *5, 2009 U.S. Dist LEXIS 53272.

Staying of Foreclosure and Bond

PSW argues that, if the preliminary injunction motion is granted, the court should require CWCAM to agree to stay its mortgage foreclosure action pending final adjudication of the instant action, and to post a bond in the full principal amount of $300 million that is owed to PSW. PSW's request for a stay of foreclosure is contained on page 23 of its opposition brief. PSW has not moved for any such relief. Therefore, PSW's request is not properly before the court. In any event, PSW fails to cite any legal authority in support of its request that this state court enjoin or stay a federal court judgment. *See Matter of Frontier Ins. Co.,* 27 A.D.3d 274, 275, 813 N.Y.S.2d 50 (1st Dept 2006) ("New York courts must give full faith and credit to a federal court judgment"). Accordingly, PSW's request for a stay in the mortgage foreclosure action is denied.

PSW's request for a bond is governed by CPLR 6312, which provides that "the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction." CPLR 6312(b). "The fixing of the amount of an undertaking is a matter within the sound discretion of the court." *Lelekakis v. Kamamis,* 303 A.D.2d 380, 380, 755 N.Y.S.2d 665 (2d Dept 2003).

***13** In the event that PSW is ultimately successful in demonstrating that plaintiffs are not entitled to injunctive relief, PSW is entitled to an undertaking that is "rationally related to the amount of the defendant's potential liability if the preliminary injunction later proves to be unwarranted, and not based upon speculation." *Id.* at 380–81, 755 N.Y.S.2d 665 (internal citations omitted). Although the Junior Loans purchased by PSW—that is, Junior Loans 1, 2 and 3—were each in the principal amount of $100 million, it is undisputed that PSW purchased these loans for only $45 million. Therefore, plaintiffs' undertaking is limited to the amount of this purchase price.

Due deliberation having been had, and it appearing to this court that a cause of action exists in favor of the plaintiffs and against the defendant and that the plaintiffs are entitled to a preliminary injunction on the ground that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiffs' rights respecting the subject of the action and tending to render the judgment ineffectual, as set forth in the aforesaid decision, it is

ORDERED that the undertaking is fixed in the sum of $4,500,000.00 conditioned that the plaintiffs, if it is finally determined that they were not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts:

(a)acquiring or selling PCV ST MEZZ 1 LP's limited partnership interests in PCV ST Owner LP and/or from acquiring or selling PCV ST MEZZ 1 LP's limited liability company interests in PCV ST Owner GP LLC, whether by foreclosure sale or otherwise, without prior payment of the total outstanding indebtedness (in excess of $3,666,000,000) in connection with the senior loan extended to PCV ST Owner LP and ST Owner LP by Wachovia Bank, N.A. and Merrill Lynch Mortgage Lending, Inc. to finance Tishman Speyer Development Corp.'s acquisition of Stuyvesant Town and Peter Cooper Village (Senior Loan);

(b)acquiring or selling ST MEZZ 1 LP's limited partnership interests in ST Owner LP and/or from acquiring or selling ST MEZZ 1 LP's limited liability company interests in ST Owner GP LLC, whether by foreclosure sale or otherwise, without prior payment of the total outstanding indebtedness (in excess of $3,666,000,000) in connection with the Senior Loan;

(c)acquiring or selling PCV ST MEZZ 2 LP's limited partnership interest in PCV ST MEZZ 1 LP and/or from acquiring or selling PCV ST MEZZ 2 LP's limited liability company interests in PCV ST MEZZ 1 GP LLC, whether by foreclosure sale or otherwise, without prior payment of the total outstanding indebtedness (in excess of $3,666,000,000) in connection with the Senior Loan;

***14** (d)acquiring or selling ST MEZZ 2 LP's limited partnership interest in ST MEZZ 1 LP and/or from acquiring or selling ST MEZZ 2 LP's limited liability company interests in ST MEZZ 1 GP LLC, whether by foreclosure sale or otherwise, without prior payment of the total outstanding indebtedness (in excess of $3,666,000,000) in connection with the Senior Loan;

(e)acquiring or selling PCV ST MEZZ 3 LP's limited partnership interest in PCV ST MEZZ 2 LP and/or from acquiring or selling PCV ST MEZZ 3 LP's limited liability company interests in PCV ST MEZZ 2 GP LLC, whether by foreclosure sale or otherwise, without prior payment of the total outstanding indebtedness (in excess of $3,666,000,000) in connection with the Senior Loan;

(f)acquiring or selling ST MEZZ 3 LP's limited partnership interest in ST MEZZ 2 LP and/or from acquiring or selling ST MEZZ 3 LP's limited liability

company interests in ST MEZZ 2 GP LLC, whether by foreclosure sale or otherwise, without prior payment of the total outstanding indebtedness (in excess of $3,666,000,000) in connection with the Senior Loan; and the motion is otherwise denied.

All Citations

29 Misc.3d 1216(A), 918 N.Y.S.2d 396 (Table), 2010 WL 4243437, 2010 N.Y. Slip Op. 51848(U)

End of Document

STATE OF NEW YORK
SUPREME COURT ALBANY COUNTY

In the Matter of the Application of

DARNELL GREEN, 16-A-4116,
Petitioner,

DECISION/ORDER/JUDGMENT

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

Index No.: 2156-17
RJI No.: 01-17-ST8634

- against -

ANTHONY J. ANNUCCI, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION,
Respondent.

PRESENT: HON. LISA M. FISHER:

APPEARANCES: Sophia Heller, Esq.
Counsel for Petitioner
Prisoners' Legal Services of New York
41 State Street, Suite M1112

Hon. Eric T. Schneiderman
Counsel for Respondent
Attorney General of New York State
(Shannan C. Krasnokutski, Esq. Assistant Attorney General,
Of Counsel)
The Capitol
Albany, New York 12224

FISHER, J.:

Petitioner, an inmate in the care and custody of the New York State Department of Corrections and Community Supervision ("DOCCS"), commenced this CPLR article 78 proceeding to challenge Respondent's determination denying his Freedom of Information Law (hereinafter "FOIL") request for video footage of a January 4, 2016 incident. He seeks the requested video footage and the award of attorneys' fees pursuant to Public Officers Law § 89 (4) (c) (i). Petitioner also submitted a motion for a poor person order, which is granted under CPLR § 1101 (e).

Petitioner's FOIL request was denied on October 5, 2016. Petitioner appealed, which was denied on December 14, 2016. Respondent's grounds for denial were pursuant to Public Officers

Law § 87 (2) (a) and Civil Rights Law § 50-a. The justification was that "the video was used to evaluate the performance of an officer toward continued employment[,]" and also because "there is a substantial and realistic potential for this record to be used to harass or embarrass a [DOCS] employee covered by § 50-a."

The Petition argues that the requested video does not properly qualify as a personnel record, but even if it was, there is no demonstration that the video's disclosure could be used in an abusive manner against an officer. Respondent opposes the application, reiterating its positions noted above. Petitioner submits a reply.

In today's society it is becoming more common for interactions with law enforcement to be video recorded. This is particularly true in light of the recent national events, including in New York, regarding use of force by law enforcement. More departments and agencies are utilizing various video recording devices like body cams or handheld recorders to capture interactions with the public or wards. This has seamlessly blended into correctional facilities, where video surveillance is a necessity and handheld video recorders are now being used. The videos generated are often used to justify the actions of an officer, in the prosecution of an offense, and undoubtedly for evaluation of an officer's job performance for continued employment, promotion, discipline, or termination. Notwithstanding this, the Court's review of the applicable common law finds a lack of cases involving video records in FOIL situations such as this.

FOIL is governed by article 6 of the Public Officers Law (hereinafter "POL"). Under this article, the Legislative declaration is that "the public . . . should have access to the records of government in accordance with the provisions of this article" (POL § 84). The declaration "expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies" (*Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]). "To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted" (*Capital Newspapers*, 67 NY2d at 566; *see* POL § 87 [2]). Such "[e]xemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" (*Capital Newspapers*, 67 NY2d at 566; *see Matter of Farbman & Sons, Inc. v New York*

City Health & Hosps. Corp., 62 NY2d 75, 79–80 [1984] [noting exemptions are to be "narrowly interpreted" so as "[t]o give the public maximum access to records of government"]).

Pertinently here, agencies may deny access to records of portions thereof that are "specifically exempted from disclosure by state or federal statute" (POL § 87 [2] [a]). Under Civil Rights Law § 50-a (1), "[a]ll personnel records used to evaluate performance toward continued employment or promotion, under the control of any . . . department of the state . . . or a department of correction of individuals employed as correction officers . . . shall be considered confidential and not subject to inspection or review without the express written consent of such . . . correction officer . . . except as may be mandated by lawful court order."

Respondent argues that the video of the incident was used in the evaluation of an officer(s) and is protected under Civil Rights Law § 50-a (1). The Court disagrees and finds that the video recording is not a "personnel record" under the statute. The question of "whether a document qualified as a personnel record under Civil Rights Law § 50-a(1) depends upon its nature and its use in evaluating an officer's performance—not its physical location or its particular custodian" (*Prisoners' Legal Servs. of N.Y. v New York State Dept. of Correctional Servs.*, 73 NY2d 26, 32 [1988]). Personnel records "contain personal, employment-related information about a public employee" (*Prisoners' Legal Servs.*, 73 NY2d at 31).

Here, while the subject video recording was a medium used to evaluate the performance of the officer(s), this is coincidently the video's use and not exclusively its nature and use. The Court finds the video recording to be a mixed use material, meaning it could be used for several purposes including that of an officer(s) evaluation. The video footage is not confidential and personal, but a video record of an event and incident that occurred at a correctional facility. It cannot be said to be a personnel record warranting protection from FOIL. To hold otherwise would allow *every* video recording to be held under such exemption, whether that be in a correctional facility such as an incident like this or on a police officer's body cam recording—all which could seemingly fall under Civil Rights Law § 50-a. Using this logic Respondent could theoretically cloak any "matter material and necessary" merely by placing such video footage into a personnel file and using the video footage to evaluate the officer's performance. The Court finds the video footage here which was used, in part, to evaluate an officer(s)' performance to be very different than that of documents pertaining to misconduct or rule violations by corrections officers which was at issue in *Prisoners' Legal Servs.* Officer evaluation was not the nature and use of the video subject to the FOIL request.

As such, the remaining subdivisions of Civil Rights Law § 50-a do not apply. (*See Prisoners' Legal Servs.*, 73 NY2d at 32–33.) It is further immaterial whether the video footage could be used "to degrade, embarrass, harass or impeach the integrity of the officer[,]" as the video footage is not a personnel record or a confidential record. Further, the video footage that is sought just depicts the actual acts and conduct of individuals, not unsubstantiated allegations or complaints as in *Prisoners' Legal Servs.* (73 NY2d at 31.) If these acts or conduct depicted subsequently degrade, embarrass, or impeach the integrity of an officer, such would be due to the subjective fault of the actor(s).

In its discretion, the Court declines to award reasonable attorneys' fees under POL § 89 (4) (c) (i) as the agency had a reasonable basis for denying access given the novelty of the video recording issue. The Court will reconsider counsel fees for the entire application if there is a failure to comply with this order.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit or rendered academic.

Thereby, it is hereby

ORDERED AND ADJUDGED, that the Petition is **GRANTED**, and disclosure of the subject video footage shall be made to Petitioner within 30 days of service of notice of entry; and it is further

ORDERED AND ADJUDGED that all other relief is **DENIED**, and it is further

ORDERED that this Court shall maintain continuing jurisdiction to ensure compliance and the possibility of further counsel fees.

This constitutes the Decision/Order/Judgment of the Court. Please note that a copy of this Decision/Order/Judgment along with the original papers are being filed by Chambers with the County Clerk. The original Decision/Order/Judgment is being returned to the prevailing party, to comply with CPLR R. 2220. Counsel is not relieved from the applicable provisions of this Rule with regard to filing, entry and Notice of Entry.

IT IS SO ORDERED AND ADJUDGED.

DATED: September 11, 2017
Catskill, New York

ENTER

HON. LISA M. FISHER
SUPREME COURT JUSTICE

Papers Considered:

1) Notice of petition, dated March 30, 2017; verified petition, with annexed exhibits, dated March 30, 2017; memorandum of law in support of petition, dated March 30, 2017;
2) Answer, with annexed exhibits, of Shannan C. Krasnokutski, Esq., dated June 22, 2017; affirmation, of Shannan C. Krasnokutski, Esq., dated June 22, 2017; affidavit of David J. Harvey, Esq., dated June 22, 2017; confidential affidavit of Michele J. O'Gorman, dated June 16, 2017; including all confidential exhibits;
3) Reply affirmation, of Sophia Heller, Esq., dated June 27, 2017; and
4) Papers associated with Petitioner's motion for a poor person order.

2008 WL 11363387
Only the Westlaw citation is currently available.
United States District Court,
W.D. New York.

Cariol J. HORNE, Plaintiff,
v.
BUFFALO POLICE BENEVOLENT ASSOCIATION, INC., et al., Defendants.

07-CV-781C
|
Signed 12/08/2008
|
Filed 12/10/2008

Attorneys and Law Firms

Anthony L. Pendergrass, Law Office of Anthony L. Pendergrass, Buffalo, NY, for Plaintiff.

Michael B. Risman, Joseph S. Brown, Adam W. Perry, Hodgson Russ LLP, W. James Schwan, Buffalo, NY, for Defendants.

Opinion

JOHN T. CURTIN, United States District Judge

***1** Plaintiff has filed a motion for leave to amend the complaint (Item 33). Michael Risman, Esq., on behalf of defendants the City of Buffalo, Mayor Byron Brown, and Commissioner of Police H. McCarthy Gipson, has filed a declaration in opposition to the motion (Item 39). W. James Schwan, Esq. has also filed a declaration in opposition to the motion on behalf of the remaining defendants (Item 41).

In the proposed amended complaint, plaintiff seeks to add two employees of the City of Buffalo as defendants and several additional theories of liability. Specifically, plaintiff alleges that 1) defendants improperly terminated salary and benefits to which plaintiff was entitled under New York General Municipal Law § 207-c without due process of law; and 2) defendants wrongfully disclosed plaintiff's personnel records in violation of New York Civil Service Law § 50-a. Plaintiff has also added some factual material and has further elaborated on her claims for fraud and breach of the duty of fair representation.

Fed. R. Civ. P. 15(a) provides that leave to amend a complaint "shall be freely given when justice so requires." *Foman v. Davis*, 371 U.S. 178, 182 (1962). If amendment would be futile, *i.e.*, if it could not withstand a motion to dismiss pursuant to Rule 12(b)(6), leave to amend may be denied. *See Lucente v. International Business Machines Corp.*, 310 F.3d 243, 258 (2d Cir. 2002).

To the extent that plaintiff alleges she is entitled to salary and benefits pursuant to New York General Municipal Law § 207-c following the disciplinary hearing and termination of her employment on May 8, 2008, this proposed claim would not survive a motion to dismiss, and the amendment to include this claim would be futile. In a decision dated July 7, 2008 denying plaintiff's motion for a temporary restraining order and preliminary injunction, this court found that when a police officer is terminated from service based on a disciplinary hearing and a determination that she was guilty of misconduct, she is not entitled to continued benefits under General Municipal Law § 207-c. *See Dacey v. Dutchess County*, 503 N.Y.S.2d 845 (App. Div. 1986).

Additionally, plaintiff states she was deprived of section 207-c benefits without due process from February 15, 2008 when she was removed from "injured on duty" ("IOD") status and ordered to report for light duty. In her proposed amended complaint, plaintiff has alleged that she disputed her ability to perform light duty and was nonetheless removed from IOD status without a pre-termination hearing. New York General Municipal Law § 207-c(3) provides that if, in the opinion of a physician, an officer is able to perform light duty and a light duty assignment is available and offered to the officer, the payment of section 207-c benefits shall be discontinued. However, the right of a disabled officer to receive section 207-c disability payments constitutes "a property interest giving rise to procedural due process protection, under the Fourteenth Amendment, before those payments are terminated," and a due process hearing is triggered when an officer on section 207-c status submits evidence from her treating physician supporting the officer's claim of "continued total disability." *Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes*, 731 N.E.2d 137, 139 (N.Y. 2000) (pursuant to the analogous provision General Municipal Law § 207-a, firefighters who contest a light-duty determination are entitled to a due process hearing); *see also DeMasi v. Benefico*, 567 F. Supp. 2d 449, 454 (S.D.N.Y. 2008). Accordingly, before her section 207-

c benefits could be discontinued on February 15, 2008, plaintiff was entitled to notice and a limited opportunity to be heard. *Locurto v. Safir,* 264 F.3d 154, 171 (2d Cir. 2001). New York courts have stated that section 207-c provides no definitive pre-termination procedure that must be followed, and that such procedures may be the subject of collective bargaining. *See Matter of Park v. Kapica,* 864 N.E.2d 1284, 1287 (N.Y. 2007). It is unclear from the submissions on this motion for leave to amend the complaint whether the parties have collectively bargained a procedure to be followed where, as here, the officer contests a light duty determination, and it appears that no pre-termination hearing was conducted prior to the plaintiff's removal from IOD status on February 15, 2008. Accordingly, plaintiff has pled a deprivation of section 207-c benefits without due process of law from February 15, 2008 until her termination for misconduct.

***2** Finally, New York State law is clear that Civil Rights Law § 50-a creates neither an express nor implied private right of action on the part of a police officer for a claimed violation of that statute. *See Poughkeepsie Police Benevolent Ass'n, Inc. v. City of Poughkeepsie,* 584 N.Y.S.2d 168 (App. Div. 1992); *Simpson v. New York City Transit Auth.,* 491 N.Y.S.2d 645 (App. Div.), *aff'd,* 489 N.E.2d 1298 (1985). As such, plaintiff's proposed claim under Civil Rights Law § 50-a would likewise be subject to dismissal, and amendment of the complaint to include such a claim would be futile.

To the extent that plaintiff seeks to amend the complaint to add the Civil Rights Law cause of action (Count XIX), the motion for leave to amend the complaint is denied. However, plaintiff is granted permission to file the remainder of the second amended complaint, including that portion of the General Municipal Law cause of action (Count XVIII) alleging a deprivation of section 207-c benefits from February 15, 2008 until her termination, consistent with this decision. The second amended complaint shall be filed on or before December 18, 2008. Defendants shall file their answers to the second amended complaint or move against it on or before January 16, 2009. Thereafter, the court will issue an appropriate scheduling order.

So ordered.

All Citations

Slip Copy, 2008 WL 11363387

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2001 WL 36384915 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
Suffolk County

In the matter of the application of William R. MAGGI, as President of the Suffolk County Corrections Officers Association, Inc., Petitioner,
v.
Patrick MAHONEY, as Suffolk County Sheriff, and the County of Respondent,
and
Cleveland Johnson, Jr., the Reverend Enrique Lebron, Theresa Sanders and John Cragg, and John and Jane Doe Nos. 1-10, who constitute and/or purport to act in the name of the Suffolk County Jail Oversight Commission, Additional Respondents.

No. 2000-28343.
May 3, 2001.

Mot. Seq. # 001 - MD

Short Form Order

Meyer, Suozzi, English, et al., Attorneys for the Petitioner, 1505 Kellum Place, Mineola, New York 11501.

Robert J. Cimino, Esq., Suffolk, Suffolk County Attorney, Attorney for the Respondents, 100 Veterans Memorial Hwy., P.O. Box 6100, Hauppauge, New York 11788.

Hon. Mary M. Werner, Justice of the Supreme Court.

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

MOTION DATE 12-5-00

ADJ. DATE 3-1-01

CASEDISP

Upon the following papers numbered 1 to 10 read on this motion petition pursuant to CPLR Article 78; Notice of Petition/ Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 5 - 9; Replying Affidavits and supporting papers _____; Other 10; it is,

ORDERED that this petition is dismissed.

Petitioner Maggi commenced this Article 78 proceeding, on behalf of the Suffolk County Correction Officers Association (SCCOA), for a judgment (a) declaring that the creation of the Suffolk County Jail Oversight Commission by respondent Patrick Mahoney, Sheriff of the County of Suffolk, was unlawful, invalid and a nullity; and (b) enjoining and restraining respondent Mahoney from acting individually or in concert with the "additional respondents" or in the name of the Oversight Commission with respect to investigations conducted by the Sheriff into activities of correction officers and other members of SCCOA at the county jail.

The facts may be simply stated. On May 16, 2000, Sheriff Mahoney issued a press release in which he announced the creation of a Jail Oversight Commission as an independent body to "review allegations of inmate abuse by members of the Suffolk County Sheriff's Department." In a personal affidavit submitted herein, the Sheriff explains that he is "responsible for investigating allegations of misconduct ... and prosecuting disciplinary proceedings against those employees found to have engaged in acts of misconduct, such as using excessive force and/or unjustified force against inmates." He further states that because of "widespread media coverage" of an investigation of Nassau County correction officers accused of beating and causing the death of an inmate, he was concerned that "public confidence in the ability of correction authorities to police their employees had diminished." It was to restore such confidence that the Sheriff created the Jail Oversight Commission (JOC).

The Sheriff further explains that the JOC is an advisory panel composed of four "distinguished civic leaders" who serve as volunteers and do not receive compensation from the County. The JOC's review process consists of meeting with a Sheriff's Department investigator "to review the investigator's report and findings to ensure that the investigation has been conducted thoroughly and fairly." The JOC then advises the Sheriff of its opinion "on those issues." As of the date of the affidavit, February 19, 2001, the JOC has met once and reviewed one complaint; the Sheriff advises that "[s]everal other complaints are currently under investigation and will be reviewed by the JOC at a future time."

At the outset the court must address the question of whether the petitioner has standing to maintain this proceeding. Contrary to petitioner's contention, respondents have preserved the right to raise the issue by asserting it in their answer. Respondents contend that petitioner has not sustained any injury in fact and that in the absence of such injury, neither Maggi nor the SCCOA has the necessary standing to maintain the proceeding. Petitioner argues that the SCCOA members have suffered injury in fact, in that their rights to confidentiality of their personnel records under Civil Rights Law § 50-a have been abrogated by the creation of the Jail Oversight Commission.

Civil Rights Law § 50-a limits access to the personnel record of a police officer without a court order or the consent of the officer (*Poughkeepsie Police Benevolent Association, Inc. v City of Poughkeepsie,* 184 AD2d 501, 584 NYS2d 168 [2d Dept 1992]). The legislative history of the statute indicates that it was enacted to curb abusive use of a police officer's personnel record in connection with the officer's appearance as a witness in litigation (*Simpson v New York City Transit Authority,* 112 AD2d 89, 491 NYS2d 645, 646-647 [1st Dept 1985], *aff'd* 66 NY2d 1010, 499 NYS2d 396). However, the Legislature did not create an express private right of action on the part of police officers for claimed violations of Civil Rights Law § *50-a (Poughkeepsie PBA v City of Poughkeepsie, supra,* 584 NYS2d at 169), and the courts have concluded, from the statute's legislative history, that the Legislature did not intend to create such a right of action (*Simpson v New York City Transit Auth., supra,* 491 NYS2d at 647; *Carpenter v City of Plattsburgh,* 105 AD2d 295, 484 NYS2d 284, 286 [3d Dept 1985], *aff'd* 66 NY2d 791, 497 NYS2d 909).

Thus petitioner, individually and as the representative of the members of SCCOA, has failed to satisfy the threshold requirement of standing to maintain this proceeding, since no other injury or harm is alleged. Finally, because injunctive relief is granted only to protect a legal right, petitioner is not entitled to the injunction sought herein (*Poughkeepsie PBA v City, supra).*

In light of the above, the court does not reach the merits of the claim.

The petition is dismissed.

Dated: May 3, 2001

<<signature>>

J.S.C.

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KeyCite Red Flag - Severe Negative Treatment
Order Reversed by McBride v. City of Rochester, N.Y.A.D. 4 Dept., April 29, 2005

2004 WL 5489809 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
Monroe County

Bettie and Gregory MCBRIDE, individually and as parents and natural guardians of Genesis McBride, an infant, Plaintiffs,
v.
CITY OF ROCHESTER, New York; City of Rochester Police Department; Sergeant Daniel Holmsten; Officer Thomas Rodriguez, Defendants.

No. 1988-02.
September 22, 2004.

Order

Hon. William P. Polito, Supreme Court Justice.

Plaintiffs, Bettie McBride, Gregory McBride and Genesis McBride; along with City defendants City of Rochester, New York, City of Rochester Police Department, Sergeant Daniel Holmstein and Officer Thomas Rodriguez, all defendants represented by the City of Rochester, through it's attorney, Linda S. Kingsley, Corporation Counsel, John M. Campolieto, of counsel, having appeared before the Court at the Court's motion term on November 25, 2003 to answer the plaintiffs motion to compel the City's disclosure of certain juvenile deposition statements and records which the City had stated were not discoverable due to privacy concerns of the individuals whose information was included within the documents and certain Rochester Police Department documents and employment records which the City's believed were protected by New York State Civil Rights Law §50a.

The plaintiff in this matter requested the documents from the City through the discovery process. The City provided all documents which it deemed discoverable and retained six specific and identifiable documents. Both the plaintiff and the City defendants in this action have submitted memorandum of law stating their legal justification as to why they believe the documents should be disclosed or retained. The Court has reviewed the briefs submitted by the parties and has reviewed the documents in camera,

NOW, with due deliberation being had and upon the reasons cited in my decision letter, dated July 6, 2004 and attached and made a part of hereto, stating in part:

A. (Juvenile Witness Statements); partially legible witness statements previously provided to the plaintiff are to be turned over by the defendant to the plaintiff and are to be reproduced in a legible form as they are descriptions of the incident which are not protected by the Civil Rights Law. These documents are to be disclosed to the plaintiff.

B. (Items B(1) and B(2)); the RPD 1408 form dated 2/18/02 and the undated two page narrative of the incident authored by Lieutenant James Noble. These documents are description of the incidents and are not protected by the Civil Rights Law. These documents are to be disclosed to the plaintiff.

C. (Items 3-6); the aforementioned documents, except for the introduction and first paragraph of item (4), are not sufficiently probative of the incident and contain post accident review of the officer's conduct and thus are protected and are not discoverable by the plaintiff.

NOW, with the all discoverable documents being disclosed and the plaintiff and the defendant having stipulated that the depositions will be scheduled promptly, it is further

ORDERED, that the defendant must disclose the two witness statements which had previously been disclosed to the plaintiff which are designated as the juvenile witness statements and the City must disclose documents designated as B(1) and b(2) along with the first paragraph of document item (4).

Dated: 9/22, 2004

<<signature>>

HON. WILLIAM P. POLITO

Supreme Court Justice

2014 WL 2217900
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Christopher SMITH and Linda Smith, Plaintiffs,
v.
The TOWN OF STONY POINT and the Town of Stony Point Police Department, Defendants.

No. 13 CV 5000(VB).
|
Signed May 22, 2014.

Opinion

MEMORANDUM DECISION

BRICCETTI, District Judge.

***1** In this Section 1983 action, plaintiff Christopher Smith alleges his former employer, the Town of Stony Point Police Department (the "Department"), violated his civil rights by releasing his personnel file to prospective employers. [1]

1 Under New York law, a municipal police department has no separate legal identity apart from the municipality which created it. Therefore, it cannot be sued. *See Hall v. City of White Plains,* 185 F.Supp.2d 293, 303 (S.D.N.Y.2002); *Baker v. Willett,* 42 F.Supp.2d 192, 197 (N.D.N.Y.1999) ("A police department cannot sue or be sued because it does not exist separate and apart from the municipality and does not have its own legal identity."). Accordingly, plaintiff's claim lies, if at all, against the Town of Stony Point.

Now pending is defendants' motion to dismiss the amended complaint. (Doc. # 15). For the following reasons, defendants' motion is GRANTED.

The Court has subject matter jurisdiction under 28 U.S.C. § 1331.

BACKGROUND

For purposes of ruling on this motion, the Court accepts as true all well-pleaded factual allegations in the amended complaint and draws all reasonable inferences in favor of plaintiff. [2]

2 As explained below (*see infra* p. 9), the Court does not reach plaintiff Linda Smith's derivative claim for loss of consortium under New York law. Accordingly, the Court hereinafter refers to Christopher Smith as "plaintiff."

Plaintiff was employed by the Department for 22 years before his voluntary resignation in 2011. During this time, plaintiff claims he maintained an "exemplary record of service," rising through the Department's ranks from patrolman to sergeant.

After resigning from full-time employment with the Department, plaintiff "sought parttime employment with other police departments in the same geographical area." Although his employment prospects were good, plaintiff alleges he received no offers of employment.

Plaintiff later learned a number of his prospective employers had received an anonymous letter containing "private and proprietary" information about plaintiff's employment with the Department. Although some of the statements in the letter were accurate, others were "false and defamatory." Several prospective employers told plaintiff the letter played a role in their decision not to hire him. According to plaintiff, "most of the information contained in this letter could only have been obtained from [his] private and protected personnel file."

Plaintiff alleges the disclosure of confidential information in his personnel file violated his civil rights, and resulted in his inability to work in his chosen profession.

Defendants now move to dismiss, arguing plaintiff (i) cannot allege the deprivation of a constitutionally protected liberty or property interest, as required to state a due process claim, and (ii) fails to plead a claim against the Town of Stony Point (the "Town") under *Monell v. Department of Social Services,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

DISCUSSION

I. *Legal Standard*

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court evaluates the sufficiency of the complaint under the "two-pronged approach" announced by the Supreme Court in *Ashcroft v. Iqbal,* 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). First, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to the assumption of truth and are thus not sufficient to withstand a motion to dismiss. *Id.* at 678; *Hayden v. Paterson,* 594 F.3d 150, 161 (2d Cir.2010). Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Ashcroft v. Iqbal,* 556 U.S. at 679.

***2** To survive a Rule 12(b)(6) motion to dismiss, the allegations in the complaint must meet a standard of "plausibility." *Id.* at 678; *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 564, 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." *Ashcroft v. Iqbal,* 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

II. *Due Process*

Plaintiff argues he was deprived of a property interest in the privacy of his personnel file arising from the protections afforded police officers' employment records under New York Civil Rights Law § 50–a ("Section 50–a"), and unspecified "Constitutional protections." These claims sound in procedural due process and arise under the Fourteenth Amendment.

A. *Procedural Due Process Violation Based on Section 50–a*

To prevail on this claim, plaintiff must show he possessed a protected liberty or property interest in the privacy of his personnel file and was deprived of that interest without due process. *See McMenemy v. City of Rochester,* 241 F.3d 279, 285–86 (2d Cir.2001).

"Although the Constitution protects property interests, it does not create them." *Donato v. Plainview–Old Bethpage Cent. Sch. Dist.,* 96 F.3d 623, 629 (2d Cir.1996). Rather, such interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Once such a property interest is identified, however, federal constitutional law—not state law—"determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Town of Castle Rock, Colo. v. Gonzalez,* 545 U.S. 748, 757, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) (internal quotation marks omitted).

New York does not recognize any common law right to privacy. *See Arrington v. N.Y. Times Co.,* 55 N.Y.2d 433, 440, 449 N.Y.S.2d 941, 434 N.E.2d 1319 (1982). Thus, "[w]hatever protection is afforded [plaintiff's] privacy comes solely by virtue of statute." *Simpson v. N.Y.C. Transit Auth.,* 112 A.D.2d 89, 90, 491 N.Y.S.2d 645 (1st Dep't 1985).

Section 50–a, the relevant statute here, provides:

> All personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof ... shall be considered confidential and not subject to inspection or review without the express written consent of such police officer ... except as may be mandated by lawful court order.

N.Y. Civ. Rights Law § 50–a.

When, as here, the claimed property interest is rooted in state statutory law, federal courts begin by considering the scope of the right conferred by the statute, as interpreted by the courts of that state. *See generally Sealed v. Sealed,* 332 F.3d 51 (2d Cir.2003) (certifying questions of statutory construction to Connecticut Supreme Court to determine whether state statutes gave rise to federally protected entitlement).

***3** The Court's review of New York case law reveals Section 50–a was not meant to create a "blanket exemption insulating police records from ... disclosure." *Matter of Capital Newspapers v. Burns,* 67 N.Y.2d 562, 569, 505 N.Y.S.2d 576, 496 N.E.2d 665 (1986). To the contrary, "the legislative intent

underlying the enactment of Civil Rights Law § 50–a was narrowly specific, to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action." *Id.* (internal quotation marks omitted); *see also Carpenter v. City of Plattsburgh,* 105 A.D.2d 295, 298, 484 N.Y.S.2d 284 (3d Dep't), *aff'd,* 66 N.Y.2d 791, 497 N.Y.S.2d 909, 488 N.E.2d 839 (1985) (holding that Section 50–a "was designed to limit access to [police] personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination").

Thus, New York courts have repeatedly upheld disclosures of the contents of police personnel files outside of the context of litigation, and in furtherance of the police departments' official functions. *See, e.g., Reale v. Kiepper,* 204 A.D.2d 72, 73, 611 N.Y.S.2d 175 (1st Dep't 1994) (publication of results of disciplinary proceedings against New York City Transit Police Officers in departmental bulletins disseminated only within police precincts was "permissible" government action "in furtherance of an official function"); *Carpenter v. City of Plattsburgh,* 105 A.D.2d at 299, 484 N.Y.S.2d 284 (Section 50–a did not bar disclosure of plaintiff-police officer's personnel file in connection with petition to annul his appointment as temporary captain of police department).

Here, as defendants are alleged to have disclosed the contents of plaintiff's personnel file in furtherance of their official functions (responding to employment inquiries from neighboring police departments), and as plaintiff himself alleges his file was disclosed "prior to any litigation commencing," Am. Compl. (Doc. # 14) ¶ 15, Section 50–a affords plaintiff no legitimate claim of entitlement to privacy in his personnel file.

Accordingly, plaintiff cannot plausibly allege defendants' disclosure of his personnel file deprived him of a property interest in violation of the Due Process Clause of the Fourteenth Amendment.

B. *Procedural Due Process "Stigma Plus" Claim*

To the extent the amended complaint alleges constitutional defamation in violation of the Due Process Clause of the Fourteenth Amendment, this claim fares no better.

Because "damage to one's reputation is not by itself sufficient to invoke the procedural protection of the Due Process Clause," the Second Circuit requires a showing of "stigma plus" to establish constitutional defamation. *Valmonte v. Bane,* 18 F.3d 992, 999 (2d Cir.1994) (internal quotation marks omitted). " 'Stigma plus' refers to a claim brought for injury to one's reputation (the stigma) coupled with the deprivation of some 'tangible interest' or property right (the plus), without adequate process." *DiBlasio v. Novello,* 344 F.3d 292, 302 (2d Cir.2003).

***4** To establish the "stigma" element of the claim, plaintiff must allege the government made false and defamatory statements that "call into question [his] good name, reputation, honor, or integrity," *Quinn v. Syracuse Model Neighborhood Corp.,* 613 F.2d 438, 446 (2d Cir.1980) (internal quotation marks omitted), or "impugn [his] professional reputation in such a fashion as to effectively put a significant roadblock in [his] continued ability to practice his ... profession." *Donato v. Plainview–Old Bethpage Cent. Sch. Dist.,* 96 F.3d at 631.

Importantly, the "deleterious effects [flowing] directly from a sullied reputation," including "economic harm," *Sadallah v. City of Utica,* 383 F.3d 34, 38–39 (2d Cir.2004), and "damage to a plaintiff's job prospects," *Watson v. Grady,* 2010 WL 3835047, at *21 n. 11 (S.D.N.Y. Sept.30, 2010), cannot themselves constitute the "plus." To establish the "plus" element, plaintiff must allege an *additional* "specific and adverse [state] action clearly restricting [his] liberty—for example, the loss of employment." *Velez v. Levy,* 401 F.3d 75, 87–88 (2d Cir.2005). The Second Circuit has cautioned against conflating the "deleterious effects" of the defamation itself (damage to reputation and the resulting pecuniary harm) with the "additional state-imposed burden"—the "plus"—"necessary for invoking the 'stigma plus' doctrine." *Sadallah v. City of Utica,* 383 F.3d at 38–39; *see id.* at 39 (merely "[r]epeating the economicharm argument ... does not satisfy the separate and independent 'plus' prong of the 'stigma plus' test").

Here, although plaintiff plausibly alleges the "stigma" piece of his claim—that the Department's publication of the false and defamatory letter containing information obtained from his personnel file prevented him from obtaining employment in his chosen field—he fails to allege the "plus." Indeed, as plaintiff alleges he "voluntarily resigned" from his employment with the

Department, Am. Compl. (Doc. # 14) ¶ 6, he cannot argue a plus stemming from the loss of government employment. *See, e.g., Siegert v. Gilley,* 500 U.S. 226, 234, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) (no liberty interest implicated when alleged government defamation occurred subsequent to plaintiff's voluntary resignation from government employment); *Sadallah v. City of Utica,* 383 F.3d at 38–39 (damage to reputation and resulting economic harm were direct "deleterious effects" of alleged defamation, and did not "satisfy the separate and independent 'plus' prong of the 'stigma plus' test"). Nor can plaintiff establish a "plus" based on his inability to continue to work as a police officer, as this is a direct consequence of the defamation itself. *See id.* at 38.

Accordingly, plaintiff has failed to state a procedural due process claim based on a "stigma-plus" theory. [3]

[3] To the extent plaintiff alleges a violation of his substantive due process rights, this claim is subsumed in his procedural due process stigma plus claim. *See Segal v. City of New York,* 459 F.3d 207, 213 (2d Cir.2006) (noting that "stigma plus is a species within the phylum of procedural due process claims"); *Velez v. Levy,* 401 F.3d at 93–94 (allegations of conscienceshocking government action based in relevant part upon alleged government defamation subsumed in stigma plus claim).

III. *Municipal Liability*

As noted above, "[a] police department cannot sue or be sued because it does not exist separate and apart from the municipality and does not have its own legal identity." *Baker v. Willett,* 42 F.Supp.2d 192, 197 (N.D.N.Y.1999). Accordingly, plaintiff's failure to name individual police defendants means his Section 1983 claim lies, if at all, against the Town. However, plaintiff's failure to allege an underlying constitutional violation or an actionable Town policy or custom compel dismissal of his *Monell* claim.

***5** A municipality is liable for a deprivation of a citizen's rights pursuant to 42 U.S.C. § 1983 "when execution of a 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, inflicts the injury [for which] the government as an entity is responsible." *Monell v. N.Y.C. Dep't of Soc. Servs.,* 436 U.S. at 694. Importantly, however, *"Monell* does not provide a separate cause of action for the failure by the government to train its employees; it *extends* liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation." *Segal v. City of New York,* 459 F.3d 207, 219 (2d Cir.2006).

Thus, plaintiff's failure to allege an underlying due process violation is fatal to his *Monell* claim against the Town. *See Guerrero v. City of New York,* 2013 WL 673872, at *3 (S.D.N.Y. Feb.25, 2013). And plaintiff's theory of liability—that the Department "failed to abide by its own rules and regulations" requiring it to "protect plaintiff's property interest in his files"—is the antithesis of a *Monell* claim. *See Overhoff v. Ginsburg Dev., L.L.C.,* 143 F.Supp.2d 379, 389 (S.D.N.Y.2001) (dismissing claim "that existing Village policies were not enforced" as "the antithesis of a *Monell* claim").

Accordingly, plaintiff fails to state a claim against the Town.

IV. *State Law Claim*

Having dismissed plaintiff Christopher Smith's federal claims, the Court declines to exercise supplemental jurisdiction over Linda Smith's state law claim for loss of consortium. *See* 28 U.S.C. § 1367(c)(3).

CONCLUSION

Defendants' motion to dismiss the amended complaint is GRANTED.

The Clerk is instructed to terminate the motion (Doc. # 15) and close this case.

SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 2217900

End of Document

Exhibit 2

Patrolmen's Benevolent Association
NEW YORK CITY TRANSIT POLICE DEPARTMENT
299 BROADWAY (ROOM 505) • NEW YORK, N.Y. 10007 • Telephone 964-6992 - 6993

JOHN MAYE
President
FLOYD HOLLOWAY
1st Vice-President
THOMAS GRASSO
2nd Vice-President
JULIO COSME JR.
Executive Secretary
JOSEPH CARNEY
Financial Secretary
AMADEO FASOLINO
Recording Secretary
JOHN McLOUGHLIN
Treasurer

June 18, 1976.

Hon. Hugh L. Carey
Governor of the State of New York
State Capitol
Albany, New York. 12224

Re: Senate 7635-B by Mr. Padavan

Dear Governor Carey:

The above bill which is now before you would amend the Civil Rights Law to provide that all personnel records used to evaluate the performance of police officers shall be confidential and not subject to review or inspection without the written consent of the officer or by order of the court.

It further provides no court order will issue except after hearing and a clear showing of relevancy and materiality, and additionally, that if the judge signs an order he will review the file and determine whether to make the records or part of them available.

As a result of your disapproval last year of a similar bill (Assembly 2175-B) -- Veto Memorandum No. 127 -- this year's measure has been amended to meet your objections. The bill specifically provides that the provisions do not apply to district attorneys, the attorney general, a grand jury, or any other governmental agency which requires the records in furtherance of their official function.

The Patrolmen's Benevolent Association, N.Y.C. Transit Police Department, which represents some 3000 members of the transit police force, endorses this measuee and respectfully urges your approval.

As with all citizens the civil rights of police officers must be protected. These rights are sacred and must be given way only to the paramount interest of the public good.

Patrolmen's Benevolent Association
NEW YORK CITY TRANSIT POLICE DEPARTMENT
299 BROADWAY (ROOM 505) • NEW YORK, N.Y. 10007 • Telephone 964-6992 - 6993

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Executive Secretary
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Recording Secretary
JOHN McLOUGHLIN
Treasurer

Hon. Hugh L. Carey June 18, 1976.

In today's milieu police officers are bearing the brunt of fishing expeditions by some attorneys who are subpoenaing personnel records in an attempt to attack officers' credibility, a tactic that has lead to abuse and in some cases to the disclosure of unverified and unsubstantiated information that the records contain. It also has resulted in the disclosure of confidential information and privileged medical records.

These abuses can be stopped and the civil rights of police officers upheld by enactment of this bill. If the information in the personnel records is required in the public interest, the judge can release it. If it is not, he may withhold it. In either case, the police officer has been accorded due process and the rights of the public secured.

Hopefully you will agree that the purpose of the bill, which last year you characterized as "commendable", can be achieved without expense to effective law enforcement.

For these reasons, your approval is respectfully requested.

Respectfully yours,

John Maye
President

Affiliated with { *Police Conference State of New York, Inc.*
International Conference of Police Ass'ns.
Metropolitan Police Conference Inc.