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January 7, 2009

Hon. Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals
for the Second Circuit
United States Courthouse
500 Pearl Street, 3rd floor
New York, New York 10007

Re: Esposito v. The State of New York
Docket No. 08-4879-cv

Dear Ms. Wolfe:

The Office of the Corporation Counsel represents defendants-appellees City of New York, New York City Police Commissioner Raymond Kelly, Detective Robert Arbuiso and Lieutenant Adam Lamboy ("City defendants"), in the above-referenced matter. We respectfully submit this letter memorandum, in lieu of a brief, in support of affirmance of the District Court's August 8, 2008 Opinion and Order granting the City defendants' motion to dismiss plaintiff Luisa C. Esposito's Second Amended Complaint against the City defendants, pursuant to Federal Rules of Civil Procedure 12(b)(6), and dismissing the complaint in its entirety. Please distribute the enclosed copies of this memorandum brief to the Judges of this Court who are assigned to hear and consider this case.

FACTS

Plaintiff, Luisa C. Esposito, proceeding *pro se*, commenced this action pursuant to 42 U.S.C. § 1983, alleging that she was deprived of her constitutional rights by all defendants, including defendants City of New York, Raymond Kelly, Robert Arbuiso and Adam Lamboy ("City defendants") under the First and Fourteenth Amendments to the United States Constitution. Specifically, plaintiff claimed that all defendants conspired to deprive her of her

constitutional rights under the First and Fourteenth Amendments and her right to equal protection of the laws. See Second Amended Complaint, ¶¶ 46-52, 62-65 (A69-94). Additionally, plaintiff alleged that defendants Allen H. Isaac, Harvey Gladstein & Partners LLC f/k/a Gladstein & Isaac, Brian J. Isaac, and Pollack, Pollack Isaac & DeCicco LLP assaulted her, breached a contract with her, and breached fiduciary duties owed to her. Id. at ¶¶ 53-61.

The allegations of plaintiff's Second Amended Complaint, dated May 9, 2008, arise out of an incident that occurred between plaintiff and defendant Allen H. Isaac on or about July 8, 2005 and September 16, 2005, after the defendant firm of Pollack, Pollack, Isaac & DeCicco referred plaintiff's legal matter resulting from a car accident to the defendant law firm Harvey Gladstein & Partners LLC f/k/a Gladstein & Isaac. See Second Amended Complaint at ¶¶ 20-22. Specifically, plaintiff claimed that defendant Isaac, plaintiff's attorney from the firm Gladstein & Isaac, sexually assaulted her and sexually harassed her.

Plaintiff alleged that on or about October or November 2005, she filed a grievance complaint with the New York State Supreme Court, Appellate Division, First Department's Departmental Disciplinary Committee ("DDC") to complain about the sexual assault. Id. at ¶ 31. She alleged that the grievance complaint was handled by defendant Naomi Goldstein. Id. Additionally, plaintiff claimed that on or about December 23, 2005, she met with Detective Robert Arbuiso, who questioned plaintiff about the alleged sexual assaults. Id. at ¶ 25. She alleged that she spoke to assistant district attorneys in February 2006, but that the New York County District Attorney's Office closed their investigation of plaintiff's case in March 2006. Id. at ¶¶ 27-28. Plaintiff alleged that on or about July 2007, she met with defendant Lieutenant Adam Lamboy and told him that "she wanted Mr. Isaac arrested for these alleged crimes." Id. at ¶ 29. Plaintiff alleged that in or about July 2007, her attorney sent a "Notice and Demand" to Police Commissioner Raymond Kelly, asking that Mr. Isaac be arrested. Id. at ¶ 30. Plaintiff claimed that by letter dated July 11, 2007, the Police Commissioner's Office responded to plaintiff's "Notice and Demand" regarding her sexual assault complaint, and advised her that the matter was being forwarded to the appropriate official in the New York City Police Department. Id. Based upon these facts, plaintiff alleged that the City defendants violated her First and Fourteenth Amendment Rights. Id. at ¶¶ 46-52. Specifically plaintiff claimed that her equal protection rights were violated, and that she was denied her "right to a fair and honest judicial system." Id. at ¶¶ 49, 62-65. She alleged that she was denied "fair and honest court proceedings," and her First Amendment right to petition the government. Id. at ¶ 50.

On or about May 30, 2008, the City defendants moved to dismiss the Second Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds that: (1) plaintiff failed to state a claim that any of her constitutional rights were violated; (2) plaintiff failed to state a claim that there was a conspiracy to deprive her of her constitutional rights; (3) plaintiff failed to state a claim against the City defendants pursuant to

¹ Numbers in parentheses refer to pages in plaintiff-appellant's Appendix.

² For purposes of the City defendants' motion to dismiss only, the City defendants construed plaintiff's allegations as true.

42 U.S.C. § 1983; (4) plaintiff failed to state a claim against defendant Commissioner Raymond W. Kelly because plaintiff did not allege that he was personally involved in the alleged deprivation of her constitutional rights; and (5) defendants Raymond Kelly, Robert Arbuiso and Adam Lamboy were entitled to qualified immunity from liability for all claims.

DECISION BELOW

By Opinion and Order entered August 8, 2008, the United States District Court for the Southern District of New York (Scheidlin, U.S.D.J.) dismissed plaintiff's complaint in this case, and in five other actions that were consolidated for decision (A14-67). The District Court noted that these actions, all filed as related to Anderson v. State of New York, 07 Civ. 9599 (S.D.N.Y. Oct. 26, 2007), related to alleged corruption in the New York State courts. Each action alleged some underlying wrongdoing by an attorney, followed by a complaint to the disciplinary committee, followed by the committee's failure to take action. The Court noted that the complaints generally alleged that the disciplinary committee was engaged in a conspiracy to "whitewash" grievances filed against prominent attorneys (A16).

The Court concluded that the United States Constitution does not permit the District Court to supervise the departmental disciplinary committees or review the decisions of the courts of New York State, and that the only federal court that may review such decisions is the United States Supreme Court, notwithstanding the possibility of corruption in the New York State courts (A16). Because the District Court lacked jurisdiction to review the decisions of the departmental disciplinary committees, it dismissed all of the actions.

The Court reviewed the background facts and summarized plaintiff's claims in this case (A17-21). Plaintiff alleged that her former attorney repeatedly sexually harassed and assaulted her; that the New York City Police Department failed to pursue her criminal complaint against him; and that the New York state court system failed to pursue her attorney grievance.

Pursuant to 42 U.S.C. § 1983, plaintiff claimed that all defendants violated her rights to due process and equal protection, as well as her First Amendment right to petition the government for redress of grievances. She also claimed that the City of New York, Kelly, Arbuiso, and Lamboy violated her rights to due process and equal protection. Finally, plaintiff alleged state law breach of contract, breach of fiduciary duty, and assault claims against the individual defendant attorney; and Harvey Gladstein & Partners LLC, and Pollack, Pollack, Isaac & DeCicco LLP (A20-21).

After reviewing the applicable law and standard of review, including the principles underlying § 1983 actions, and the law pertaining to a litigant's right to an investigation, qualified immunity, and the Rooker-Feldman doctrine (A43-56), the District Court dismissed plaintiff's constitutional claims for failure to investigate or pursue grievances (A59). The Court ruled that there is no constitutional right to have the government investigate an allegation of wrongdoing, and for this reason, the defendants are also entitled to qualified immunity (A59).

The Court below also held that plaintiff lacked standing to bring an action for denial of access to the courts, ruling as follows (A60):

Several of plaintiffs' claims relate to the alleged failure of various defendants to take appropriate steps in various attorney disciplinary procedures. A non-party generally has no legally protected interest that is affected by such failure. In the absence of such an interest, a plaintiff has no standing to assert a claim. Because they have no cognizable interest in having criminal or civil proceedings brought by the Government against the various defendants, plaintiffs cannot state a claim against government officials for failing to initiate those proceedings.

Finally, having dismissed all federal law claims, the Court dismissed plaintiff's state law claims, noting such claims are more appropriate for litigation in state court (A62-63). The Court reasoned that when a plaintiff has not alleged diversity jurisdiction and her federal claims fail as a matter of law, courts generally decline to exercise supplemental jurisdiction over remaining state law claims (A62). The Court also denied plaintiff leave to replead, holding that amendment would be futile, since plaintiff has not suffered any wrongs that could be addressed in federal district court (A63). The District Court accordingly dismissed plaintiff's complaint in its entirety (A63-64).

ARGUMENT

The District Court properly dismissed plaintiff's complaint in its entirety as against the City defendants. As the Court below correctly ruled, the United States Constitution does not permit the District Court to supervise the departmental disciplinary committees, and the Court thus lacked subject matter jurisdiction to review such decisions; there is no constitutional right to have the government investigate an allegation of wrongdoing; the City individual defendants are entitled to qualified immunity; and plaintiff lacks standing to bring an action for denial of access to the courts, as she has no cognizable interest in having criminal or civil proceedings brought by the government against the various defendants, and cannot state a claim against government officials for failing to initiate those proceedings.

A. Plaintiff lacks standing to bring a claim for denial of access to the courts.

Plaintiff's claim for "denial to a fair and honest judicial system," or denial of access to the courts, was properly dismissed. The Supreme Court has consistently held that citizens lack standing to contest the policies of the prosecuting authority when she herself is neither prosecuted nor threatened with prosecution. See Younger v. Harris, 401 U.S. 37, 43 (1971); Bailey v. Patterson, 369 U.S. 31, 33 (1962); Poe v. Ullman, 367 U.S. 497, 501 (1961). A private citizen lacks a judicially cognizable interest in prosecution or nonprosecution of another. See Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (private citizen who was the victim of a crime has no constitutional right to criminal prosecution of another private citizen). Thus, plaintiff has no constitutional entitlement to the prosecution of her alleged assailant, and plaintiff's claims for denial of access to courts were properly dismissed.

B. Plaintiff fails to state a claim that the City defendants violated her First Amendment rights.

Plaintiff's First Amendment claims against the City defendants also fail as a matter of law, because the alleged conduct of the City defendants did not deprive plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States. To state a claim pursuant to 42 U.S.C. § 1983, a plaintiff must allege (1) that the challenged conduct was attributable at least in part to a person acting under color of state law, and (2) that such conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); DeJean v. County of Nassau, 2008 U.S. Dist. LEXIS 4291 (E.D.N.Y. 2008).

A private citizen does not have a constitutional right to initiate or to compel the initiation of criminal proceedings against another individual. See Leeke v. Timmerman, 454 U.S. 83 (1981), Linda R.S. v. Richard D., 410 U.S. 614 (1973). Thus, the City defendants' actions (or inactions) in no way infringed upon any of plaintiff's First Amendment rights. See DeJean, 2008 U.S. Dist. LEXIS 4291; Price v. Hasly, 2004 U.S. Dist. LEXIS 29764, at *2 (W.D.N.Y. 2004); Lis v. Leahy, 1991 U.S. Dist. LEXIS 21749 (W.D.N.Y. 1991). Therefore, plaintiff cannot maintain an action pursuant to 42 U.S.C. § 1983 against any of the City defendants with respect to her First Amendment claims.

C. Plaintiff fails to state a viable equal protection claim against the City defendants.

Likewise, plaintiff has not stated a viable equal protection claim against the City defendants. To establish an equal protection violation, plaintiffs must prove purposeful discrimination, directed at an identifiable suspect class. McCleskey v. Kemp, 481 U.S. 279, 292 (1987); Giano v. Senkowski, 54 F.3d 1050, 1057 (2d Cir. 1995). The Equal Protection Clause, in essence, requires that similarly situated persons be treated alike. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). Plaintiff's failure to allege that she was treated differently from other similarly individuals is fatal to her equal protection claim. See Jackson v. Mann, 196 F.3d 316, 321 (2d Cir. 1999). Plaintiff's vague and general allegations amount to nothing more than conjecture and speculation. Accordingly, plaintiff's equal protection claim is likewise without merit.

D. Plaintiff fails to state a claim for failure to investigate and protect.

To the extent plaintiff alleges that City defendants failed to properly investigate her complaint that she was sexually assaulted by a private individual and failed to protect her from said individual, such claims were properly dismissed, because the Due Process Clause does not require government to protect the victim from her assailant. DeShaney v. Winnebago County Department of Social Services., 489 U.S. 189, 202 (1989) (citing Monell v. New York City Department of Social Services, 436 U.S. 658 (1978)).

In DeShaney, the Supreme Court held that the harm to the plaintiff was caused by the perpetrator, not by the failure of the City to investigate or protect the plaintiff from a third party actor. DeShaney, 489 U.S. at 191, 202-03. While citizens may legitimately expect

assistance when they seek aid from the police, an officer's failure to investigate or respond to a complaint does not constitute a federal statutory or constitutional claim under 42 U.S.C. § 1983. See DeShaney, 489 U.S. at 196 (a "state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause"); Sealed v. Sealed, 332 F.3d 51, 55 (2d Cir. 2003) ("states have no substantive due process obligation to protect against private violence"). Here, the alleged harm to plaintiff was not inflicted by the defendants, but by the private citizen who allegedly sexually assaulted her. The City defendants thus did not violate plaintiff's due process rights.

E. Plaintiff fails to state a claim that there was a conspiracy to deprive her of her constitutional rights.

Plaintiff fails to state a claim that defendants engaged in a conspiracy to deprive her of her constitutional rights (Count One of Second Amended Complaint). In order to maintain a claim for conspiracy under § 1983, plaintiff must: (1) set forth facts (not merely a recitation of conclusory allegations), (2) which clearly demonstrate an *agreement* between the alleged co-conspirators, and (3) prove that certain specific acts were committed in furtherance of that agreement. See Zemsky v. City of New York, 821 F.2d 148, 151 (2d Cir.), cert. denied, 484 U.S. 965 (1987) (dismissing *pro se* complaint containing only vague and conclusory allegations of conspiracy); Leon v. Murphy, 988 F.2d 303, 311 (2d Cir. 1993); Sommer v. Dixon, 709 F.2d 173, 175 (2d Cir.), cert. denied, 464 U.S. 857 (1983).

The essential element of a conspiracy claim is an agreement to deprive a plaintiff of his or her constitutional rights. Without a "meeting of the minds, the independent acts of two or more wrongdoers do not amount to conspiracy." National Congress for Puerto Rican Rights v. City of New York, 75 F. Supp. 2d 154, 168 (S.D.N.Y. 1999); and see Walker v. Goord, 2000 U.S. Dist. LEXIS 3501 (S.D.N.Y. March 21, 2000) (plaintiff must prove that defendants willfully agreed to violate plaintiff's constitutional rights); Perez v. City of New York, 1999 U.S. Dist. LEXIS 21137 (E.D.N.Y. 1999)(recognizing that an essential element of a claim of conspiracy is an agreement among co-conspirators to violate plaintiff's constitutional rights).

Likewise, vague and conclusory allegations of conspiracy, not pleaded with particularity, cannot withstand a motion to dismiss. See e.g. San Fillipo v. U.S. Trust Co. of New York, Inc., 737 F.2d 246, 256 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985) (affirming dismissal of conspiracy complaint where allegations were vague and unsupported by a description of particular overt act); Sommer v. Dixon, 709 F.2d 173, 175 (2d Cir.), cert. denied, 464 U.S. 857 (1983) ("a complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss).

In the instant case, because plaintiff failed to establish any cognizable constitutional deprivations, plaintiff's conspiracy claim fails as a matter of law. See Feinberg v. City of New York, 2004 U.S. Dist. LEXIS 16098, * 14 (S.D.N.Y. 2004) (where plaintiff failed to establish a violation of his constitutional rights, the conspiracy claim must fail as well). Furthermore, plaintiff's Second Amended Complaint is entirely devoid of any allegations regarding when, where, and by whom an agreement was made, the nature of such an agreement, or the specific acts performed in furtherance of this alleged agreement. Plaintiff's conspiracy allegations fail as a matter of law because the Second Amended Complaint does not even contain

allegations regarding a “meeting of the minds” between defendants or specific acts committed in furtherance of the conspiracy. Plaintiff only generally avers that all of the defendants conspired with one another to deprive her of her constitutional rights. Accordingly, plaintiff’s vague and conclusory allegations of conspiracy fail as a matter of law, and were properly dismissed as against City defendants.

F. Plaintiff fails to state a claim under 42 U.S.C. § 1983 against defendant City of New York.

Plaintiff’s claims against defendant City of New York brought pursuant to 42 U.S.C. § 1983 were also properly dismissed for failure to state a claim (Count One of Second Amended Complaint). Plaintiff failed to prove that an identified official municipal policy or practice was the “moving force [behind] the constitutional violation,” to establish municipal liability. Monell v. Department of Social Services, 436 U.S. 658, 694 (1978).

In the instant case, plaintiff’s Second Amended Complaint fails to allege that (1) the City of New York had a formal policy that caused plaintiff’s alleged injuries; (2) that New York City officials responsible for establishing final policy with respect to the subject matter of this case took action or made a specific decision which caused the alleged violation of plaintiff’s constitutional rights; or (3) that there is an unlawful practice by subordinate officials so permanent and well settled to constitute “custom or usage.” Additionally, plaintiff’s Second Amended Complaint does not allege any facts suggesting a custom or policy by defendant City of New York, nor does plaintiff allege that a custom or policy of the City of New York caused the alleged constitutional violations to plaintiff in the instant case. Accordingly, plaintiff’s claims against defendant City of New York brought pursuant to 42 U.S.C. § 1983 were properly dismissed.

G. Plaintiff fails to allege that Commissioner Raymond Kelly was personally involved in the alleged deprivation of her constitutional rights.

Liability under § 1983 is imposed upon a defendant only when the defendant personally “subjects, or causes to be subjected” any person to the deprivation of any federal right. Accordingly, “personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.” Hernandez v. Keane, 341 F.3d 137, 144 (2d Cir. 2003), cert. denied, 543 U.S. 1093 (2005); William v. Smith, 781 F.2d 319, 323 (2d Cir. 1986); Moffitt v. Town of Brookfield, 950 F.2d 880, 885 (2d Cir. 1991).

None of plaintiff’s allegations establish New York City Police Commissioner Raymond Kelly’s personal involvement in the alleged deprivation of plaintiff’s constitutional rights. Plaintiff here failed to plead Commissioner Kelly’s personal involvement with specific factual support. See Davis v. State of New York, 316 F.3d 93, 101 (2d Cir. 2002) (affirming dismissal of claim against then Governor Pataki, where plaintiff failed to sufficiently allege Pataki’s personal involvement in Attica’s smoking policies); Joyner v. Griener, 195 F. Supp. 2d 500, 505 (S.D.N.Y. 2002) (plaintiff’s “broad, simple and conclusory statements” concerning defendants are insufficient to allege personal involvement).

In the instant case, plaintiff's only allegations related to Commissioner Kelly are that plaintiff sent a "Notice and Demand" to him asking him to ensure that Mr. Isaac was arrested. Furthermore, according to the Second Amended Complaint, an individual from the Commissioner's Office (not the Commissioner) responded to plaintiff's concerns by letter and stated that the matter would be forwarded to the appropriate official in the New York City Police Department. See Second Amended Complaint at ¶ 30. Plaintiff does not allege that the Commissioner himself was personally involved in the alleged deprivation of her constitutional rights in any way. In fact, plaintiff does not even have a good faith basis to assert that Commissioner Kelly was aware of her complaint or had any knowledge or input in the decision (or lack thereof) to prosecute Mr. Isaac. Furthermore, as previously noted, plaintiff has no right to the criminal prosecution of another, and even if Commissioner Kelly had been involved, he would not be liable to plaintiff.

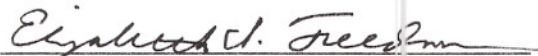
H. Defendants Raymond Kelly, Robert Arbuiso, and Adam Lamboy are entitled to qualified immunity from liability for all claims.

The District Court properly ruled that the individual City defendants are entitled to qualified immunity for plaintiff's constitutional claims. The doctrine of qualified immunity shields government officials from civil liability if their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, qualified immunity is not merely a defense, but rather is also "an entitlement not to stand trial or face other burdens of litigation." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Accordingly, the availability of qualified immunity should be decided by a court "at the earliest possible stage in litigation." Scott v. Harris, 550 U.S. 372, at n.2 (2007); Hunter v. Bryant, 502 U.S. 224, 227 (1991).

When analyzing qualified immunity in the context of a suit for damages based on an alleged constitutional violation, a police officer is immune from such suit if either (a) it was objectively reasonable for the police officer to believe that he was not committing a constitutional violation, or (b) officers of reasonable competence could disagree on whether a constitutional violation was being committed. Posr v. Court Officer Shield No. 207, 180 F.3d 409, 416 (2d Cir. 1999) (quoting Golino v. City of New Haven, 950 F.2d 864, 870 (2d Cir. 1991), cert. denied, 505 U.S. 1221 (1992)). For the reasons set forth herein, the City defendants had no reason to believe they committed a constitutional violation against plaintiff. At the very least, reasonable officers could disagree about whether they were committing a constitutional violation by refusing to prosecute defendant Isaac. For these reasons, and the reasons stated in this memorandum brief, defendants Raymond Kelly, Robert Arbuiso and Adam Lamboy are entitled to qualified immunity from liability as a matter of law for all claims, as the District Court properly determined.

For the reasons stated herein and by the District Court, the Opinion and Order dismissing plaintiff's complaint as against the City defendants, should be affirmed.

Respectfully submitted,



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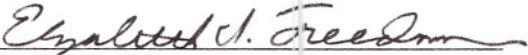
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ANTI-VIRUS CERTIFICATION

I, Elizabeth I. Freedman, hereby certify that I scanned this document using VirusScan Enterprise Version 8.5.0i anti-virus software, and no virus was detected.

Dated: New York, New York
January 7, 2009


Elizabeth I. Freedman
Assistant Corporation Counsel