UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

RODERICK WEBBER, Plaintiff v. EDWARD DECK, ET AL., Defendants	)	Case No. 1:18-cv-00931-LM

REPLY OF CAMPAIGN DEFENDANTS TO PLAINTIFF'S OBJECTION TO DEFENDANTS' MOTION TO DISMISS

Defendants Donald J. Trump for President, Inc. (the "Campaign"), Edward Deck, and Fred Doucette (collectively, the "Campaign Defendants") submit this reply to plaintiff's objection to their motion to dismiss the second amended complaint.

I. Introduction

Despite having filed a seventy-seven page second amended complaint and a twenty-five page objection[1] to the motion to dismiss, plaintiff has failed to allege specific facts to support his theory that Mr. Deck and Mr. Doucette conspired with state actors such that their conduct can be characterized as state action. Plaintiff has also failed to allege facts from which the court could reasonably conclude that the Campaign employed or controlled the actions of the alleged tortfeasors, making it vicariously liable for those alleged actions.

[1] After many admonitions from the court to comply with Local Rule 7.1(a) regarding page limits, plaintiff has resorted to incorporating entire sections of other papers by reference so as to circumvent the page limits and escape the requirements of the Local Rules. *See, e.g.*, Doc. 139 (07/15/2019) at 1, 20, and 25; *see also* 5.1(a)(2) (discouraging incorporation by reference in context of exhibits and appendices).

Plaintiff's construction of the statutes providing Mr. Deck with a "complete" justification defense would render those protections largely nugatory. His failure to acknowledge and distinguish *King v. Friends of Kelly Ayotte*, 860 F. Supp. 2d 118 (D.N.H. 2012), aff'd without opinion, 12-1891 (1st Cir. 2013), is fatal to his tort claims against the Campaign Defendants. His allegations of fact on each of his tort claims omit one or more element essential to state those claims. Accordingly, the second amended complaint must be dismissed as against the Campaign Defendants.

II. Argument

This court's analysis of the Campaign Defendants' motion to dismiss is limited to whether the facts pled in plaintiff's second amended complaint – *not* assertions made in plaintiff's objection – plausibly state a legal claim for relief. *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-87 (2009). They do not. The second amended complaint, at most, asserts a myriad of legal conclusions that this court should not accept as true. *King*, 860 F. Supp. 2d at 123 (citing authorities). Yet the courts have been clear that allegations like those in the second amended complaint that are legal conclusions "with the defendant's name merely plugged into the elements of the claim fail to state a claim." *Katz v. McVeigh*, 931 F. Supp. 2d 311, 343 (D.N.H. 2013), aff'd without opinion, 13-1453, 13-1529 (1st Circ. 2014) (internal quotation marks and brackets omitted).[2]

[2] As examples, this court has rejected the following conclusory statements as insufficient to state a claim: (1) that it was the policy and practice of an organization to fail to properly supervise, train and control its employees, who allegedly perpetrated abuse on children, *Katz*, 931 F. Supp. 2d at 342; (2) that employees of an organization "caused the publication of false, misleading and untrue information" about the plaintiffs, *id.* at 356; (3) that the defendants' actions were "inspired by unlawful racial animus," *King*, 860 F. Supp. 2d at 128; (4) that the defendants engaged in "concerted actions" to deprive the plaintiff of his due process rights, *Puiia v. Cross*, 2012 DNH 135 at 9; and (5) that a judge and members of the New Hampshire Attorney Discipline Office discriminated against a plaintiff's lawyer because of the plaintiff's

A. There are no Allegations in the Second Amended Complaint Upon Which the Court Could Reasonably Infer that the Campaign Defendants Were Acting Under Color of Law

Plaintiff contends that the Campaign Defendants, two private citizens and a private organization, are liable for federal civil rights violations under 42 U.S.C. §1983 ("§1983") on the theory that private persons acting jointly with state or local officials are acting under color of law. Doc. 139 (07/15/2019) at 2. The law is not so simplistic.

"When the named defendant in a section 1983 case is a private party, the plaintiff must show that the defendant's conduct can be classified as state action . . . . If there is no state action, the plaintiff's claim fails." *Jarvis v. Vill. Gun Shop, Inc.*, 805 F.3d 1, 8 (1st Cir. 2015) (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982)). The Supreme Court has explained that to convert private action into state action, there must be "something more." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). The court has recognized four tests to determine whether there has been the requisite "something more": (1) the public function test; (2) the state compulsion test; (3) the nexus test; and (4) the joint action test. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). The plaintiff relies only on cases that apply the state compulsion and joint action tests.

Under the state compulsion test private conduct will be considered state action if it takes place "against a backdrop of state compulsion or involvement." *Adickes*, 398 U.S. at 169. The second amended complaint alleges no facts that would support an inference that any of the

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ethnicity and national origin, *Omran v. Laplante*, No. 1:16-cv-00005-DBH, 2016 WL 3351921, at *3 (D.N.H. May 27, 2016), report and recommendation adopted, No. 1:16-cv-05-DBH, 2016 WL 3351005 (D.N.H. June 14, 2016). Plaintiff's bare allegations against Mr. Trump are equally deficient as these examples. Note: The Campaign Defendants were unable to find the opinion for *Omran* on the court's website and therefore could not provide the citation in the form required by LR 5.3(b). They have therefore provided the citation in accordance with LR 5.3(c).

Campaign Defendants took action against plaintiff as a result of compulsion or involvement by state actors. Plaintiff does not allege that Mr. Doucette acted in concert with Manchester police when they removed him from the event, so there is no basis whatsoever to infer that he acted under state compulsion. Nor does plaintiff allege any facts from which the court could infer that Mr. Deck acted under compulsion. Indeed, the second amended complaint includes documentation stating that Mr. Deck directed plaintiff to leave the ballroom before the police arrived. Doc. 75 (05/22/2019) at Appendix 16. Absent an allegation that the Manchester police compelled Mr. Deck to make this request – and there is no such allegation – there is no plausible claim that Mr. Deck's conduct was under compulsion by a state actor.

Under the joint action test private conduct will be considered state action only when a private party jointly participates with a state official in the carrying out of the state actor's duties, such as by seizing disputed property. *Lugar*, 457 U.S. at 941. Again, plaintiff has alleged no facts that would support an inference that Mr. Doucette jointly participated in plaintiff's removal from the event by the Manchester Police Department.

Plaintiff's application of the joint action test, moreover, is premised on his assertions that there was a conspiracy between the Campaign Defendants, and the Manchester police officers. Doc. 139 (07/15/2019) at 4. An allegation of conspiracy, however, must include facts establishing that an agreement was made. *Katz*, 931 F. Supp. 2d at 340. An allegation of parallel conduct and an assertion of conspiracy is insufficient to state a claim. *Id*. at 340. A conclusory allegation that an agreement was made at some unidentified point in time likewise will not suffice. *Id.*

Plaintiff has not alleged facts supporting the existence of any such agreement among Mr. Deck, Mr. Doucette, and the Manchester police officers. Instead, plaintiff has relied on bald

statements such as "Defendants performed acts in furtherance of their 'meeting of the minds'" without actually alleging any facts that, if true, would establish an agreement. Doc. 139 at 5. Plaintiff's generic and barebones allegations do not state a claim for conspiracy or, by extension, joint action in which Mr. Deck and Mr. Doucette were participants.

B. Plaintiff has Alleged No Facts Permitting a Reasonable Inference that the Campaign is Vicariously Liable for the Actions of Mr. Deck, Mr. Doucette, or the Manchester Police Department.

Plaintiff fundamentally misunderstands the Campaign Defendants' argument seeking dismissal of his claim that the Campaign is vicariously liable for the allegedly tortious conduct of Mr. Deck, Mr. Doucette, and the Manchester police officers. Doc. 139 (07/15/2019) at 5. He maintains that the Campaign argued it was not vicariously liable for the actions of Mr. Deck, Mr. Doucette, and the Manchester police officers "because they were 'independent contractors' of Defendant Trump Campaign rather than agents or employees." *Id.* In fact the Campaign Defendants argued:

> for [vicarious] liability to exist, there must be an employer/employee or principal/agent relationship or the independent contractor must be performing an inherently dangerous task. There is no allegation of fact that supports the existence of such a relationship between the Campaign and any of the alleged tortfeasors or that providing security at a political event is inherently dangerous.

See e.g. Doc. 97 (06/05/2019) at 11. Hence, the Campaign Defendants have simply asserted that plaintiff has failed to allege facts to support the existence of vicarious liability. Plaintiff's objection implicitly underscores the accuracy of this assertion. *See, e.g.*, Doc. 139 at 12 (". . . Campaign is liable under respondeat superior because . . . Deck, Doucette, and Manchester Defendants were *employees or agents* of Defendant Trump Campaign.") (emphasis supplied); *cf.* Doc. 75 (05/22/2019) ¶111 ("Based upon information and belief, the . . . Trump Campaign . . . [is] vicariously liable for the assaults on the Plaintiff because Defendants Deck, Doucette,

Pittman, Cosio, Craig and security or staffers of those entities committed the assaults on Plaintiff while they were acting within the scope of their employment for the purposes of serving one or more of their employers/masters/entities."). As this court held in *Katz*, "These kinds of allegations, 'couched completely as legal conclusions, with the defendant's name merely plugged into the elements of [the] claim' fail to state a claim." *Katz*, 931 F. Supp. 2d at 343.

Plaintiff's objection devotes a good deal of space to establishing that vicarious liability is premised on the degree of control the employer or principal has over the tortfeasor. *See* Doc. 139 (07/15/2019) at 6-9. That is not in dispute, however. The question raised by the motion to dismiss is whether plaintiff alleged facts in the second amended complaint that would establish employment, agency, or control over an independent contractor. In his objection, the plaintiff neglects entirely to cite any allegations of fact in his second amended complaint from which the court could infer that the Campaign employed or otherwise exercised control over Mr. Deck, Mr. Doucette, or the Manchester police officers. Rather, plaintiff offers a host of allegations having no bearing on whether the Campaign employed or controlled Mr. Deck, Mr. Doucette, or the Manchester police officers on October 12, 2015. These include:

- A finding by another court that *Mr. Trump* had control over Mr. Deck's actions at another time and another place. *Id.* at 8-9.
- Alleged battery by "Trump supporters" at another event and Campaign staff's alleged rejection of plaintiff's request for help. *Id.* at 8.
- Alleged statements by *Mr. Trump* at other events encouraging unnamed individuals to eject someone from the event or to inflict harm on someone. *Id.*

None of these allegations is germane to whether the Campaign employed or controlled Mr. Deck, Mr. Doucette, or the Manchester police officers when plaintiff was allegedly injured.

The sole factual allegation plaintiff makes regarding the Campaign's relationship to the alleged tortfeasors is that the Campaign made payments to them. Doc. 139 (07/15/2019) at 8.

Even accepting this allegation as true, however, it does not establish employment, agency, or control. Payments evidence merely the existence of donative intent or a legal obligation to pay. They say nothing about the source of that obligation. *Id.* at 6, 10.

Because plaintiff has alleged no facts on which the Campaign can be held liable for the allegedly tortious conduct of Mr. Deck, Mr. Doucette, or the Manchester police, his vicarious liability claims against the Campaign must be dismissed.

C. Plaintiff has Failed to Allege Facts to Support a Claim of Assault.

In their motion to dismiss, the Campaign Defendants cited *King v. Friends of Kelly Ayotte*, 860 F. Supp. 2d 118 (D.N.H. 2012), aff'd. (Apr. 5, 2013) as controlling authority on plaintiff's assault claims. Doc. 97 at 9-10. Plaintiff does not mention *King* in his objection. In that case nearly identical allegations to those made by the plaintiff were held insufficient to state a claim for assault. The assault claims should therefore be dismissed.

Plaintiff's objection inadvertently identifies another ground for dismissal of the assault claim against Mr. Doucette. Plaintiff acknowledges that the second amended complaint alleges that Mr. Doucette told plaintiff to leave the event and then asked him whether he had to "get a badge to get you out of here." Doc. 139 at 11. This statement unambiguously communicated to plaintiff that Mr. Doucette had no intent to contact him physically.

D. Mr. Deck's Actions were Justified as a Matter of Law.

Plaintiff claims that the Campaign Defendants misconstrue the effect and purpose of RSA ch. 106-F and ch. 627. Doc. 139 (07/15/2019) at 15. A security guard is one who is "contracted to any entity for the purpose of providing protection of individuals or their property . . . [including] but is not limited to crowd control . . . personal protection, or body guard services, but shall not require the licensing of persons from other states temporarily accompanying

national political candidates on visits to the state." RSA 106-F:4, XIII. [3] Plaintiff explicitly alleges that Mr. Deck was present at the event to provide security for Mr. Trump who was then a candidate for national office. Mr. Deck was therefore authorized to use non-deadly force to maintain decorum at the event under RSA 627:6, and his use of force to assist Manchester police in removing plaintiff was justified. This justification is a "complete defense" to plaintiff's battery claim against Mr. Deck. Doc. 75 at ¶7.

E. Allegations of Assault and Battery Are not Suffiicent Facts to State a Claim for Intentional Infliction of Emotional Distress.

To support a claim for intentional infliction of emotional distress, the conduct must have been *intended to cause severe emotional distress*. *Morancy v. Morancy*, 134 N.H. 493, 496 (1991). The conduct must also be outrageous, extreme, atrocious, and utterly intolerable. *Bethany T. v. Raymond Sch. Dist. with Sch. Admin. Unit 33*, 2013 DNH 074 at 9; *see also Mikell v. Sch. Admin. Unit No. 33*, 158 N.H. 723, 729 (2009) ("In determining whether conduct is extreme and outrageous, it is not enough that a person has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice.") (internal quotation marks omitted).

The second amended complaint does not allege facts on which the court could infer that the Campaign Defendants intended to inflict severe emotional distress. Plaintiff's bare allegation that he suffered severe emotional distress (Doc. 139 at 19 (citing appendices to second amended complaint)) is not indicative of the Campaign Defendants' intent. Even accepting as true the facts – as opposed to the characterizations – alleged in the second amended complaint they support only the conclusion that (1) plaintiff was being disruptive, (2) Mr. Doucette demanded

[3] The Campaign Defendants mistakenly cited to RSA 106-F:4, XII in their motion to dismiss. The citation should have been to RSA 106-F:4, XIII, which provides the definition of "security guard."

that plaintiff leave and stood in his way so he could not return to his seat, and (3) Mr. Deck demanded that plaintiff leave, joined the Manchester police in removing him, and "threw" him "headfirst" into a table.[4] *Id.* at 18. Under *Mikell*, this does not state a claim for intentional infliction of emotional distress.

F. Plaintiff Failed to Allege Facts Supporting the Existence of a Legal Duty to the Plaintiff.

Plaintiff contends that the Campaign Defendants are liable for negligence because they "breached their duty of care and their breach proximately caused the Plaintiff's injuries" and should have known of Mr. Deck's and a Manchester police officer's alleged propensity to commit assault and battery "on any person they perceived to be opposed to Defendant Trump." Doc. 139 (07/15/2019) at 19-20. Plaintiff has not alleged facts to support the existence of such a legal duty on the part of the Campaign Defendants. Such generic and barebones allegations do not state a claim for negligence.

G. Plaintiff Failed to Allege Facts Supporting a Conclusion that the Campaign Negligently Hired, Trained, Supervised, and Retained Defendants Deck and Doucette.

For the same reason that plaintiff's vicarious liability claims against the Campaign are defective (*ante* at 5-7) his claims of negligent hiring, training, supervision, and retention also fail. Plaintiff has alleged no facts to support an inference that the Campaign "hired" Mr. Deck, Mr. Doucette, or the Manchester police officers. As for plaintiff's argument that the Campaign had notice that Mr. Deck and Officer Pittman had a propensity for "intentional misconduct" plaintiff relies solely upon *Mr. Trump's* alleged knowledge of Mr. Deck's "violent nature" "since the *Galicia v. Trump* case." Doc. 139 (07/15/2019) at 21. He makes no argument or allegation that

[4] The Campaign Defendants categorically deny that Mr. Deck threw plaintiff into a table. Because plaintiff struggled with Mr. Deck and the police officer as he was escorted out, the three of them stumbled and fell into the table.

Officer Pittman had a propensity for "intentional misconduct," much less that the Campaign knew about it.

Even if one were to accept that knowledge of mere allegations of intentionally tortious acts in another civil action were sufficient to establish that it was negligence to hire or maintain the alleged tortfeasor, plaintiff does not allege that the *Campaign* had such knowledge. *Id.* ("Surely the Trump Campaign knew or should have known" of Mr. Deck's alleged propensity.)

H. Plaintiff's Fraud and False Imprisonment Claims.

The Campaign Defendants stand upon the arguments in their motion to dismiss with respect to plaintiff's claims against them for fraud and false imprisonment.

III. Conclusion

Only the facts and allegations set forth in the second amended complaint may be considered when ruling on the Campaign Defendants' motion to dismiss. The plaintiff's patently insufficient claims set forth in the second amended complaint and his objection demonstrate the necessity of dismissal.

Respectfully submitted,

Donald J. Trump for President, Inc.,
Edward Deck,
and Fred Doucette,
By Their Attorneys,

Date: July 26, 2019

/s/ Bryan K. Gould

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CERTIFICATE OF SERVICE

I hereby certify that the within pleading is being served electronically upon the persons listed below through the court's ECF system.

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