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

CAMPAIGN DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendants Donald J. Trump for President, Inc. (the "Campaign"), Edward Deck, and Fred Doucette (collectively, the "Campaign Defendants"), move to dismiss the claims against them in plaintiff's second amended complaint for failure to state a claim upon which relief can be granted. This motion rests on the following grounds.

I. Introduction

The plaintiff seeks to recover damages from the defendants for his removal from the No Labels "Problem Solvers" convention at which the Donald Trump, then a presidential candidate, was a speaker. The second amended complaint alleges eighteen causes of action. *See generally* Doc. 75 (05/22/2019). The second amended complaint names the Campaign in seven state law claims and nine federal law claims under 42 U.S.C. §1983 ("§1983"), Mr. Deck in six state law claims and nine §1983 federal law claims, and Rep. Doucette in six state law claims and eight §1983 federal law claims.

The claims against the Campaign should be dismissed because (1) there are no facts alleged to support an inference that the Campaign was acting under color of state law; (2) there are no facts alleged to support an inference that the Campaign had a relationship with the alleged tortfeasors that could serve as a basis for vicarious liability; and (3) there are no facts alleged to support an inference that the Campaign committed any of seven state-law torts alleged in the complaint.

The claims against Defendants Deck and Doucette should be dismissed because (1) there are no facts alleged to support an inference that Defendants Deck and Doucette were acting under color of state law; and (2) there are no facts alleged to support an inference that Defendants Deck and Doucette committed any of the state-law torts alleged in the complaint.

II. Statement of Facts

The plaintiff attended the No Labels "Problem Solvers" convention in Manchester, New Hampshire, on October 12, 2015. Doc. 75 (05/22/2019) at ¶33. Co-defendant Donald J. Trump (the "President"), then a presidential candidate and private citizen, was speaking at the convention. *See id.* at ¶40. During the question and answer portion of the presentation, the plaintiff, without a microphone, asked the President a question regarding an alleged assault at a previous campaign rally. *Id*. The plaintiff was directed to the back of the ballroom, and continued to draw attention to himself. *Id.* at ¶¶41, 50. As a consequence, the plaintiff was removed from the ballroom. *Id.* at ¶51. The plaintiff alleges that in the process of being removed from the convention that he was subjected to a variety of tortious conduct and that several of his federally-protected civil rights were violated. *See generally* Doc. 47 (04/17/2019).

III. Argument

A. Motion to Dismiss Standard

To withstand a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must allege 'a plausible entitlement to 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). "[A] plaintiff . . . is . . . required to set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988).

The "tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). A facially-plausible complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

The court will accept as true the well-pleaded factual allegations of the complaint and draw all reasonable inferences in favor of the plaintiff. *Cook v. Gates*, 528 F.3d 42, 48 (1st Cir. 2008); *McCloskey v. Mueller*, 446 F.3d 262, 266 (1st Cir. 2006). However, "this deferential standard does not force [a] court to swallow the plaintiff's invective hook, line, and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996).

B. The Allegations Against the Defendants Fail to State Claims for Which Relief May be Granted.

The court has original jurisdiction over the §1983 claims and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. §1367. The defendants first address why the

claims made under §1983 must fail and then address the claims made under state law in the order they appear in the second amended complaint. Furthermore, because the plaintiff has alleged that multiple defendants are liable for each claim, the Campaign Defendants address each claim in turn, with specific arguments as to why the second amended complaint fails to state a claim against each of the Campaign Defendants.

i. The §1983 Claims Fail to Allege Facts Supporting an Inference That the Campaign Defendants Acted Under Color of State Law.

The plaintiff has alleged that the Campaign Defendants are liable under §1983 for multiple federal civil rights violations.

Under the Fourth Amendment plaintiff alleges unreasonable seizure and stop and frisk (Count 8), unreasonable search and seizure and "excessive force" (Count 9), and false arrest against the Campaign Defendants (Count 16), and retaliation against the Campaign alone (Count 17). Under the First Amendment he alleges a deprivation of freedom of speech (Count 10) and of freedom of religion (Count 11) against the Campaign Defendants. Under the Fourteenth Amendment he alleges false imprisonment against the Campaign Defendants (Count 15).

To state a valid claim under §1983 for the violation of constitutional rights, a plaintiff must allege facts supporting the proposition that the defendant acted under color of law as a state actor. 42 U.S.C.A. §1983. "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 . . . [; i]f 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)); *see also United States v. Price*, 383 U.S. 787, 794 n.7 (1966) (finding that §1983 claims require the same "state action" as is required under the Fourteenth Amendment); *see generally* COLOR OF LAW, Black's Law Dictionary (10th ed. 2014) ("The term [color of law] usu. implies a misuse of power made

possible because the wrongdoer is clothed with the authority of the state. *State action* is synonymous with *color of [state] law* in the context of federal civil-rights statutes or criminal law.") (emphasis in original).

The Fourteenth Amendment by its own terms "prohibits only state action," it "erects no shield against merely private conduct, however discriminatory or wrongful." *United States v. Morrison*, 529 U.S. 598, 619, 621 (2000) (internal quotation marks omitted); *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) ("Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of §1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful.") (internal quotation marks omitted). It is well established that the "action of private persons" ordinarily does not amount to state action. *Morrison*, 529 U.S. at 621 (quoting *United States v. Harris*, 106 U.S. 629, 640 (1883)).

The second amended complaint does not allege any facts to support an inference that either Mr. Deck or Rep. Doucette were state actors at the time of the convention. Additionally, the second amended complaint does not allege any facts to support a claim that it was a governmental entity or was otherwise clothed in state authority. Nor does a private party's enlistment of municipal police officials to enforce the party's rights convert his or her private actions into state conduct. *See Cape Cod Nursing Home Council v. Rambling Rose Rest Home*, 667 F.2d 238, 243 (1st Cir. 1981) (finding that where plaintiffs were not rightfully on the property, "the police action in removing [the plaintiffs] could not in itself create such a right where none existed before").

The plaintiff has therefore failed to plead any "factual content that allows the court to draw the reasonable inference" that the Campaign Defendants were acting under color of state

law during the October 2015 No Labels convention. *See Iqbal*, 556 U.S. at 678. As a result, each of the §1983 claims against the Campaign Defendants must be dismissed.

The First Circuit has recognized that a "private party may become a state actor if he assumes a traditional public function when performing the challenged conduct; or if the challenged conduct is coerced or significantly encouraged by the state; or if the state has 'so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in [the challenged activity].' " *Santiago v. Puerto Rico*, 655 F.3d 61, 68-69 (1st Cir. 2011) (quoting *Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 5 (1st Cir. 2005) (alterations in original). The second amended complaint does not allege any of these facts supporting the existence of any of these circumstances, however.

ii. The Plaintiff has not Alleged Facts Sufficient to State a Claim That the Campaign is Liable Under any of the Claims in the Second Amended Complaint.

A person may be held vicariously liable for the tortious actions of another only under two narrow circumstances. First, an employer may be vicariously liable for the torts of an employee when the employee committed the tortious act within the scope of his or her employment. *Porter v. City of Manchester*, 151 N.H. 30, 39 (2004). An employee acts within the scope of his or her employment when (1) the conduct is of the kind the employee is hired to perform; (2) the act occurred substantially within authorized time and space limits; and (3) the act was done by a purpose to serve the employer. *Id.* at 39-40.

Second, a principal may be vicariously liable for the tortious conduct of an agent. *See Herman v. Monadnock PR-24 Training Council, Inc.*, 147 N.H. 754, 759 (2002). The analysis for determining whether an agency relationship exists for purposes of vicarious liability is different from the analysis for determining whether an employer/employee relationship exists.

Dent v. Exeter Hospital, 155 N.H. 787, 792 (2007). The necessary elements to establish an agency relationship include: "(1) authorization from the principal that the agent shall act for him or her; (2) the agent's consent to so act; and (3) the understanding that the principal is to exert some control over the agent's actions." *VanDeMark v. McDonald's Corp.*, 153 N.H. 753, 761 (2006) (quoting *Herman*, 147 N.H. at 758).

The second amended complaint alleges that Mr. Deck, Rep. Doucette, and the Manchester Police Department committed the allegedly tortious acts to which he attributes his claimed damages. Doc. 75 (05/22/2019) at ¶¶41-55. Plaintiff fails to allege, however, any facts upon which the court could conclude that any of these defendants were employees or agents of the Campaign. Plaintiff alleges that the Campaign retained and paid Mr. Deck, Rep. Doucette, and the Manchester Police Department, but that does not mean that any of them were employees or agents of the Campaign.

Vicarious liability normally does not extend to torts allegedly committed by independent contractors. *Arthur v. Holy Rosary Credit Union*, 139 N.H. 463, 465 (1995). New Hampshire courts have recognized an exception to this rule when an independent contractor is engaged to perform work that is dangerous by its nature. *Id.* In circumstances where an independent contractor is engaged to perform inherently dangerous work, the principal may be held liable for the actions of the independent contractor. *Id.* (holding that construction projects, although typically fraught with danger, as a rule do not fall within the inherently dangerous category.). This exception does not apply when the danger arises from the negligent carrying out of the work, but instead the work must be inherently dangerous even when conducted with reasonable care. *Id.* The determination of inherent danger should not be based on broad generalizations, but instead on the facts of each case. *Wilson v. Nooter Corp.*, 499 F.2d 705, 708 (1st Cir. 1974).

New Hampshire courts have not addressed specifically whether the work performed by a security officer at a political event is inherently dangerous. Several other jurisdictions, however, have held that security services, even armed security services, are not inherently dangerous, sufficient to expose principals to automatic liability for the actions of independent contractors. *Schreiber v. Camm*, 848 F. Supp. 1170, 1178 (D.N.J. 1994) (holding that guarding property from malefactors by a security guard is not inherently dangerous, even if the security guard is armed with a firearm); *Ross v. Texas One P'ship*, 796 S.W.2d 206, 215 (Tex. App. 1990), writ denied, 806 S.W.2d 222 (Tex. 1991) (holding that work undertaken by armed security guards is not inherently dangerous, and thus principals are able to hire independent contractors for providing security without being exposed to automatic liability for the negligence of those contractors).

Because plaintiff has not alleged facts to support an inference that Mr. Deck, Rep. Doucette, or the Manchester police were employees or agents of the Campaign or that providing security at a political event is inherently dangerous, there is no basis for vicarious liability against the Campaign. Accordingly, those counts alleging such liability must be dismissed.

iii. The Plaintiff has not Alleged Facts Sufficient to State a Claim That the Campaign is Liable for Assault.

To plead an assault claim under New Hampshire law, a plaintiff must allege that: "(1) the defendant . . . intended to cause harmful or offensive contact to the plaintiff, and (2) the plaintiff must have been put in imminent apprehension of such contact." *King v. Friends of Kelly Ayotte*, 860 F. Supp. 2d 118, 129 (D.N.H. 2012), aff'd. (Apr. 5, 2013) (internal quotation marks omitted).

The plaintiff has not alleged any facts from which the court may infer that Mr. Deck, Rep. Doucette, or any other unnamed personnel were employees or agents of the Campaign.

Accordingly, the claims against the Campaign for assault must be dismissed.

iv. The Plaintiff has not Alleged Facts Sufficient to State a Claim That Mr. Deck is Liable for Assault.

The plaintiff alleges that Mr. Deck is personally liable for assault based on tapping him on the shoulder, physically directing him to the rear of the ballroom, preventing him from returning to his seat, and using threatening tones and words. Doc. 75 (05/22/2019) at ¶¶ 100, 103, 104, 108.

With respect to the tapping on the shoulder allegation, this fact is insufficient to state a claim for assault because a reasonable person would not apprehend harm from being tapped on the shoulder. Moreover, the plaintiff has failed to allege facts from which the court can infer that Mr. Deck "intended" to cause harmful or offensive conduct to the plaintiff. *See King*, 860 F. Supp. 2d at 129. Instead, the plaintiff simply recites the elements of the assault cause of action and makes the bare legal conclusion that Mr. Deck "intended to cause apprehension of harmful contact to the Plaintiff." Doc. 75 at ¶¶ 108, 109. Such "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," will not be accepted as true by the court for purposes of a motion to dismiss. The plaintiff must plead more specific factual allegations to survive such a motion. In this case, the plaintiff's complaint is utterly devoid of any factual allegations tending to establish Mr. Deck's intent or facts that if true could support the inference that Mr. Deck acted with the intent to cause harm or offensive conduct to the plaintiff. Without sufficient factual allegations, the conclusory claims contained in the plaintiff's second amended complaint amount to nothing more than "the-defendant[s]-unlawfully-harmed-me" and "therefore cannot withstand defendants' Motions to Dismiss." *King*, 860 F. Supp. 2d at 130 (quoting *Iqbal*, 556 U.S. at 678).

In a similar case involving the removal of a political reporter from political campaign events, the court found allegations that defendants had approached the plaintiff "in a menacing

and threatening manner, and put their hands on him as he tried to roll video" and "repeated threats to arrest" the plaintiff insufficient to support a claim for assault because the plaintiff did not allege sufficient facts from which the court could infer the intent of the defendants. *King*, 860 F. Supp. 2d at 130. This court should make a similar finding as to plaintiff's assault claim against Mr. Deck.

Accordingly, the claim against Mr. Deck for assault must be dismissed.

v. The Plaintiff has not Alleged Facts Sufficient to State a Claim That Rep. Doucette is Liable for Assault.

The plaintiff alleges that Rep. Doucette is personally liable for assault because he blocked plaintiff's return to his seat, prompted plaintiff to keep rolling his videotape, told plaintiff he would not be getting a microphone, and suggested he was going to get a police officer to remove plaintiff from the convention. Doc. 75 (05/22/2019) at ¶44. The plaintiff has not alleged facts that any of these statements or actions were intended to cause harmful or offensive contact to the plaintiff. On the contrary, the only reasonable inference the court could draw from these alleged statements and actions is that they were simply to inform the plaintiff that he was not entitled to a microphone, that he was not permitted to return to his seat, and that if he continued to disrupt the convention, the police would intervene.

Accordingly, the assault claim against Rep. Doucette must be dismissed.

vi. The Plaintiff has not Alleged Facts Sufficient to State a Claim That the Campaign is Liable for Battery.

Under New Hampshire law, a defendant is only liable for battery if: "(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or imminent apprehension of such a contact, and (b) a harmful contact with the person of the other

directly or indirectly results." *Rand v. Town of Exeter*, 976 F. Supp. 2d 65, 76 (D.N.H. 2013) (internal quotation marks omitted).

The plaintiff alleges that the Campaign is vicariously liable for battery based on the conduct of Defendants Deck, Doucette, and the City of Manchester and Manchester Police Department.

As noted above, however, for such 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. Accordingly, the claim of vicarious liability for battery against the Campaign must be dismissed.

vii. The Plaintiff has not Alleged Facts Sufficient to State a Claim That Mr. Deck is Liable for Battery.

The plaintiff alleges that Mr. Deck is personally liable for battery.

Under New Hampshire law persons "authorized by law to maintain decorum or safety . . . in a place where others are assembled may use non-deadly force when and to the extent that he or she reasonably believes it necessary for such purposes." RSA 627:6 (creating defenses to criminal charges). New Hampshire law also provides that private persons who are directed by law enforcement officer to assist in the arrest of a person are justified in using non-deadly force when and to the extent that he reasonably believes necessary. RSA 627:5, III. "Conduct which is justifiable under [the criminal code] constitutes a defense to any offense. The fact that such conduct is justifiable shall constitute a complete defense to any civil action based on such conduct." RSA 627:1.

Security personnel, moreover, are regulated and licensed in New Hampshire. RSA 106-F:1. Licensing is not required for "persons from other states temporarily accompanying national political candidates on visits to the state." RSA 106-F:4, XII. This exemption applies to any person contracted to any entity for the purpose of providing protection of individuals, including but not limited to crowd control situations. *Id.*

The plaintiff alleges that Mr. Deck is from another state, that he was working security for President Trump at the No Labels event, and that he assisted Officer Pittman in removing plaintiff from the ballroom. Doc. 75 (05/22/2019) at ¶118. According to Officer Pittman's affidavit (which is attached to the second amended complaint), he was approached by Mr. Deck about removing a disruptive male in the crowd (the plaintiff). *Id.* at Affidavit 12. Officer Pittman and Mr. Deck approached the plaintiff together, at which point the plaintiff became very disruptive, refused to leave, raised his hand and began yelling. *Id.* Officer Pittman grasped the plaintiff's arm to remove him from the building, at which point he became "very tense," and Mr. Deck assisted Officer Pittman in removing the plaintiff. *Id.* According to Officer Pittman's affidavit, the plaintiff struggled while being escorted out of the building, causing him to fall into a table. *Id.* Based on these facts Mr. Deck was assisting Officer Pittman in effectuating an arrest of plaintiff while he was resisting the officer. As a result, under RSA 627:5, III he was justified to use non-deadly force to the extent he reasonably deemed necessary to assist Officer Pittman. Such justification provides a complete defense to plaintiff's claim for battery.

Additionally, Mr. Deck is an authorized person under the law as a "security guard" accompanying a national political candidate's visit to New Hampshire. Consequently, under RSA 627:6, V he was also authorized to use non-deadly force to the extent he deemed necessary

under the circumstances. Such justification also forms a complete defense to plaintiff's claim for battery.

The plaintiff's battery claim against Mr. Deck is also facially deficient because he fails to plead sufficient facts to plausibly suggest that Mr. Deck intended to cause harmful or offensive contact to the plaintiff. Instead, as with the plaintiff's assault claim against Mr. Deck, the plaintiff simply relies on a threadbare recitation of the elements of the battery claim and conclusory statements, which are insufficient to survive a motion to dismiss under Rule 12(b)(6). For these reasons, the plaintiff's claim for battery against Mr. Deck must be dismissed.

viii. The Plaintiff has not Alleged Facts Sufficient to State a Claim That Rep. Doucette is Liable for Battery.

The plaintiff alleges that Rep. Doucette is personally liable for the alleged battery. The plaintiff alleges that he had a verbal conversation with Rep. Doucette, and that Rep. Doucette placed his body in front of the plaintiff (without any physical contact) to prevent him from returning to his seat. Doc. 75 (05/22/2019) at ¶44. Nowhere in his second amended complaint does the plaintiff allege that Rep. Doucette in any way made contact with the plaintiff, harmful or otherwise. Therefore, the essential element of "harmful or offensive contact" is not met, which is fatal to the plaintiff's battery claim against Rep. Doucette. Accordingly, the claim of personal liability for battery against Rep. Doucette must be dismissed.

C. State Law Tort: Intentional Infliction of Emotional Distress

To state a claim for intentional infliction of emotional distress, a plaintiff must allege that the defendant: "(1) acted intentionally or recklessly; (2) that [his] acts were extreme and outrageous; and (3) that [his] acts caused the plaintiff to suffer severe emotional distress." *Bethany T. v. Raymond Sch. Dist. with Sch. Admin. Unit 33*, No. 11-CV-464-SM, 2013 WL 1933756, at *3 (D.N.H. May 10, 2013). The conduct must have been "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." *Id.* (internal quotations omitted). The standard for intentional infliction of emotional distress is "formidable." *Id.* (internal quotations omitted).

i. The Plaintiff has not Alleged Facts Sufficient to State a Claim That the Campaign is Liable for Intentional Infliction of Emotional Distress.

The plaintiff alleges that the Campaign is vicariously liable for intentional infliction of emotional distress. The plaintiff alleges that the Campaign is liable because of the conduct of its employees, as well as the City of Manchester and the Manchester Police Department, because it allegedly made disbursements to those entities for security services. Doc. 47 (04/17/2019) at ¶132.

Again, however, for such liability to exist there must be an employer/employee or principal/agent relationship or the defendant must have engaged an independent contractor to perform an inherently dangerous task. There is no allegation of fact in the second amended complaint that supports the existence of such a relationship or that providing security at a political event is inherently dangerous.

Additionally, the plaintiff has provided no factual support for the assertion that the Campaign made financial disbursements to the City of Manchester or the Manchester Police Department, or that a principal/agent relationship was formed thereby. For support, the plaintiff cites to Appendix 12 of his second amended complaint, which only provides the names of certain entities with no context or meaning to be derived therefrom.

Accordingly, the vicarious liability claim against the Campaign for intentional infliction of emotional distress must be dismissed.

ii. The Plaintiff has not Alleged Facts Sufficient to State a Claim That Mr. Deck is Liable for Intentional Infliction of Emotional Distress.

The plaintiff alleges Mr. Deck is personally liable for intentional infliction of emotional distress.

The plaintiff does not support his claim with allegations of fact. Instead he alleges legal conclusions such as "[d]efendants acted in an absolutely outrageous, atrocious, and intolerable manner with the intent to thereby cause [sic] severe emotional distress on the Plaintiff." Doc. 75 (05/22/2019) at ¶129. The plaintiff does not allege facts suggesting that Mr. Deck's conduct met the exceptionally high standard for intentional infliction of emotional distress. Allegations of assault and battery are insufficient to state a claim for intentional infliction of emotional distress. *See Katz*, 931 F. Supp. 2d at 357. There is no allegation that Mr. Deck struck the plaintiff, much less that he did so in an extreme, outrageous, or atrocious manner. Instead, the second amended complaint alleges that Mr. Deck assisted a Manchester police officer to escort an uncooperative plaintiff from the event.

Likewise, in the *King* case, which arose in a similar context to this case, the court found that allegations that defendants had approached the plaintiff "in a menacing and threatening manner, and put their hands on him as he tried to roll video" and made "repeated threats to arrest" the plaintiff were insufficient to support a claim for intentional infliction of emotional distress. *King*, 860 F. Supp. 2d at 130.

Accordingly, the claim against Mr. Deck for intentional infliction of emotional distress must be dismissed.

iii. The Plaintiff has not Alleged Facts Sufficient to State a Claim That Rep. Doucette is Liable for Intentional Infliction of Emotional Distress.

The plaintiff alleges that Rep. Doucette is personally liable for intentional infliction of emotional distress.

The plaintiff does not allege any facts to support his allegation against Rep. Doucette except to state the following legal conclusion: "[d]efendants [sic] words and actions were so outrageous in character, and so extreme in degree, that they should be regarded as atrocious, and utterly intolerable in a civilized society such as the City of Manchester." Doc. 75 (05/22/2019) at ¶128. The plaintiff alleges that Rep. Doucette blocked his return to his seat, prompted him to keep rolling his videotape, told him he would not be getting a microphone, and suggested he was going to get a police officer to remove the plaintiff from the convention. *Id.* at ¶44. These allegations, even if accepted as true, do not even approach the realm of extreme, outrageous, or atrocious conduct. Again, assault and battery alone are insufficient to state a claim for intentional infliction of emotional distress. *See Katz*, 931 F. Supp. 2d at 357.

Accordingly, the claims against Rep. Doucette for intentional infliction of emotional distress must be dismissed.

D. State Law Tort: Negligence

A plaintiff claiming negligence must allege: (1) that the defendant owed the plaintiff a duty; (2) that the duty was breached; (3) that the plaintiff suffered an injury; and (4) that the defendant's breach was a substantial cause of the injury. *Vachon v. New England Towing, Inc.*, 148 N.H. 429, 430 (2002). "Absent a duty, there is no negligence." *Grady v. Jones Lang LaSalle Constr. Co., Inc.*, 171 N.H. 203, 207 (2018) (internal quotation marks omitted). "Under established New Hampshire law, whether an enforceable duty exists is a legal concept that focuses on the relationship between the parties, policy issues attendant to their relationship, and

the foreseeability of harm. *Hungerford v. Jones*, 988 F. Supp. 22, 25 (D.N.H. 1997). A duty of care arises out of the relationship between the two parties and the need for protection against reasonably foreseeable harm. *Riso v. Dwyer*, 168 N.H. 652, 654 (2016).

i. The Plaintiff has not Alleged Facts Sufficient to State a Claim That the Campaign is Liable for Negligence.

The plaintiff alleges that the Campaign is vicariously liable for the actions of its "employees," and also because it allegedly make payments to the City of Manchester and Manchester Police Department for security services.

For such 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.

Besides mere conclusory statements or bald legal conclusions, the plaintiff has not alleged facts to plausibly establish that Defendants Deck and Doucette were employees or agents of the campaign. Additionally, the Campaign cannot be held vicariously liable for actions of the Manchester Police Department or the City of Manchester, as the plaintiff has failed to allege sufficient facts to establish that there was an employer/employee or principal/agent relationship between the Campaign and these entities sufficient to support a claim for vicarious liability.

Accordingly, the claims against the Campaign for negligence must be dismissed.

ii. The Plaintiff has not Alleged Facts Sufficient to State a Claim That Mr. Deck is Liable for Negligence.

The plaintiff alleges Mr. Deck is personally liable for negligence.

The plaintiff does not state what duty Mr. Deck owed to the Plaintiff, other than to state that "[d]efendants owed a duty of ordinary care to keep the Plaintiff safe from assault and battery while attending the No Labels Problem Solvers event." Doc. 75 (05/22/2019) at ¶134. The plaintiff does not allege facts sufficient to infer a relationship that would create such a duty.

In the analogous *King* case, which involved claims by a *pro se* journalist arising out of his removal from political campaign events, the court found that the plaintiff's allegations that representatives of a political campaign approached him in a menacing and threatening manner, put their hands on him as he tried to roll video at a political event, made repeated threats to have journalist arrested at those events, were insufficient to state a claim for negligence because the allegations were devoid of an assertion of a duty owed. *King*, 860 F. Supp. 2d at 130. Similarly, the plaintiff's negligence claim against Mr. Deck must be dismissed.

iii. The Plaintiff has not Alleged Facts Sufficient to State a Claim That Rep. Doucette is Liable for Negligence.

The plaintiff alleges Rep. Doucette is personally liable for negligence.

The plaintiff alleges that "[d]efendant Doucette had no authority to stop or assault Plaintiff and had a duty not to harm Plaintiff or interfere with Plaintiff's legitimate rights and freedoms" and therefore concludes that he is liable for negligence. Doc. 75 (05/22/2019) at ¶138. The plaintiff does not allege facts sufficient to infer a relationship that would create such a duty.

Accordingly, the claims against Rep. Doucette for negligence must be dismissed.

E. State Law Tort: Negligent Hiring, Training, Supervision, and Retention

An employer may be liable for the damages resulting from negligent supervision of its employee's activities. *Trahan-Laroche v. Lockheed Sanders, Inc.*, 139 N.H. 483, 485 (1995). Liability for negligent hiring and retention exists where "the actor has brought into contact or

association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct." *Marquay v. Eno*, 139 N.H. 708, 719 (1995) (internal quotation marks omitted). To establish negligent training and/or supervision the plaintiff must prove that:

> A person conducting an activity through servants or other agents is . . . negligent or reckless:
>
> > (a) in giving improper or ambiguous orders of in failing to make proper regulations; or
> > (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others:
> > (c) in the supervision of the activity; or
> > (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

Restatement (Second) of Agency §213 (1958) (adopted as New Hampshire law in *Trahan-Laroche*, 139 N.H. at 485).

i. The Plaintiff has not Alleged Facts Sufficient to State a Claim That the Campaign is Liable for Negligent Hiring, Training, Supervision, and Retention.

The plaintiff alleges that the Campaign "negligently hired, trained, supervised, and retained Defendant Deck and Pittman for the No Labels event and they knew or should have known that Defendant Deck and Pittman were unfit for the job due to their past conduct and behavior and that they were peculiarly likely to commit intentional misconduct and created a danger of harm to third persons such as Plaintiff." Doc. 75 (05/22/2019) at ¶145. This is a quintessential example of a plaintiff relying solely on "threadbare recitals of the elements of a cause of action" to state a claim, rather than specific factual allegations. *Iqbal*, 556 U.S. at 678. As a result, the court need not accept the conclusory allegations in paragraph 145 of the second amended complaint as true for purposes of this motion to dismiss. Aside from these bare

conclusions of law, the plaintiff fails to allege any facts to indicate how the Campaign could have known of Mr. Deck's alleged unfitness or alleged propensity towards intentional misconduct, or what that "past conduct and behavior" entailed.[1] Doc. 75 (05/22/2019) at ¶175.

For these reasons, the claims against the Campaign for negligent hiring, training, supervision, and retention must be dismissed.

F. State Law Claim: Intentional Misrepresentation/Fraud

The elements of fraud or deceit are (1) the defendant misrepresented a material fact to the plaintiff, knowing it to be false; (2) the defendant did so with fraudulent intent that the plaintiff act on it; and (3) that the plaintiff, without knowledge of its falsity, detrimentally relied on the misrepresentation. *Alexander v. Fujitsu Bus. Comm. Sys., Inc.*, 818 F. Supp. 462, 467 (D.N.H. 1993).

i. <u>The Plaintiff has not Alleged Facts Sufficient to State a Claim That the Campaign is Liable for Intentional Misrepresentation/Fraud.</u>

The plaintiff alleges that the Campaign is vicariously liable for the actions of its employees, as well as being vicariously liable because it allegedly made payments to the City of Manchester and Manchester Police Department for security services. For such liability to exist, however, there must be an employer/employee or principal/agent relationship or engagement of an independent contractor to perform an inherently dangerous task. There are no allegations of fact to support the existence of such a relationship or such inherent dangerousness. As a result, the fraud claim against the Campaign must be dismissed.

[1] The Campaign Defendants emphatically deny that Mr. Deck – a former FBI agent – was unfit or had a propensity for intentionally tortious conduct.

ii. The Plaintiff has not Alleged Facts Sufficient to State a Claim That Mr. Deck is Liable for Intentional Misrepresentation/Fraud.

The plaintiff alleges Mr. Deck is personally liable for intentional misrepresentation/fraud.

The plaintiff claims that Mr. Deck "knowingly and consciously and fraudulently misrepresented that the microphone was in the back of the hall to induce Plaintiff to leave his seat and thereby remove Plaintiff from the hall and prevent Plaintiff from questioning Defendant Trump." Doc. 75 (05/22/2019) at ¶147. The plaintiff also alleges that Mr. Deck "impersonated law enforcement officials by telling local police . . . that [he] was [an] active duty secret service agent." *Id.* at 149.

The plaintiff has not alleged facts sufficient to support the detrimental reliance element of his fraud claim. He does not allege that he was harmed by the alleged representation that there was a microphone elsewhere or that he relied on the allegedly false statement that Mr. Deck was a secret service agent. Instead, the plaintiff explicitly acknowledges earlier in the second amended complaint that he recognized Mr. Deck as a member of Candidate Trump's private security detail. Doc. 75 at ¶100.

Accordingly, the claims against Mr. Deck for intentional misrepresentation and fraud must be dismissed.

iii. The Plaintiff has not Alleged Facts Sufficient to State a Claim That Rep. Doucette is Liable for Intentional Misrepresentation/ Fraud.

The plaintiff alleges Rep. Doucette is personally liable for fraud because he "knowingly and consciously and fraudulently misrepresented that the microphone was in the back of the hall to induce Plaintiff to leave his seat and thereby remove Plaintiff from the hall and prevent Plaintiff from questioning Defendant Trump." Doc. 75 (05/22/2019) at ¶147. The plaintiff also

alleges that Rep. Doucette is liable because he "impersonated law enforcement officials by telling local police . . . that [he] was [an] active duty secret service agent." *Id.* at 149.

Again, plaintiff does not allege that he detrimentally relied on these alleged misrepresentations, and his fraud claim against Rep. Doucette must be dismissed.

G. State Law Claim: False Imprisonment

To prevail on a claim for false imprisonment, a plaintiff must prove:

> (1) the defendant acted with the intent of confining him within boundaries fixed by the defendant; (2) the defendant's act directly or indirectly resulted in the plaintiff's confinement; (3) the plaintiff was conscious of or harmed by the confinement; and (4) the defendant acted without legal authority.

Farrelly v. City of Concord, 168 N.H. 430, 445 (2015).

i. The Plaintiff has not Alleged Facts Sufficient to State a Claim That the Campaign is Liable for False Imprisonment.

The plaintiff alleges that the Campaign is vicariously liable for the actions of its employees, as well as because it allegedly made payments to the City of Manchester and Manchester Police Department for security services. Once again, for such liability to exist, there must be an employer/employee or principal/agent relationship or engagement of an independent contractor to perform an inherently dangerous task. There are no allegations of fact to support the existence of such a relationship or such inherent dangerousness. As a result, the false imprisonment claim against the Campaign must be dismissed.

ii. The Plaintiff has not Alleged Facts Sufficient to State a Claim That Defendants Deck and Doucette are Liable for False Imprisonment.

The plaintiff alleges that Mr. Deck and Rep. Doucette "falsely imprisoned Plaintiff by building a human wall and assaulting plaintiff and battering Plaintiff as they prevented Plaintiff from returning to his seat in the hall." Doc. 75 (05/22/2019) at ¶153. This characterization, which is nothing more than a series of bare legal conclusions, is insufficient to support a claim

for false imprisonment because the plaintiff was not confined within fixed boundaries. The plaintiff does not allege facts sufficient to support the claim that he was confined within fixed boundaries set by Defendants Deck and Doucette. The plaintiff similarly has not alleged sufficient facts to establish that Defendants Deck and Doucette *intended* to confine the plaintiff at all, let alone within fixed boundaries. Accordingly, the claims against Defendants Deck and Doucette for false imprisonment must be dismissed.

H. The Plaintiff has not Alleged Facts Sufficient to State a Claim That the Campaign Defendants are Liable for Civil Conspiracy.

The plaintiff did not include civil conspiracy as a claim for relief, but mentions "conspiracy" and its elements throughout the second amended complaint. *See, e.g.*, Doc. 75 (05/22/2019) at ¶¶108, 120, 162, 167, 200. References to conspiracy and conspiratorial conduct, when used as mere legal assertions, and unsupported by factual content, are insufficient to satisfy a claim for civil conspiracy. *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 47 (1987). The plaintiff's scattered references to a conspiracy in his second amended complaint are therefore insufficient to state a claim for civil conspiracy.

A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means. *Jay Edwards, Inc.*, 130 N.H. at 47 (quoting 15A C.J.S. Conspiracy § 1(1), at 596 (1967)). To prove civil conspiracy, a plaintiff must establish: "(1) two or more persons (including corporations); (2) an object to be accomplished (i.e. an unlawful object to be achieved by lawful or unlawful means or a lawful object to be achieved by unlawful means); (3) an agreement on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." *Id.* Even if plaintiff intended to allege a claim for civil conspiracy in the second amended complaint, such a claim still must be dismissed under

Rule 12(b)(6) because the plaintiff has failed to plead the requisite factual support to meet each element of the claim as stated above.

IV. Conclusion

Taking as true the plaintiff's well-pleaded facts and drawing all reasonable inferences therefrom, the Court should find that the plaintiff's claims against the Campaign Defendants fail to state a claim against him for the above stated causes of action. The defendants therefore respectfully requests that the court dismiss the claims against them in the plaintiff's amended complaint for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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

Date: June 5, 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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