UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MICHAEL A. JONES, JR.,

Plaintiff(s),

v.

DECISION AND ORDER
09-CV-6556

THE TOWN OF CANANDAIGUA, MARION CASSIE, DAVID DAWSON, OKSANA FULLER, individually, and in their capacity as the majority membership of the Town Board, CAROL MAUE and THOMAS REH, individually, and in their respective official capacities as legal counsel to the Town of Canandaigua, and other known or unknown members of the Town of Canandaigua,

Defendant(s).

Preliminary Statement

This action stems from plaintiff Michael A. Jones, Jr., Esq.'s (hereinafter "Jones") brief term as Planning Board Attorney for the Town of Canandaigua from February 2008 through December 2008. In the Complaint, Jones asserted seven causes of action, two federal causes of action and five New York State law claims. See Complaint (Docket # 1). By Decision and Order dated March 31, 2011, the Court dismissed all of plaintiff's federal claims other than his "stigma plus" due process claim. See Decision and Order (Docket # 47). As to the remaining "stigma plus" claim, the Court identified three potential defects in the cause of action and authorized the parties to engage in limited discovery relevant to the claim and the identified areas of concern. The Court stated: "Once this limited discovery is complete, a factual record may properly be

presented to the Court on a motion for summary judgment whereupon the Court can determine whether there are sufficient facts to support a stigma plus theory of recovery." Id. at pp. 16-17. Having heeded the Court's direction, the parties now return to the Court for consideration of the defendants' motions for summary judgment on the stigma plus claim. (Dockets ## 50, 51).[1]

Relevant Facts

The background facts relevant to the genesis of Jones's stigma plus claim were set forth in detail in my previous Decision and Order and familiarity is assumed here. See Decision and Order (Docket # 47) at pp. 2-6. In that previous Decision and Order the Court identified potential roadblocks that might prevent Jones from pursuing his stigma plus claim in federal court. The first was whether Jones could ever prove that the defamatory statements alleged in the Complaint damaged Jones's professional reputation to the extent that they "effectively put a significant roadblock in [Jones's] continued ability to practice his or her profession." Id. at p. 15 (quoting Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623, 630-31 (2d Cir. 1996)). The second potential roadblock was "whether the availability of an Article 78 proceeding defeats Jones's stigma plus claim." See Decision and Order (Docket # 47) at p. 18 (citing Anemone v. Metro. Transp. Auth., 629 F.3d 97,

[1] These dispositive motions are being heard by the undersigned by consent of the parties pursuant to 28 U.S.C. Section 636(c). See Docket # 15.

121 (2d Cir. 2011)("An Article 78 hearing provides the requisite post-deprivation process-even if [plaintiff] failed to pursue it.")).[2] For the reasons set forth below, both roadblocks present insurmountable obstacles to Jones's stigma plus claims.

Discussion

Deprivation of Liberty Interest: "Defamation alone, even by a government entity, does not constitute a deprivation of a liberty interest protected by the Due Process Clause." Martz v. Inc. Vill. of Valley Stream, 22 F.3d 26, 31 (2d Cir. 1994). The use of the "stigma plus" term pays tribute to the fact that something more must "be established before mere defamation will rise to the level of a constitutional deprivation." Id. In the context of a decision not to re-employ, "[s]pecial aggravating circumstances are needed to implicate a liberty interest." Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d at 630. Allegations of professional incompetence will implicate a liberty interest "only when they denigrate the employee's competence as a professional and impugn the employee's professional reputation in such a fashion as to effectively put a significant roadblock in that employee's continued ability to practice his or her profession." Id. at 630-31. Allegations that "defamation by public officials had resulted

[2] The Court also identified qualified immunity, an affirmative defense raised by defendants in their Answers, as a third issue that could be determinative of plaintiff's ability to pursue his claims in federal court. See Decision and Order (Docket # 47) at p. 17.

in a poor reputation that made it less likely that he would be hired in the future" are simply "not enough to support the finding of a liberty interest." Valmonte v. Bane, 18 F.3d 992, 1001 (2d Cir. 1994).

In my previous Decision and Order, I questioned whether Jones's allegations met the "significant roadblock" hurdle, but denied the motion to dismiss and permitted focused discovery on whether Jones could adduce sufficient evidence to create an issue of fact as to whether the actions of the defendants sufficiently impaired his ability to practice law. The record, now supplemented, confirms that Jones is unable to demonstrate "special aggravating circumstances" to meet the "plus" element of a stigma plus due process claim. The hurdle for Jones here in federal court is not merely whether he was defamed by the defendants or whether their actions hurt his reputation thereby making it more difficult for him to attract or keep clients. The hurdle is higher than that. See Colabella v. Am. Inst. of Certified Pub. Accountants, No. 10-cv-2291 (KAM)(ALC), 2011 WL 4532132, at *16 (E.D.N.Y. Sept. 28, 2011)("Courts in the Second Circuit have consistently held, however, that one must have no ability to practice one's profession at all in order to state a claim for deprivation of a liberty interest.")(internal quotation and citations omitted); Schultz v. Inc. Vill. of Bellport, No. 08-CV-0930 (JFB)(ETB), 2010 WL 3924751, at *7 (E.D.N.Y. Sept. 30, 2010)(A due process claim predicated on a

liberty interest in engaging in an occupation "will succeed only where a person is blocked from participating in a particular field."); Rodriguez v. Margotta, 71 F. Supp. 2d 289, 297 (S.D.N.Y. 1999)("It is well settled that one must have no ability to practice one's profession at all in order to state a claim for deprivation of a liberty interest."), aff'd, 225 F.3d 646 (2d Cir. 2000); Thomas v. Held, 941 F. Supp. 444, 450 (S.D.N.Y. 1996)("The statements made about the employee, moreover, must be so damaging to his or her professional reputation that they would hinder seriously the employee from finding work in that field, thereby violating the employee's liberty interest in pursuing the occupation of his choosing."); see also Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1269 (10th Cir. 1989)(holding that plaintiff's allegation that defendants' statements "made him less attractive to potential clients ... is insufficient to state a deprivation of a liberty or property interest under Section 1983").

The facts adduced during discovery simply do not create an issue of fact with respect to Jones' liberty interest. Jones maintains his law license and his ability to practice law was never blocked or significantly impeded as a result of the alleged defamation. See Exhibit "P" annexed to Docket # 52 at p. 109. Jones described his law practice both before and after 2008 as a general practice and he continues to earn a substantial income from his law practice. Id. at pp. 23, 131. In his 2009 federal tax

return Jones claimed over $250,000 in gross income from his law practice. See Exhibit "E" attached to Exhibit "O" annexed to Docket # 50. Discovery has confirmed that Jones currently provides legal services for clients in many practice areas, including criminal defense, personal injury, family law, matrimonial law, wills and estate law, and real estate. See Exhibit "P" annexed to Docket # 52 at pp. 132, 134-35. Although Jones identified twenty one clients who terminated their relationship with him after the alleged defamation occurred, he also disclosed a client list identifying 520 clients for whom he has performed legal services since 2008. See Exhibit "B" attached to Exhibit "O" annexed to Docket # 50. Moreover, Jones's criminal practice from assigned counsel work has grown from $4,044 in compensation in 2008 to $33,888 in 2010. See Exhibit "C" attached to Exhibit "O" annexed to Docket # 50. In sum, the evidence in this record confirms that Jones could not prove that the actions of the defendants put a "significant roadblock" in his continued ability to practice law. Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d at 630-31. The lack of proof is fatal to Jones's stigma plus claim.

Availability of an Article 78 Proceeding: Even were the Court to assume that Jones could prove a "significant roadblock" in his continued ability to practice law, his stigma plus claim still fails because he had an available name clearing remedy and did not pursue it. See Anemone v. Metro. Transp. Auth., 629 F.3d 97, 121

(2d Cir. 2011)("An Article 78 proceeding provides the requisite post-deprivation process-even if [plaintiff] failed to pursue it."). Jones conceded both in his response papers and during the January 20, 2012 oral argument that an Article 78 proceeding was available to him but he did not pursue the remedy. Since Article 78 afforded Jones a meaningful opportunity to challenge the actions of the defendants in allegedly damaging his name and reputation, he was not deprived of due process of law. See Guerra v. Jones, 421 F. App'x 15, 19 (2d Cir. 2011)(Summary judgment on due process liberty interest claim affirmed because plaintiff had available to him "adequate process in the form of a post-deprivation Article 78 hearing in state court"); see also Arredondo v. Cnty. of Nassau, No. 11-CV-710, 2012 WL 910077, at *11 (2d Cir. Mar. 16, 2012)(where "plaintiff failed to utilize [] post-deprivation procedures that were available to him under state law ... his due process claim must be dismissed").

State Law Claims: Pursuant to 28 U.S.C. § 1367(c), the court may choose to decline supplemental jurisdiction over pendant state law claims if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine-judicial economy, convenience, fairness, and comity-will point toward declining to exercise

jurisdiction over the remaining state-law claims." Valencia *ex rel.* Franco v. Lee, 316 F.3d 299, 305 (2d Cir. 2003)(citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988)). Since the Court has now dismissed all of plaintiff's federal claims, the Court dismisses, without prejudice, plaintiff's remaining state-law claims. In dismissing Jones's state law claims, the Court notes it has made no analysis or determination as to their substantive merits.

Conclusion

The defendants' motions for summary judgment (Dockets ## 50, 51) are **granted in part and denied in part.** Plaintiff's federal claims are dismissed with prejudice. Plaintiff's state law claims are dismissed without prejudice pursuant to 28 U.S.C. § 1367(c). The Clerk of the Court shall enter judgment in favor of defendants and close this case.

SO ORDERED.

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Jonathan W. Feldman
United States Magistrate Judge

Dated: September 25, 2012
Rochester, New York