

08-4879-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

LUISA C. ESPOSITO,

Plaintiff-Appellant,

v.

THE STATE OF NEW YORK, THE OFFICE OF COURT ADMINISTRATION OF THE UNIFIED COURT SYSTEM, THOMAS J. CAHILL, in his official and individual capacity, NAOMI GOLDSTEIN, in her official and individual capacity, ALBERT S. BLINDER, in his official and individual capacity, HARVEY GLADSTEIN & PARTNERS LLC f/k/a GLADSTEIN & ISAAC, and ALLEN H. ISAAC, individually and as a partner of HARVEY GLADSTEIN & PARTNERS LLC f/k/a GLADSTEIN & ISAAC, THE CITY OF NEW YORK, RAYMOND KELLY, in his official and individual capacity, ROBERT ARBUISO, in his official and individual capacity, and ADAM I. LAMBOY, in his official and individual capacity, ARTHUR POLLACK, individually and as a partner of POLLACK, POLLACK, ISAAC & DECICCO, LLP, CONRAD POLLACK, individually and as a partner of POLLACK, POLLACK, ISAAC & DECICCO, LLP, BRIAN J. ISAAC, individually and as a partner of POLLACK, POLLACK, ISAAC & DECICCO, LLP, POLLACK, POLLACK, ISAAC & DECICCO, LLP and JANE AND JOHN DOES,

Defendants-Appellees.

*On Appeal from the United States District Court
for the Southern District of New York*

**BRIEF FOR DEFENDANT-APPELLEE
HARVEY GLADSTEIN & PARTNERS LLC**

Of Counsel:

Traycee Ellen Klein
Eric B. Topel

EPSTEIN BECKER & GREEN, P.C.
*Attorneys for Defendant-Appellee
Harvey Gladstein & Partners LLC*
250 Park Avenue
New York, New York 10177
212-351-4500

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Defendant-Appellee Harvey Gladstein & Partners LLC submits this brief in opposition to the appellate brief submitted by *pro se* Plaintiff-Appellant Luisa C. Esposito (“Esposito”) appealing the decision from the United States District Court for the Southern District of New York.

STATEMENT OF FACTS¹

I. The Relevant Parties

Harvey Gladstein, Esq., (“Gladstein”) is an attorney admitted to practice law in the state of New York. Gladstein was a partner at the law firm of Gladstein & Isaac, Esqs. (“G & I”). In or around the end of January 2006, Gladstein withdrew from G & I and founded the law firm of Harvey Gladstein & Partners LLC (“HGP”). Defendant-Appellee Allen Isaac, a former partner of G & I, is not, and has never been, affiliated with HGP.

II. The State Court Action

On or about July 7, 2006, Esposito commenced a state court action in the New York Supreme Court in New York County, *Luisa C. Esposito v. Allen H. Isaac, Esq., et al.*, Index No: 109446/06 (dated July 6, 2006) against, *inter alios*, Gladstein (individually and as a partner of G & I), and G & I. This action is

¹ For purposes of this appeal, HGP assumes the facts alleged by Esposito to be true.

hereinafter referred to as “the State Court Action”.² In the State Court Action, Esposito seeks to hold Gladstein and G & I liable for the alleged wrongful acts perpetrated by Allen Isaac.

The Complaint in the State Court Action alleges that, in or around July 2002, Esposito retained the legal services of Brian Isaac, Esq., and the law firm of Pollack, Pollack, Isaac & DeCicco, LLP (the “Pollack Firm”), to represent her in a personal injury (vehicular accident) action entitled *Luisa Esposito v. Pasquale Amoruso, et al.* (“Amoruso matter”), Nassau County Index No. 2982/03. According to Esposito, in May or June 2005, Brian Isaac and the Pollack Firm retained Allen Isaac to act as trial counsel in connection with this matter. (A-17, 76.)³ Esposito claims that during the course of this alleged representation, she met with Allen Isaac at G & I’s offices to prepare for trial and that during this time he sexually assaulted, verbally harassed, and groped her, and requested that she engage with him in sexual activity. (A-17-18, 76-77.) The Complaint further asserts that Allen Isaac engaged in this conduct for his own sexual gratification.

The State Court Action seeks to hold Gladstein & G & I liable for the alleged conduct of Allen Isaac on the theories: (1) negligent and intentional breach of fiduciary duty; (2) negligence and/or reckless hiring, training, supervision

² Counsel for HGP also represents Gladstein, as well as G & I in the State Court Action.

³ A-___ refers to the relevant page(s) of the Joint Appendix.

and/or retention of Allen Isaac; and (3) intentional infliction of emotional distress. The sum and substance of the allegations made by Esposito are that Allen Isaac subjected her to sexual assault and battery and that Gladstein and G & I should be liable for the acts of Allen Isaac. The State Court Action is currently being litigated before the Honorable Doris Ling-Cohan.

III. The Federal Court Action

On December 28, 2007 and February 6, 2008, Esposito filed a Complaint and Amended Complaint, respectively, in the United States District Court for the Southern District of New York (the “Federal Court Action”). (A-12-13; Pl. App.⁴ at 3.) The Amended Complaint seeks to hold HGP liable for (1) deprivation of constitutional rights pursuant to 42 U.S.C. § 1983; (2) breach of contract; (3) breach of fiduciary duty; and (4) assault. In the Amended Complaint, Esposito seeks to hold HGP liable for the alleged sexual assault and battery committed by Allen Isaac.

The Amended Complaint was deficient for several reasons: (1) HGP cannot be liable under 42 U.S.C. § 1983; (2) HGP, which is not in any way affiliated with G & I, is not alleged to have done anything wrong in the Amended Complaint; and (3) the factual underpinnings giving rise to the breach of contract, breach of fiduciary duty, and assault as against HGP are already being litigated in the State

⁴ The Brief for the Plaintiff-Appellant Luisa C. Esposito shall be referred to herein as “Pl. App. at ___”.

Court Action. Given the lack of merit with respect to the federal causes of action alleged in the Amended Complaint, and due to the fact that the remaining state law claims were identical to those causes of action already being litigated in the State Court Action against Gladstein and G & I, on March 25, 2008, counsel for HGP sent a letter and stipulation to Esposito requesting that she withdraw her Federal Court Action as against HGP. Esposito never responded to said request and instead, on or around May 19, 2008, Esposito filed a Notice of Motion for Permission to File a Second Amended Complaint, which the Court granted. (A-9.) The causes of action and facts set forth in the Second Amended Complaint as against HGP are the same as those in the Amended Complaint discussed above. (A-70-94.)

IV. Dismissal

On May 30, 2008, HGP filed a motion to dismiss the Second Amended Complaint or in the alternative for summary judgment. (A-8.) HGP rested its motion on the fact that HGP was not a proper party to the Federal Court Action, Esposito had failed to state a claim under Section 1983 against HGP and/or G & I because neither were state actors nor acting under color of state law; and the state law claims were duplicative of the ongoing State Court Action. The other defendants submitted their own motions to dismiss Esposito's causes of action alleged against them in the Second Amended Complaint. On August 8, 2008, the

Honorable Shira A. Scheindlin issued an opinion and order granting all of the motions to dismiss as to all defendants. In so doing, Judge Scheindlin ultimately concluded that the District Court did not have jurisdiction to hear the federal claims on the grounds of immunity, constitutionality, and lack of standing. In determining that there were no viable federal claims alleged in the Second Amended Complaint, Judge Scheindlin declined to exercise jurisdiction over the supplemental state law claims. (A-14-64; Pl. App. at 5.)

V. Motion for Reconsideration

On August 16, 2008, Esposito filed a motion with the District Court for an order granting reconsideration and modification of the District Court's August 8, 2008 Opinion and Order. (A-5.) By order dated August 20, 2008, the District Court denied her motion as Esposito had not identified any material facts or law overlooked by the District Court. (*Id.*)

VI. Appeal

On September 2, 2008, Esposito filed her Notice of Appeal with respect to Judge Scheindlin's decision (A-5), and she now requests that this Court vacate Judge Scheindlin's August 8 Opinion and Order. (Pl. App. at 3.)

In this appeal, Esposito contends that the District Court's dismissal constituted "a violation of her civil rights by impeding her rights of Due Process under the First and Fourteenth Amendments of the United States Constitution."

(Pl. App. at 3, 13.) She alleges that she should be permitted to bring her constitutional claims in federal court since she has “no possible avenue by which to have the decisions reviewed in state court.” (Pl. App. at 20.) Esposito also asserts that the District Court erred when it dismissed her Section 1983 claims (Pl. App. at 23), and that dismissal should be overturned to “prevent manifest injustice”. (Pl. App. at 24.)

In her appeal, Esposito does not address the District Court’s dismissal of those claims alleged against HGP, including the District Court’s determination to decline to exercise supplemental jurisdiction over the state law claims. In fact, excluding the caption, there are no references to HGP in the entire appellate brief. Instead, Esposito merely asserts on appeal that

the District Court erred when it dismissed [her] Section 1983 Complaint, along with five other similarly related cases under the same Order and Opinion . . . This clearly violates my right to equal protection of the laws and due process under the First and Fourteenth Amendments of the United States Constitution. (Pl. App. at 13.)

For the reasons set forth below, HGP respectfully requests that the Court deny Esposito’s appeal and affirm the decision of the District Court dismissing all of Esposito’s claims as against HGP in their entirety.

SUMMARY OF THE ARGUMENT

As an initial matter, Esposito has waived her right to appeal her claims against HGP as Esposito has not challenged the District Court's dismissal of those claims in her appellate brief. However, even if Esposito has not waived her right to appeal those claims against HGP, the Court's affirmation of the District Court's dismissal of those claims alleged against HGP is still warranted. HGP is not an appropriate party to this lawsuit. HGP never had any interaction with Esposito, is a completely separate corporate entity from G & I, the law firm previously associated with Allen Isaac, and Allen Isaac is not nor has he ever been a member of or in any way affiliated with HGP.

Moreover, even if Esposito meant to name G & I as a defendant in the Federal Court Action (given that Allen Isaac was a partner therein at the time he allegedly engaged in the unlawful conduct), instead of HGP, the claims are still without merit, have no basis to be in federal court, and warrant dismissal. Esposito's claims under 42 U.S.C. § 1983 that HGP (or G & I) violated her constitutional rights are without merit given that neither HGP (nor G & I) are state actors and are not alleged to have been acting under color of state law. The District Court also correctly declined to exercise supplemental jurisdiction over the state law claims as they are duplicative of the claims already being litigated by Esposito in the State Court Action.

ARGUMENT

I. Waiver

On this appeal, it is unclear as to whether Esposito is challenging the granting of HGP's motion. Nowhere in the appeal, other than the caption, does she address (or even reference) HGP. Similarly, nowhere in the appeal does Esposito address (or challenge) the District Court's decision to refuse to exercise supplemental jurisdiction over the state law claims. Since Esposito has failed to raise any arguments on this appeal as against the granting of HGP's motion, any such argument must be deemed waived. *See, e.g., Island Software & Computer Serv., Inc. v. Microsoft Corp., Inc.*, No. 06-2740-cv, 2008 WL 2474588, at *1 (2d Cir. June 18, 2008) (deeming arguments not raised on appeal to be waived); *Hicks v. City of Buffalo*, No. 03-6199, 2004 WL 2616750, at *2 (2d Cir. Nov. 18, 2004) (plaintiffs waived their right to appeal the dismissal of certain claims because they did not challenge the dismissal on appeal); *Garraway v. Julian*, Nos. 03-7984, 03-0282, 2004 WL 1637971, at *1 (2d Cir. July 22, 2004); *Pozdniakov v. Immigration & Naturalization Serv.*, 354 F.3d 176, 177-178 (2d Cir. 2003). Based on the foregoing, the Court should affirm the District Court's granting of HGP's motion to dismiss.

II. Esposito's Claims Against HGP Fail As A Matter Of Law

Even, assuming *arguendo*, however, that Esposito did not waive arguments in regard to HGP on appeal, the District Court was correct in dismissing the claims

set forth in the Second Amended Complaint as against HGP because HGP is not a proper party to this litigation, HGP is not a state actor nor did it act under color of state law, and the state law claims are duplicative of the pending State Court Action.

A. Esposito's Claims Against HGP Should Be Dismissed As It Is Not A Proper Party To The Instant Action

Esposito's entire basis for naming HGP as a defendant in the instant action is her belief that it is a successor to G & I and thus, is somehow responsible for the unlawful actions allegedly taken by Allen Isaac. Esposito's belief is mistaken.

In the caption, Esposito asserts that HGP is "formerly known as Gladstein & Isaac". (A-69.) Esposito's position is incorrect.⁵ HGP has never had any interaction with Esposito. HGP is not the successor corporation to G & I and it is a completely separate and distinct legal entity from G & I. Allen Isaac is not, nor has he ever been a member of or in any way affiliated with HGP.⁶ Further, HGP

⁵ As is reflected in the civil docket sheet at entry No. 47, (A-8), in support of HGP's motion to dismiss, Harvey Gladstein submitted an affidavit, which set forth before the District Court the undisputed evidence that HGP is not, and was not, in any way connected or affiliated with Gladstein & Isaac or Allen Isaac. Esposito did not consult with HGP's counsel regarding the content of her Appendix submitted on this appeal, which did not include a copy of this Affidavit. Pursuant to the instructions of Ms. Deborah Holmes, whom is believed to be the Second Circuit's deputy clerk for this matter, which were provided to HGP's counsel during a telephone communication at around 4:30 p.m. on Tuesday, January 6, 2008, this Affidavit has been annexed as an Exhibit to the instant brief.

has never provided any legal services to Esposito and it did not even exist as a corporate entity at the time Esposito had any dealings with Allen Isaac.

Moreover, even if HGP was a proper party, Esposito's Second Amended Complaint is bereft of any claims that HGP engaged in any of the alleged wrongdoing, other than by way of her conclusory allegations that "all defendants" engaged in certain unlawful conduct. Accordingly, all claims alleged against HGP were correctly dismissed in their entirety by the District Court.

B. Esposito's Claims, If Brought Against G & I, Fail To State A Cause Of Action Upon Which Relief May Be Granted

To the extent Esposito intended to name G & I as a party to the Federal Court Action, her claims are still without merit and were appropriately dismissed.⁷

1. Esposito's Federal Claims Against HGP And/Or G & I For Deprivation Of Rights Were Correctly Dismissed As Neither Were State Actors Or Acting Under Color Of State Law

To state a claim under Section 1983, "a plaintiff must allege that [s]he was injured by either a state actor or a private party acting under color of state law." *Ciambriello v. County of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002) (citation omitted); *see also Milton v. Alvarez*, No. 04 Civ. 8265SAS, 2005 WL 1705523, at

⁶ To the extent Plaintiff infers that Allen Isaac's son, Brian Isaac, was affiliated with HGP, he too is not, nor has he ever been in any way affiliated with HGP.

⁷ Since *pro se* complaints are liberally construed, HGP addresses Esposito's allegations against HGP as if Esposito commenced the action against G & I, the firm of which Allen Isaac was associated with at the time of the alleged wrongdoing.

*3 (S.D.N.Y. July 19, 2005); *Gangemi v. Johnson*, No. 98 Civ. 8470 (SHS), 1999 WL 777861, at *2 (S.D.N.Y. Sept. 30, 1999); (A-46-47.) Here, both HGP and G & I are and/or were privately owned entities and thus, not state actors. Accordingly, in order for Esposito to satisfy the second prong of the aforementioned test and sustain her claim for deprivation of rights under § 1983, the Second Amended Complaint had to allege facts establishing that HGP or G & I acted under color of state law. The Second Amended Complaint makes no such allegations.

In determining whether a party is ‘acting under color of state law’, “plaintiff’s constitutional deprivation must have been caused by conduct performed during the exercise of a right or privilege authorized by the State” and “the person charged with committing the deprivation may be fairly characterized as a state actor.” *Gangemi*, 1999 WL 777861, at *2 (citations omitted).

“[A] private actor acts under color of state law when the private actor is a willful participant in joint activity with the State or its agents.” *Ciambriello*, 292 F. 3d at 324 (internal quotations omitted); *Prowisor v. Bon-Ton, Inc.*, 426 F. Supp. 2d 165, 170 (S.D.N.Y. 2006), *aff’d*, No. 06-221-CV, 2007 WL 1233595 (2d Cir. Apr. 26, 2007) (internal quotations and citations omitted) (“For a private individual or entity to be deemed to have been acting under color of state law the allegedly unconstitutional conduct of which plaintiff complains must be fairly attributable to

the state.”). Conduct will be fairly attributable to the state where “there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.” *Prowisor*, 426 F. Supp. 2d at 170 (internal quotations and citations omitted); *see also Ciambriello*, 292 F. 3d at 324 (“[A] private actor acts under color of state law when the private actor is a willful participant in joint activity with the State or its agents.”). In addition, a corporate entity is considered a state actor “only if (1) the government created the corporate entity by special law, (2) the government created the entity to further governmental objectives, and (3) the government retains permanent authority to appoint a majority [of] the directors of the corporation.” *Horvath v. Westport Library Ass’n*, 362 F.3d 147, 153 (2d Cir. 2004) (internal quotations and citations omitted); *Daniels v. Health Ins. Plan of Greater New York*, No. 02 CIV 6054 MBM, 2005 WL 1138492, at *4 (S.D.N.Y. May 12, 2005).

“A merely conclusory allegation that a private entity acted in concert with a state actor does not suffice to state a § 1983 claim against the private entity.” *Ciambriello*, 292 F. 3d at 324 (citations omitted); *Milton*, 2005 WL 1705523, at *3. Rather, “there must be a sufficiently high level of entanglement between the state and the private actor such that the latter can be considered the state itself.” *Id.* at *3; *see also Gangemi*, 1999 WL 777861, at *3 (“While a private individual need not be a state official to be considered a state actor, he must have acted together

with or ha[ve] obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State to be considered a state actor.”) (internal quotations and citations omitted).

For instance, in *Milton*, defendants’ motion to dismiss was granted because the complaint was silent as to any facts indicating that the state was pervasively entwined with Columbia University and its employees. In that case, a *pro se* plaintiff alleged violations of Section 1983 predicated on his being stopped and questioned on Columbia University’s campus by the school’s security officers and thereafter, being detained and subsequently arrested for burglary. Milton’s claims were ultimately dismissed since he made no allegation that the state played any role in Columbia’s day-to-day operations and because there were no facts establishing a high level of entanglement between the state and the University. *Milton*, 2005 WL 1705523, at *3.

Similarly, in *Prowisor*, plaintiff’s Section 1983 claim for deprivation of his Constitutional rights stemming out of his detention by department store security guards and ultimate arrest on suspicion of shoplifting (for which he was subsequently acquitted) was dismissed because the Complaint and evidence failed to establish the requisite close nexus or high level of entanglement between the security guards and the town police. *Prowisor*, 426 F. Supp. 2d at 170; *see also Folino v. Town of Niagara*, No. 07-CV-407, 2007 WL 4224635 (W.D.N.Y. Nov.

27, 2007) (claim that defendant acted in concert with the District Attorney and Judge to deprive him of Constitutional rights, without additional factual support, deemed insufficient to survive motion to dismiss); *Ciambriello*, 292 F. 3d 307.

During the relevant time period, G & I was a privately owned partnership.⁸ Esposito alleged no facts in her Second Amended Complaint establishing (1) a deprivation of her federal rights or (2) how G & I could be considered a state actor or engaged in activity authorized by or agreed to with the State. Nor does she allege that the government created HGP or G & I by special law, to further governmental objectives, or that the government retains permanent authority to appoint a majority of its directors, even if applicable. Instead, Esposito merely pleads in vague and conclusory terms, that “all defendants, collectively” and individually “engaged in actions and abuses which violate and deny Esposito of her Constitutional rights, including her rights to due process.” (A-88.)

The Second Amended Complaint and Esposito’s appellate brief are silent as to any specific relationship between HGP or G & I and the State that could constitute the sufficiently close nexus and level of entanglement required for them, as private entities, to be considered having acted under state law. Such unsubstantiated allegations, without more, fail to meet the standard of plausibility required to survive dismissal. *In re Initial Public Offering Sec. Litig.*, 544 F. Supp.

⁸ HGP did not exist during the time in question.

2d 277, 285 (S.D.N.Y. 2008); *see also Cho v. Bush*, No. 07 Civ. 7722 (PAC) (GWG), 2008 WL 346040, at *2 (S.D.N.Y. Feb. 7, 2008). As Esposito has failed to sufficiently allege that HGP and/or G & I are state actors or that they acted under color of state law, it was appropriate for Judge Scheindlin to dismiss Esposito's Section 1983 claims against HGP. *See Robinson v. New York City Dep't of Hous. Pres. & Dev.*, No. 01-9136, 2002 WL 1333614, at *2 (2d Cir. June 18, 2002); *Eisenstein v. Whitman*, No. 00-6501, 2001 WL 125777, at *26 (2d Cir. Feb. 14, 2001).

2. The District Court Correctly Dismissed Esposito's Federal Claims Against HGP And/Or G & I For Conspiracy To Deprive Esposito Of Her Constitutional Rights

To survive a Section 1983 conspiracy claim, Esposito was also required to allege in the Second Amended Complaint facts establishing “(1) an agreement between a state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages.” *Ciambriello*, 292 F. 3d at 324-325 (citation omitted).

“[C]omplaints containing only conclusory, vague or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of [her] constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct.” *Id.* at 325 (internal quotations and citations omitted) (dismissing conspiracy claims where

plaintiff's allegations were strictly conclusory and failed to provide any details of time and place).

Again, other than by way of her conclusory and vague allegations, there were no factual allegations in the Second Amended Complaint that there was any agreement between HGP (or G & I) and any state actor or any overt act in furtherance of their desire to deprive Esposito of any constitutional rights. Accordingly, the District Court properly dismissed Esposito's claim that HGP conspired to deprive her of her constitutional rights.

C. The District Court Correctly Dismissed Esposito's State Law Claims Against HGP

In her appellate brief, Esposito submits that she "had no opportunity to take recourse to the state court system in order to resolve [her] case, [and thus] cannot be precluded from bringing the claim in federal court (Pl. App. at 20), and that her federal court action should be permitted to proceed in order to "prevent manifest injustice". (Pl. App. at 24.) Her arguments, however, are obviously not directed at the District Court's dismissal of the claims against HGP as she does not (and cannot) dispute that she has had an opportunity to take recourse to "resolve her case". As previously set forth, Esposito's allegations of wrongdoing (e.g. negligence and breach of fiduciary duty) against Gladstein and G & I are currently being litigated in the State Court Action. Based on the foregoing, there is no manifest injustice that will occur to Esposito by this Court affirming the granting

of HGP's motion to dismiss.

1. The District Court Correctly Declined To Exercise Supplemental Jurisdiction Over Esposito's State Law Claims Following Its Dismissal Of The Federal Claims

Pursuant to 28 U.S.C. § 1367(c)(3), “[t]he district courts may decline to exercise supplemental jurisdiction over a claim . . . if (3) the district court has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3). As the District Court correctly acknowledged, courts generally decline to exercise supplemental jurisdiction over remaining state law claims when, as in the instant case, “a plaintiff has not alleged diversity jurisdiction and her federal claims fail as a matter of law.” (A-62); *Martinez v. Simonetti*, 202 F.3d 625, 636 (2d Cir. 2000) (dismissing supplemental state law claims because the federal claims were dismissed); *Adams v. Intralinks, Inc.*, No. 03 Civ. 5384 (SAS), 2004 WL 1627313, at *8 (S.D.N.Y. July 20, 2004) (dismissing state law claims pursuant to section 1367(c) where the only remaining claims were premised on state law, the litigation was at an early state of litigation, and the balance of factors including, convenience, fairness, and comity, weighed in favor of dismissal).

Since Esposito does not argue in her appeal that the District Court improperly refused to exercise supplemental jurisdiction, any such argument is waived. Moreover and more importantly, the District Court had every right to decline jurisdiction over Esposito's state claims as Esposito's federal claims failed

as a matter of law and there is no diversity jurisdiction. (A-62.)

2. Esposito's State Law Claims Are Duplicative Of The Pending State Court Action

Even if the District Court had not dismissed Esposito's federal claims, the state law claims were properly dismissed as they are duplicative of causes of action pending in the State Court Action. "The Second Circuit has long adhered to the first-filed doctrine in deciding which case to dismiss where there are competing litigations'." *Cole v. Edwards*, No. 03 Civ. 5214 (PCK) (FCF), 2004 WL 1874970, at *3 (S.D.N.Y. Aug. 13, 2004) (quoting *Kellen Co., Inc. v. Calphalon Corp.*, 54 F. Supp. 2d 218, 221 (S.D.N.Y. 1999)). Under the first-filed doctrine, "[w]here there are two competing lawsuits, the first suit should have priority, absent the showing of balance of convenience or special circumstances giving priority to the second." *Cole*, 2004 WL 1874970, at *3 (quoting *Kellen Co.*, 54 F. Supp. 2d at 221); *see also Continental Ins. Cos. v. Wickes Cos.*, No. 90 Civ. 8215 (KMW), 1991 WL 183771, at *1 (S.D.N.Y. Sept. 5, 1991).

The purpose behind this doctrine is to conserve judicial resources, avoid duplicative litigation, and protect parties from the considerable cost and potential for inconsistent judgments. *See Cole*, 2004 WL 1874970, at *3; *Kellen Co.*, 54 F. Supp. 2d at 221. It also serves to alleviate the heavily burdened Courts from duplicating each other's works in matters involving the same issues and parties. *See Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1203 (2d Cir. 1970);

Nat'l Football League Props., Inc. v. Hi-Pro Mktg., Inc., No. 92 Civ. 1456 (MJL), 1992 WL 204370, at *2-3 (S.D.N.Y. Aug. 11, 1992).

Esposito filed her State Court Action in July 2006, over a year and a half prior to serving her Federal Court Action. Therein, she alleged that she was sexually assaulted by Allen Isaac while she was a client of G & I, in which he was a partner, and that as a result of said assault, Allen Isaac, Gladstein, and G & I breached their contractual and fiduciary duties to Esposito thereby causing her harm. These claims are identical to the claims alleged by Esposito in her Second Amended Complaint.

To permit Esposito to proceed on these causes of action against HGP and/or G & I would not only result in a waste of judicial resources and considerable expense to HGP, but it could also result in inconsistent judgments. Further, given that the two actions are both pending in New York City and that Esposito's interests regarding these claims are being preserved in the State Court Action, there are no exceptional circumstances warranting the simultaneous litigation of identical causes of action or giving priority to the instant Federal Court Action. For the foregoing reasons, the District Court was correct in dismissing Esposito's state law claims alleged against HGP.

CONCLUSION

Based on the foregoing, this Court should affirm the District Court's granting of dismissal in favor of HGP, thereby dismissing Esposito's causes of actions in their entirety.

Dated: January 7, 2009
New York, New York

Respectfully submitted,

EPSTEIN/BECKER & GREEN, P.C.

By: 

Traycee Ellen Klein (TK-2755)

Eric B. Topel (ET-8744)

250 Park Avenue

New York, New York 10177

(212) 351-4500

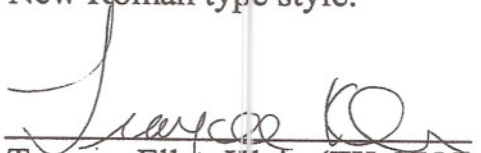
Attorneys for Harvey Gladstein &
Partners LLC

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a), the undersigned attorney for Defendant-Appellee Harvey Gladstein & Partners LLC states that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because exclusive of the Table of Contents, Table of Authorities, the Certificate of Compliance, and the Signature Line the number of words in the brief is 4,436.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word Standard 2003 Edition in 14-size font and Times New Roman type style.

By:


Traycee Ellen Klein (TK-2755)

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

----- x
 LUISA C. ESPOSITO,

Plaintiff,

- against -

: Index No. 07 CV 11612
 : (SAS) (DFE)

THE STATE OF NEW YORK, THE OFFICE OF COURT
 ADMINISTRATION OF THE UNIFIED COURT SYSTEM,
 THOMAS J. CAHILL, in his official and individual capacity,
 NAOMI GOLDSTEIN, in her official and individual capacity,
 ALBERT S. BLINDER, in his official and individual capacity,
 HARVEY GLADSTEIN & PARTNERS LLC f/k/a GLADSTEIN
 & ISAAC, and ALLEN H. ISAAC, individually and as a partner of
 HARVEY GLADSTEIN & PARTNERS LLC f/k/a GLADSTEIN
 & ISAAC, THE CITY OF NEW YORK, RAYMOND KELLY, in
 his official and individual capacity, ROBERT ARBUISO, in his
 official and individual capacity, and ADAM I. LAMBOY, in his
 official and individual capacity, ARTHUR POLLACK, individually
 and as a partner of POLLACK, POLLACK, ISAAC & DeCICCO,
 LLP, CONRAD POLLACK, individually and as a partner of
 POLLACK, POLLACK, ISAAC & DeCICCO, LLP, BRIAN J.
 ISAAC, individually and as a partner of POLLACK, POLLACK,
 ISAAC & DeCICCO, LLP, and POLLACK, POLLACK, ISAAC &
 DeCICCO, LLP, and Jane and John Does,

Defendants.
 ----- x

**AFFIDAVIT OF
 HARVEY GLADSTEIN,
 ESQ. IN SUPPORT OF
 DEFENDANT HARVEY
 GLADSTEIN &
 PARTNERS' MOTION
 TO DISMISS**

HARVEY GLADSTEIN, being duly sworn, deposes and says:

1. I am member of the law firm Harvey Gladstein & Partners LLC (hereinafter "HGP") and am fully familiar with the facts and circumstances of the matters set forth herein. I respectfully submit this Affidavit in support of HGP's Motion to Dismiss the Second Amended Complaint (hereinafter "Complaint") filed by Plaintiff Luisa Esposito.

2. I have read and reviewed the Complaint. The caption therein states that "Harvey Gladstein & Partners LLC" is formerly known as "Gladstein & Isaac." This is not true. The law firm of HGP, a private business, was formed in February of 2006 and it has nothing to do with the law firm of Gladstein & Isaac, which was dissolved in 2006.

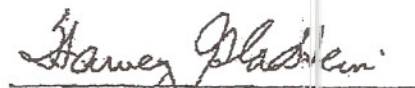
3. The Complaint also states that "upon information and belief, Defendant Allen H. Isaac" "is a partner in defendant law firm Harvey Gladstein & Partners LLC," formerly known as "Gladstein & Isaac." This is not true. Allen Isaac is not, and has not, ever been affiliated with HGP, and as stated above HGP was not formerly known as Gladstein & Isaac.

4. Prior to my being a member of HGP, I was a partner at the law firm of Gladstein & Isaac. My partner at Gladstein & Isaac was Allen Isaac. The partnership of Gladstein & Isaac dissolved in 2006.

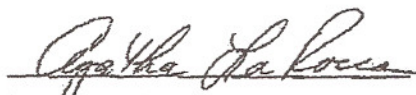
5. Contrary to the statements in the Complaint, HGP is not a successor to the Gladstein & Isaac law firm. HGP is a completely separate and distinct legal entity from Gladstein & Isaac, and HGP has never provided any legal services to Plaintiff. In fact, HGP did not even exist at the time Plaintiff had any dealings with Allen Isaac.

6. Plaintiff currently has an action pending in New York State Supreme Court against, among others, me and my former firm, Gladstein & Isaac. The action has been pending since July 2006 and discovery is ongoing. The claims alleged by Plaintiff in the Complaint, as they pertain to HGP, are the same claims that Plaintiff brings against me and Gladstein & Isaac in the New York State Court proceeding.

7. As set forth above, HGP is a private business. It has never acted under "color of state law." For all of the reasons set forth in HGP's Memorandum of Law, I respectfully request that your Honor dismiss this Complaint as against HGP in its entirety and with prejudice.


Harvey Gladstein

Sworn to before me on this
29th day of May 2008


Notary Public

AGATHA LA ROCCA
Notary Public, State of New York
No. 014856936
Qualified in Kings County
Commission Expires April 14, 2010

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

CASE NAME: Esposito v. The State of New York

DOCKET NUMBER: 08-4879-cv

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and that no viruses were detected.

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If you know, please print the version of revision and/or the anti-virus signature files _____


(Your Signature) Joanne Kim

Digitally signed by Joanne Kim
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ou=Paralegal, email=jkim@phprny.com, c=US
Date: 2009.01.07 14:16:21 -0500

Date: 01/07/2009

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Tel No: (212) 719-0990 Fax No: (212) 398-9253

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS

Paul Badhu, Being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years

on 1/7/2009 deponent caused to be served 2 copy(s) of the within

Brief for Defendant-Appellee Harvey Gladstein & Partners LLC

the attorneys at the address below, and by the following method:

By Regular 1st Class Mail

C. Esposito
Roy Street
West Hempstead, NY 11552
741-0320

Plaintiff-Appellant Pro Se

By Regular 1st Class Mail

Marianne Bechbinder, Esq.
Monica Anne Connell, Esq.
New York State Office of the
Attorney General
120 Broadway, 24th Floor
New York, NY 10271
212-416-8000
Monica.Connell@oag.state.ny.us

Attorneys for Defendants-
Appellees The State of New York,
The Office of Court
Administration of the Unified
Court System, Thomas J. Cahill, in
his official and individual capacity,
Naomi Goldstein, in her official
and individual capacity, Albert S.
Blinder, in his official and
individual capacity

By Regular 1st Class Mail

Thomas Blase Coppola, Esq.
Gordon & Rees, LLP
89 Headquarters Plaza, North
Tower
12th Floor
Morristown, NJ 07960
973-993-3141
tcoppola@gordonrees.com

Attorneys for Defendant-Appellee
Allen H. Isaac, individually and as
a partner of Harvey Gladstein &
Partners LLC f/k/a Gladstein &
Isaac

Affidavit of Service

(Continued)

By Regular 1st Class Mail

Anthony Daniel Grande, Esq.
Morgan, Melhuish, Abrutyn
& Broadway, Suite 1701
New York, NY 10006
212-388-6448
aGrande@morganlawfirm.com

Attorneys for Defendants-
Appellees Arthur Pollack, Conrad
Pollack and Brian J. Isaac,
individually and as partners of
Pollack, Pollack, Isaac & DeCicco,
LLP, and Pollack, Pollack, Isaac &
DeCicco, LLP

By Regular 1st Class Mail

Elizabeth Freedman, Esq.
New York City Law Department
100 Church Street
New York, NY 10007
212-788-1026
efreedma@law.nyc.gov

Attorneys for Defendants-
Appellees
The City of New York, Raymond
Kelly, in his official and individual
capacity, Robert Arbuiso, in his
official and individual capacity,
and Adam I. Lamboy, in his official
and individual capacity

Allison R. Wade

Sworn to me this

Wednesday, January 07, 2009

ALLISON R. WADE
Notary Public, State of New York
No. 01WA6191434
Qualified in New York County
Commission Expires 8/11/2012

Paul B...

Case Name: Luisa Esposito v. State of New York et. al.

Docket/Case No 08-4879-cv
(Index):