

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

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|------------------------------|---|----------------------------|
| REV. XIU HUI “JOSEPH” JIANG, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | Case No. 4:15-cv-01008 CEJ |
| |) | |
| TONY LEVETTE PORTER, |) | |
| JAIMIE D. PITTERLE, |) | |
| CITY OF ST. LOUIS, MISSOURI, |) | |
| A.M., |) | |
| N.M., |) | |
| SURVIVORS NETWORK OF THOSE |) | |
| ABUSED BY PRIESTS, |) | |
| DAVID CLOHESSY and |) | |
| BARBARA DORRIS, |) | |
| |) | |
| Defendants. |) | |

**MOTION OF DEFENDANT N.M. TO DISMISS COMPLAINT AND
MEMORANDUM IN SUPPORT**

In what appears to be a brazen attempt to frighten other potential victims of his from coming forward, on June 25, 2015, Plaintiff Xiu Hui “Joseph” Jiang filed a Complaint frivolously accusing the mother of a child who he sexually abused of violating his rights. Plaintiff Jiang’s Complaint reads like a 32 page self-serving press release which was filed without regard to the law or common sense. Despite alleging that he was falsely accused, Plaintiff includes serious unfounded allegations in his Complaint and labels them “upon information and belief.”

I. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(b), Defendants may assert various defenses in a motion to dismiss a complaint. One of the defenses that Defendants may assert is that the Plaintiff failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

Motions to dismiss under Rule 12(b)(6) test the sufficiency of the Plaintiff's case. Target Training Int'l, Ltd. v. Lee, 1 F. Supp. 3d 927 (N.D. Iowa 2014).

The Court must construe all allegations in the complaint in a light most favorable to Plaintiff, taking all well-pleaded facts and allegations within the complaint as true. Ideal Instruments, Inc. v. Rivard Instruments, Inc., 434 F. Supp. 2d 598 (N.D. Iowa 2006). The court must be mindful that in treating the factual allegations of a complaint as true pursuant to Rule 12(b)(6), the court "does not, however, blindly accept the legal conclusions drawn by the pleader from the facts." De Wit v. FIRSTAR Corp., 904 F. Supp. 1476, 1508 (N.D. Iowa 1995), quoting Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990) (citing Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987), and 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 595-97 (1969)); see also LRL Properties v. Portage Metro Hous. Auth., 55 F.3d 1097, 1103 (6th Cir. Ohio 1995) (the court "need not accept as true legal conclusions or unwarranted factual inferences"). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, which, when accepted as true, states 'a claim to relief that is plausible on its face.' Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))." Sykes v. City of Pine Lawn, 2015 U.S. Dist. LEXIS 89382, *4 (E.D. Mo., Case No. 4:15CV00462 AGF, July 9, 2015).

II. ANALYSIS

In his lawsuit against Defendant N.M., Plaintiff Jiang pleads very few facts that actually involve N.M. These facts are insufficient to form the basis for any tort claim. More specifically, they do not form the basis for any of Plaintiff's alleged claims.

A. Count 7 against N.M. for Conspiracy to Violate Civil Rights Must be Dismissed as Plaintiff Does not Plead Any Facts Relating to N.M. to Support any Element of the Claim

In Count 7 of his Complaint, Plaintiff Jiang alleges that Defendant N.M. was part of a conspiracy to violate his civil rights. In order to properly plead a conspiracy to violate civil rights a Plaintiff must plead facts showing the following:

(1) that the defendants conspired, (2) with the intent to deprive the plaintiff, either directly or indirectly, of the equal protection of the laws, or equal privileges and immunities under the laws, (3) an act in furtherance of the conspiracy, and (4) that they or their property were injured, or they were deprived of exercising any right or privilege of a citizen of the United States.

King v. Dingle, 702 F. Supp. 2d 1049, 1078 (D. Minn. 2010) *citing*, Barstad v. Murray County, 420 F.3d 880, 887 (8th Cir. 2005), *also citing* Larson v. Miller, 76 F.3d 1446, 1454 (8th Cir. 1996).

Here, even taking all of Plaintiff's asserted facts as true, Plaintiff fails to state a claim that would entitle him to relief. He failed to plead any facts showing that N.M. conspired with anyone. Plaintiff makes an assertion in paragraph 128 of his Complaint that Defendant N.M. conspired with the police, A.M., and SNAP, but this is a conclusory allegation, not a factual one. Plaintiff fails to state that N.M. had any conversations with the police other than that she called them once on the phone to state that her son was willing to view a photo array (Complaint ¶ 48). The Complaint never alleges that Defendant N.M. has ever heard of or spoken with SNAP. Lastly, N.M. and A.M. have been divorced for over 10 years – there is no fact pleaded to show that they communicated to form a conspiracy.

Defendant is aware that the agreement in a conspiracy does not have to be express, and can be proven by circumstantial evidence, but Plaintiff does not even plead circumstantial facts to show there was an agreement in this case. As “the plaintiff must allege with particularity and

specifically demonstrate with material facts that the defendants reached an agreement," Plaintiff's claim must fail at the first element. Davis v. Jefferson Hosp. Ass'n, 685 F.3d 675, 685 (8th Cir. 2012) *quoting* City of Omaha Emps. Betterment Ass'n v. City of Omaha, 883 F.2d 650, 652 (8th Cir. 1989).

Next, Plaintiff fails to plead any facts to show that N.M. had the intent to deprive Plaintiff of equal protection, privileges and immunities under the laws. He alleges that upon information and belief, N.M. targeted Plaintiff because he was a Catholic priest and therefore an easy target (Complaint ¶ 34). He further alleges, upon information and belief, that N.M. targeted Plaintiff because he is Chinese and therefore easily identifiable (Complaint ¶ 35).

Even if Plaintiff's allegations were true, they do not form the basis for a violation for civil rights. Plaintiff has to allege that Defendant N.M. and the others with whom she conspired were motivated by discriminatory design. Chambers v. Omaha Girls Club, 629 F. Supp. 925, 938 (D. Neb. 1986); *see also* Omaha Emples. Betterment Ass'n v. Omaha, 883 F.2d 650, 652 (8th Cir. 1989) (The "purpose" element of the conspiracy requires that the plaintiff prove a class-based "invidiously discriminatory animus.") Here, Plaintiff alleges that N.M. chose to accuse Plaintiff because he was an easy target – not because she was discriminating against a particular class of people. Plaintiff has failed to plead any racial animus on the part of N.M. and therefore his claim must fail. Davis v. Jefferson Hosp. Ass'n, 685 F.3d at 685.

Moreover, the facts supporting Plaintiff's conspiracy claim are based upon information and belief only. The law is clear that "Speculation and conjecture are not enough to prove a conspiracy exists." Mettler v. Whitledge, 165 F.3d 1197, 1206 (8th Cir. Minn. 1999) *see also* Green v. Missouri, 734 F. Supp. 2d 814, 853 (E.D. Mo. 2010).

Next, Plaintiff fails to allege that N.M. took any act in furtherance of a conspiracy against Plaintiff. He does not allege that N.M. requested police action, that she asked SNAP to speak out against Plaintiff, or that she coordinated with A.M. in his actions in any way. Simply, there is no allegation that she took any action in furtherance of any conspiracy.

For all of the above reasons, Plaintiff's claim must not only be dismissed, but it must be found to have been frivolously made as none of the elements of the offense are supported against N.M.

B. Count 12 for Abuse of Process Must be Dismissed Against N.M. as it Fails to State a Claim

In Count 12, Plaintiff accuses N.M. and others of abuse of process. Plaintiff claims that N.M. made "illegal, improper, and/or perverted use of the criminal prosecution"(sic) against Plaintiff.

The elements of abuse of process are as follows:

- 1) That the Defendant makes use of a legal process that is
 - a. Illegal
 - b. Improper
 - c. Perverted, or
 - d. Neither warranted nor authorized by the process;
- 2) The defendant has an improper purpose in engaging in the alleged illegal, perverted or improper use of process; and
- 3) The Plaintiff is damaged by the Defendant's use of process.

Ritterbusch v. Holt, 789 S.W.2d 491 (Mo.banc 1990). In the case at bar, Plaintiff does not allege that Defendant N.M. made use of any legal process. "Legal process is defined as 'process which emanates from or rests upon court authority, and which constitutes a direction or demand that the

person to whom it is addressed perform or refrain from doing some prescribed act.”

Mischia v. St. John's Mercy Med. Ctr., 30 S.W.3d 848, 862 (Mo. App. E.D. 2000) *quoting* 1 Am.Jur.2d Abuse of Process section 2. It is arguable whether reporting a crime to the police counts as a legal process (as opposed to a lawsuit or even a prosecution which is much more clear). However, assuming arguendo, that it does count, Plaintiff does not allege that N.M. was involved in reporting Jiang to the police. Plaintiff alleges that N.M. merely called the police and told them that her son was available to review a photo array. Certainly calling the police for this purpose is not an abuse of process. N.M. did not initiate police involvement with Jiang; she did not ask for an investigation into Jiang; she did not file the charges against Jiang.

Even if N.M. somehow had control or greater involvement in the criminal process, Defendant fails to plead that she had any improper purpose in her actions. He fails to plead, other than in conclusory statements, that she had any reason for engaging the police other than the fact that she believed her son. Accordingly, Count 12 fails to state a claim upon which relief can be granted.

C. Count 13 for Intentional Infliction of Emotional Distress Must Fail in that Plaintiff Fails to Plead that N.M. Took Any Actions Against Him that Fit the Elements of the Offense

Plaintiff Jiang alleges that Defendant N.M. and others engaged in conduct “including, but not limited to arresting and prosecuting Fr. Joseph...; publicly and pervasively accused Fr. Joseph of committing abhorrent and reprehensible crimes...; depriving Fr. Joseph of his personal liberty and right to practice his religion freely...and other conduct.” (Complaint ¶ 157).

However, Plaintiff did not plead and cannot plead facts to show that N.M. arrested Plaintiff. He did not plead facts to show that N.M. publicly accused Plaintiff of a crime. He did not plead

facts to show that N.M. deprived Plaintiff of his Constitutional rights. In fact, Plaintiff does not plead that N.M. did anything to him.

In order to properly plead intentional infliction of emotional distress Plaintiff must allege:

- 1) The defendant's conduct was extreme and outrageous;
- 2) The conduct was intentional or done recklessly;
- 3) The conduct caused severe emotional distress that resulted in bodily harm to the Plaintiff;
- 4) The conduct must have been intended only to cause extreme emotional distress to the victim; and
- 5) The conduct must have been so 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.

Gibson v. Brewer, 952 S.W.2d 239, 249 (Mo. Banc 1997).

In the present case, Plaintiff did not plead any extreme and outrageous conduct on the part of N.M. The behavior that Plaintiff lists in the count as extreme and outrageous – arresting and prosecuting Plaintiff, making public statements about Plaintiff, and depriving Plaintiff of his liberty interests are not ascribed to N.M. in the facts. As shown above, she did not do any of those actions.

Even if Plaintiff were somehow able to show that N.M. participated in defamatory public statements about Plaintiff, he would be unable to be successful on this count. This is because intentional infliction of emotional distress is not a valid claim if the offending conduct is defamation. Rice v. Hodapp, 919 S.W.2d 240 (Mo banc 1996).

Additionally, Plaintiff fails to plead that Defendant N.M. had intent to only cause extreme emotional distress to Plaintiff. To recover for intentional infliction of emotional distress, a plaintiff must plead and prove that harming plaintiff was the only motivation for the actor's conduct. Thomas v. Special Olympics Missouri, 31 S.W.3d 442, 448 (Mo.App.W.D. 2000). To the contrary, here, Plaintiff alleges that N.M.'s intent was to harm the Archdiocese, not Plaintiff. Even though it is false that N.M. had intent to harm the Archdiocese, Plaintiff's allegation that this was N.M.'s goal is prohibitive to a claim of intentional infliction of emotional distress for harming *Plaintiff*.

D. Count 14 for Defamation Must be Dismissed in that Plaintiff Fails to Plead Facts to Support any of the Elements of the Offense

In Count 14, Plaintiff accuses N.M. of defamation. More specifically, Plaintiff alleges that N.M. "disseminated, published, communicated and elicited defamatory statements regarding Fr. Joseph ... such as the allegation that Fr. Joseph had engaged in unlawful conduct involving Minor." (Complaint ¶ 161).

In order to properly plead defamation, Plaintiff must state the specific words that he claims were defamatory. Missouri Church of Scientology v. Adams, 543 S.W.2d 776, 777 (Mo. 1976). In the case at bar, Plaintiff fails to specifically plead any defamatory statement that Defendant N.M. made. Because of his failure to do so, this claim must be dismissed.

Moreover, publication of the defamatory words is an essential element of the claim. Hoeffner v. Western Leather Clothing Company, 161 S.W.2d 722 (Mo.App.E.D. 1942). Here, Plaintiff did not plead how N.M. published the defamatory statements or to whom she published them.

Lastly, Plaintiff fails to plead facts to show actual damage to his reputation. He alleges that generally, he has sustained reputational harm, but this is insufficient. Nazeri v. Missouri

Valley College, 860 S.W.2d 303 (Mo. Banc 1993). Plaintiff fails to cite even one example of any harm to his reputation.

III. CONCLUSION

Of course, N.M. has the ultimate defense to all claims in this case in that the allegations of sexual abuse against Plaintiff are TRUE, but this case should never get that far. Plaintiff has not even come close to making a sufficient claim against N.M. in this case. His facts about N.M. are startlingly sparse. The lack of facts here is so striking, in fact, that it appears that this entire case reeks of a publicity stunt designed to harass N.M. and her family and to prevent other victims of childhood sexual abuse from coming forward. This lawsuit is malicious, frivolous and harassing. The lawsuit lacks merit and is strongly against the public policy that encourages people to come forward when they are victims of childhood sexual abuse. With regard to N.M., it is purely harassing.

Plaintiff's Complaint must be dismissed against N.M. and Defendant N.M. should be awarded the attorneys' fees incurred in connection with her defense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of August, 2015, the foregoing Motion to Dismiss and Memorandum in Support was filed electronically with the Clerk of Court, therefore to be served electronically by operation of the Court's electronic filing system, upon all Counsel of Record.

/s/ Kenneth M. Chackes_____