

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT RODERICK,)
)
 Plaintiff)
)
 v.) **Docket No. 00-308-P-H**
)
 JENNIFER F. KRECKEL, et al.,)
)
 Defendants)

RECOMMENDED DECISION ON MOTIONS TO DISMISS

Seven of the eight named defendants move to dismiss the only claims asserted against them under federal law in this action and to dismiss pursuant to 28 U.S.C. § 1367(c) the state-law claims asserted against them by the plaintiff, who appears *pro se*. I recommend that the court grant the motions.

I. Applicable Legal Standards

All of the motions to dismiss invoke Fed. R. Civ. P. 12(b)(1) and 12(b)(6).¹ Rule 12(b)(1) addresses lack of jurisdiction over the subject matter and Rule 12(b)(6) is concerned with failure to state a claim upon which relief can be granted. When a party moves to dismiss pursuant to Rule 12(b)(1), the opposing party has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*,

¹ Defendants Jennifer F. Kreckel and Peter J. Kaynor also rely on Fed. R. Civ. P. 12(b)(5). Motion [of Defendants Jennifer F. Kreckel and Kaynor & Kreckel, P.A.] to Dismiss, etc. (“Kreckel Motion”) (Docket No. 7) at 1; Defendant Peter Kaynor’s Motion to Dismiss, etc. (“Kaynor Motion”) (Docket No. 9) at 1. Because I determine that the complaint fails to state a claim on which relief may be granted under Rule 12(b)(6), it is not necessary to reach this issue.

789 F. Supp. 32, 33 (D. Me. 1992). The court does not draw inferences favorable to the pleader. *Hodgdon v. United States*, 919 F. Supp. 37, 38 (D. Me. 1996). For the purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The pleading party may establish the actual existence of subject-matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* ' 1350 at 213 (2d ed. 1990); see *Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

“When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in her favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); see also *Tobin v. University of Maine Sys.*, 59 F.Supp.2d 87, 89 (D. Me. 1999).

II. Factual Background

The plaintiff has not submitted any extra-pleading material in connection with his opposition to the motions to dismiss. His complaint alleges that the defendants — three attorneys, three law firms, and two limited liability corporations — “wrongfully engaged in multiple acts of civil rights violations, including the depriving and/or prejudicing of plaintiff’s property rights, all as protected pursuant to the 1st, 5th and 14th Amendments of the U. S. Constitution, and Article 1, Sec. 1, 4, & 19 of the State of Maine Constitution.” Complaint (Docket No. 1) ¶ 14. In seventeen counts, the complaint asserts sixteen claims that can only be construed as alleging violations of state law and one claim, set forth in Count 14, that alleges violation of 42 U.S.C. § 1983 by subjecting the plaintiff to

“deprivation of his said partnership rights and other property rights, privileges, or immunities, without substantive due process and equal protection of the laws.” *Id.* ¶¶ 90-91. That claim, according to the complaint, originates in “a dispute with plaintiff’s former business partner on the fair distribution of partnership assets upon dissolution,” which included a proceeding in the Maine District Court in which defendants Jennifer F. Kreckel, Kaynor & Kreckel, and Skelton, Taintor & Abbott are alleged to have represented the plaintiff and defendants Paul R. Dumas, Jr.; Peter J. Kraynor; Joyce, Dumas, David and Hanstein; and Paul R. Dumas, Jr., L.L.C. , are alleged to have represented the plaintiff’s former business partner. *Id.* ¶¶ 10-13.²

III. Discussion

A. Federal Claims

All of the moving defendants contend that the complaint fails to allege a cause of action against them under section 1983³ because it fails to allege facts sufficient to state a claim that they acted under color of state law, a necessary element of a section 1983 claim. Defendants Kreckel, Kaynor & Kreckel, and Kaynor also argue that the complaint fails to allege interference with a constitutionally-protected right, which is also a necessary element of a section 1983 claim. The first argument is dispositive.

Section 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

² The only specific allegations in the complaint against defendant Cynthia L. Dumas, L.L.C., are that its clerk is the wife of defendant Paul R. Dumas, Jr., and that title to the property used by Paul R. Dumas, Jr., as his business premises was fraudulently transferred to Cynthia L. Dumas, L.L.C., by Paul R. Dumas, Jr., to avoid making it available to satisfy his obligations to the plaintiff. Complaint ¶¶ 79-86. Damages are also sought against Cynthia L. Dumas, L.L.C., in the counts of the complaint alleging violation of 42 U.S.C. § 1983 and intentional or negligent infliction of emotional distress, as well as a count seeking punitive damages. *Id.* at 12-13, 13-14, 14 (ad damnum clauses).

³ There can be no basis for the exercise of this court’s jurisdiction over this action other than original jurisdiction over the section 1983 claim. *See* 28 U.S.C. §§ 1331, 1343(a). Diversity jurisdiction is not present. Complaint ¶¶ 1-9; 28 U.S.C. § 1332(a).

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

28 U.S.C. § 1983.

Section 1983 ... does not provide relief against most private individuals: the deprivation must be caused by a person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." As the "color of" law requirement restricts § 1983 to "state action," the alleged deprivation must be "fairly attributable to the State."

The "fair attribution" test requires both a state policy and a state actor. The state policy component requires that the deprivation "be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." The state actor component requires that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." A defendant may be a state actor because he is a state official, because he acted together with a state official, or because his conduct is otherwise chargeable to the State.

Gonzalez-Morales v. Hernandez-Arencibia, 221 F.3d 45, 49 (1st Cir. 2000) (citations omitted). In the instant case, the complaint alleges no facts that could reasonably be interpreted to alleged that any of the defendants are state officials or that any of the defendants acted together with a state official. Accordingly, the plaintiff may proceed under section 1983, if at all, only if the alleged wrongful conduct of the defendants is "otherwise chargeable to the State."

The plaintiff first argues that the complaint alleges that the "Defendants were acting in their professional capacity as members of the Maine Bar, and by implication, as duly appointed officers of the court...i.e., 'under color of law.'" Plaintiff's Response to Motion to Dismiss of Defendants Paul R. Dumas, Jr., etc. (Docket No. 10) at 3. However, the status of the defendants as lawyers and the fact that the plaintiff's alleged injuries arise out of the defendants' use of the state courts does not and

cannot establish that their conduct is chargeable to the state. *See, e.g., Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (“It is often said that lawyers are ‘officers of the court.’ But the Courts of Appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor ‘under color of state law’ within the meaning of § 1983.”); *Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 84 F.3d 487, 492 (1st Cir. 1996) (private party’s conduct may not be fairly attributed to state “if the challenged action results from the exercise of private choice and not from state influence or coercion”). *See also Hoai v. Vo*, 935 F.2d 308, 312-13 (D.C. Cir. 1991) (section 1983 action’s allegations of abuse of state court process by private litigants and attorneys insufficient to support finding of action under color of state law); *Bilal v. Kaplan*, 904 F.2d 14, 15 (8th Cir. 1990) (conduct of counsel does not constitute action under color of state law for purposes of § 1983).

There are no allegations in the complaint that any of the defendants “reached an understanding” with a state official or “corruptly conspired with a judge.” *Snyder v. Talbot*, 836 F. Supp. 19, 23 (D. Me. 1993). *See also Lovell v. Peoples Heritage Sav. Bank*, 776 F. Supp. 578, 581-88 (D. Me. 1991) (discussing state action requirement). Nor are there any allegations that there was an elaborate financial or regulatory nexus between any of the defendants and the state, that any of the defendants had assumed a traditionally public function or that any of the defendants had entered into “a symbiotic relationship involving the sharing of profits” with the state. *Ponce v. Basketball Fed’n of the Commonwealth of Puerto Rico*, 760 F.2d 375, 377 (1st Cir. 1985). Even under the most generous reading of the plaintiff’s complaint, he has failed to allege sufficient facts to establish the state-action component of a section 1983 claim.

The plaintiff attempts to distinguish the case law upon which the moving defendants rely by pointing out that it involves “individual private actions, as opposed to joint actions of private parties

carried out in collusion.” Plaintiff’s Response to Motion to Dismiss of Defendant Peter Kaynor (Docket No. 12) at 4. *See also* Plaintiff’s Response to Motion to Dismiss of Defendants’ [sic] Jennifer F. Kreckel and K&K (Docket No. 14) at 3-4. However, the fact that actions are taken jointly rather than individually does not transform those actions into state action when they would not otherwise be so. Private individuals acting in “collusion” do not thereby become state actors. In addition, the complaint’s allegations of collusion or conspiracy, Complaint ¶¶ 14, 89, 94, are bald and conclusory, and do not include sufficient factual detail to defeat a motion to dismiss. “[S]ome factual basis supporting the existence of a conspiracy must be pled when a conspiracy is alleged in a civil rights case.” *Malachowski v. City of Keene*, 787 F.2d 704, 711 (1st Cir. 1986). Even if it were possible to make the distinction upon which the plaintiff’s argument is based, therefore, the complaint fails to meet the pleading standards established for this circuit in such cases. *Slotnick v. Staviskey*, 560 F.2d 31, 33 (1st Cir. 1977).

The moving defendants are entitled to dismissal of Count 14 of the complaint and any claims asserted in the complaint arising under section 1983. *See Lefkowitz v. Lider*, 443 F. Supp. 352, 357-58 (D. Mass. 1978).

B. State-Law Claims

The moving defendants seek dismissal of all remaining claims asserted against them in the complaint pursuant to 28 U.S.C. § 1367(c)(3). Motion to Dismiss of Defendants Paul R. Dumas, Jr.; Joyce, Dumas, David and Hanstein, P.A.; Paul R. Dumas, Jr., LLC; and Cynthia L. Dumas, LLC (Docket No. 6) at 7; Kreckel Motion at 8-9; Kaynor Motion at 5. That statute provides, in relevant part:

The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) [creating supplemental jurisdiction over all claims so related to claims over which the federal court has original jurisdiction that they form part of the same case or controversy] if —

* * *

(3) the district court has dismissed all claims over which it has original jurisdiction

28 U.S.C. § 1367(c). If the court adopts my recommendation that the section 1983 claims against the moving defendants be dismissed, it will have dismissed all claims against each of the moving defendants over which it has original jurisdiction. Accordingly, I recommend that it dismiss all remaining claims against those defendants as well. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966); *Pew v. Scopino*, 904 F. Supp. 18, 32 (D. Me. 1995).

IV. Conclusion

For the foregoing reasons, I recommend that the motions of defendants Jennifer F. Kreckel; Peter J. Kaynor; Kaynor & Kreckel, P.A.; Paul R. Dumas, Jr.; Joyce, Dumas, David and Hanstein, P.A.; Paul R. Dumas, Jr., L.L.C.; and Cynthia L. Dumas, L.L.C. to dismiss be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 8th day of March, 2001.

David M. Cohen
United States Magistrate Judge

ROBERT RODERICK
plaintiff

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CYNTHIA L. DUMAS LLC
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