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ORDER OF THE SECOND CIRCUIT
(MARCH 1, 2018)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES H. BRADY,

Plaintiff-Appellant,

v.

ASSOCIATED PRESS TELECOM, NBC NEWS NEW YORK, WCBS-TV NEW YORK, THE NEW YORK TIMES COMPANY, NEW YORK POST, NEW YORK DAILY NEWS, WALL STREET JOURNAL, NEWSDAY MEDIA GROUP,

Defendants-Appellees,

JOHN DOE, 1-50,

Defendants.

17-268-cv

Appeal from a judgment of the
United States District Court for the
Southern District of New York (Daniels, J.).

Before: Amalya L. KEARSE,
Guido CALABRESI, Denny CHIN, Circuit Judges.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiff-appellant James H. Brady, proceeding *pro se*, appeals from the district court's judgment entered February 3, 2017 dismissing his complaint with prejudice for failure to state a claim and denying him leave to amend. Brady sued defendants-appellees Associated Press Telecom, NBC News New York, WCBS-TV New York, The New York Times Company, New York Post, New York Daily News, Wall Street Journal, and Newsday Media Group, alleging fraud, conspiracy, equal protection violations, willful misconduct, and gross negligence, based on the news organizations' purported failure to investigate and report on alleged judicial corruption that occurred during Brady's state court litigation about the air rights to the space above the building in which he owned an apartment. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review *de novo* the district court's grant of a motion to dismiss for failure to state a claim, "accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff." *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2d Cir. 2016). The complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). We review a decision to deny leave to amend for abuse of discretion. *Pangburn v. Culbertson*, 200 F.3d 65, 70 (2d Cir. 1999). We conclude that the district court properly granted defendants' motions

to dismiss and did not abuse its discretion by denying Brady's motion to amend. We affirm substantially for the reasons set forth by the district court in its January 11, 2017 memorandum decision and order and by the magistrate judge in his October 4, 2016 report and recommendation, which the district court adopted in full.

We may "award just damages and single or double costs to the appellee[s]" if we determine that an appeal is frivolous. Fed. R. App. P. 38. Given the nature of this appeal, we grant the request of appellees Associated Press Telecom, NBC News New York, WCBS-TV New York, New York Post, New York Daily News, Wall Street Journal, and Newsday Media Group to apply to this Court for damages and/or double costs.

We have considered all of Brady's arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Clerk of Court

MEMORANDUM DECISION AND ORDER OF THE SOUTHERN DISTRICT OF NEW YORK (FEBRUARY 3, 2017)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES H. BRADY,

Plaintiff,

v.

ASSOCIATED PRESS TELECOM; NBC NEWSNEW YORK; WCBS-TV NEW YORK; THE NEW YORK TIMES COMPANY; THE NEW YORK POST; NEW YORK DAILY NEWS; THE WALL STREET JOURNAL; NEWSDAY MEDIA GROUP; and JOHN DOES 1-50,

Defendants.

16 Civ. 2693 (GBD) (KNF)

Before: George B. DANIELS,
United States District Judge

Plaintiff James Brady initially filed this action against the above media Defendants, (Compl., ECF No. 1), seeking "a mandatory injunction" against Defendants because they have allegedly "violated their duty to the public" by keeping "the largest public corruption

scandal in US history out of the news," (*id.* ¶ 1),[1] and "$100 million in punitive damages to send the right message to named media Defendants" for their alleged "depraved indifference."[2] (*Id.* ¶ 62.)

Before this Court is Magistrate Judge Fox's November 4, 2016 Report and Recommendation.[3] ("November 4 Report," ECF No. 72.) The November 4 Report recommends that this Court deny Defendant NYP Holdings, Inc.'s ("NYP," sued here as "The New York Post") unopposed motion to dismiss because "NYP relie[d] on motion papers and arguments submitted

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[1] In 2014, Justice Shirley Kornreich of the New York Appellate Division, First Department found that Brady's claims were precluded by the prior 2009 litigation, *Brady v. 450 W. 31st St. Owners Corp.* (*"Brady I"*), 70 A.D.3d 469 (2010), which was resolved in favor of the Cooperative Defendants. *See Brady v. 450 West 31st Street Owners Corp.* (*"Brady II"*), Nos. 157779/2013, 654226/2013, 2014 WL 3515939 (Jul. 15, 2014 Sup. Ct., N.Y. Cty.), (ECF No. 44-6). Plaintiff believes this was a result of the aforementioned corruption on the part of the state court, media, and defense lawyers involved in that and the other eight related lawsuits.

[2] This Court assumes familiarity with the facts, and incorporates by reference the relevant procedural and factual background set forth in detail in Magistrate Judge Fox's October 4, 2016 Report and Recommendation dismissing all media defendants save NYP. (October 4 Report, ECF No. 70.) This Court adopted that Report in full on January 11, 2016. (January 11, 2017 Order, ECF No. 79.)

[3] In his Report, Magistrate Judge Fox advised the parties that failure to file timely objections to the Report would constitute a waiver of those objections on appeal. (*Id.* at 3); *see also* 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). Defendant filed timely objections to the Report. (*See* NYP's Obj. to Report, ECF No. 74.) Plaintiff filed timely responses to NYP's objections largely duplicative of his previous filings before this Court. (Pl.'s Resp. to NYP's. Obj. ("Pl.'s Resp."), ECF No. 75.)

by other [media] Defendants," NYP not having moved at the same time as the other Defendants. (*Id.* at 4; NYP's Mot. to Dismiss, ECF No. 63.) This Court rejects the Report's recommendation.

Plaintiff clearly does not state a cause of action against NYP because the relief Plaintiff seeks is barred by the First Amendment. (*See* January 11, 2017 Order, ECF No. 79 (citing *Passaic Daily News v. N.L.R.B.*, 736 F.2d 1543, 1557 (D.C. Cir. 1984) (internal citations omitted) ("The Supreme Court has implied consistently that newspapers have absolute discretion to determine the contents of their newspapers."); October 4 Report, (ECF No. 70) (dismissing Plaintiff's complaint without leave to amend as to all media Defendants save NYP because of First Amendment bar).)

For the reasons stated in this Court's January 11 Order[4] dismissing the Complaint as to all other media Defendants, this Defendant should be dismissed on the same grounds. Even without NYP's motion to dismiss, this Court has the inherent authority to *sua sponte* dismiss the claims against Defendant NYP as frivolous. *See Fitzgerald v. First E. Seventh St. Tenants Corp.*, 221 F.3d 362, 363-64 (2d Cir. 2000) (holding that "district courts may dismiss a frivolous complaint *sua sponte* even when the plaintiff has paid the required filing fee" where action was the third plain-

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[4] This Court held that there is no substantive tort of conspiracy, nor is there a private cause of action under 18 U.S.C. §§ 241, 242 (under which Plaintiff brought his "conspiracy against rights" claim). (*See* January 11 Order, at 4.) This Court further found that Plaintiff failed to state colorable 42 U.S.C. § 1983 or negligence claims. (*See id.* at 5.) Finally, this Court found that the First Amendment bars the type of relief Plaintiff seeks. (*See id.* at 6.)

tiff had initiated in the Southern District stemming from alleged wrongful conversion of an apartment house into cooperative apartments) (internal citation omitted). That Magistrate Judge Fox's October 4 Report as to the other media Defendants did not recommend granting Plaintiff leave to amend because any amendment would be futile speaks to the frivolous nature of Plaintiffs claims against all media defendants, including NYP. (*See* October 4 Report, at 12.)

Conclusion

Defendants NYP's motion to dismiss is GRANTED with prejudice. Plaintiff is denied leave to amend, as amendment would be futile.

The Clerk of the Court is directed to close this case, vacate, and reissue the judgment at ECF No. 79 to reflect today's date.

SO ORDERED.

/s/ George B. Daniels,
United States District Judge

Dated: New York, New York
February 3,2017

MEMORANDUM DECISION AND ORDER OF THE DISTRICT COURT OF NEW YORK (JANUARY 11, 2017)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES H. BRADY,

Plaintiff,

v.

ASSOCIATED PRESS TELECOM; NBC NEWS NEW YORK; WCBS-TV NEW YORK; THE NEW YORK TIMES COMPANY; THE NEW YORK POST; NEW YORK DAILY NEWS; THE WALL STREET JOURNAL; NEWSDAY MEDIA GROUP; and JOHN DOES 1-50,

Defendants.

16 Civ. 2693 (GBD) (KNF)

Before: George B. DANIELS,
United States District Judge

Plaintiff James Brady initially filed this action against Associated Press Telecom, NBC News New York, WCBS-TV New York, The New York Times Company ("The Times"), The New York Post, The New York Daily News, The Wall Street Journal, and Newsday

Media Group. (Compl., ECF No. 1.) Plaintiff seeks "a mandatory injunction" against Defendants because they have allegedly "violated their duty to the public" by keeping "the largest public corruption scandal in US history out of the news," (*id.* ¶ 1), and "$100 million in punitive damages to send the right message to named media Defendants" for their alleged "depraved indifference." (*Id.* ¶ 62.)

This matter was referred to Magistrate Judge Kevin N. Fox on April 18, 2016. (ECF No. 3.) Before this Court is Magistrate Judge Fox's Report and Recommendation, ("Report," ECF No. 62), recommending that this Court grant with prejudice the motions to dismiss for failure to state a claim pursuant to Rule 12(b)(6) made by 1) The Times, (ECF No. 9); 2) the Associated Press, CBS Broadcasting Inc., Daily News, L.P., Dow Jones & Company, Inc. (erroneously sued as "The Wall Street Journal"), and Newsday LLC (collectively "AP Group Defendants," ECF No. 19); and 3) NBCUniversal Media LLC, erroneously sued as NBC News New York ("NBC," ECF No. 22).[1] (*Id.* at 12.) In his Report, Magistrate Judge Fox advised the parties that failure to file timely objections to the Report would constitute a waiver of those objections on appeal. (*Id.* at 12-13); *see also* 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). Plaintiff filed timely objections to the Report.[2] (*See* Pl.'s Obj. to Report ("Pl.'s

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[1] The relevant procedural and factual background is set forth in greater detail in the Report and is incorporated herein.

[2] Plaintiff objects wholesale to the Report because Magistrate Judge Fox did not schedule an oral argument on this motion, claiming that when Plaintiff previously had oral arguments before the State Court on the same issues, Plaintiff "crushed the multiple attorneys from the multiple international law firms

Obj."), ECF No. 65) Defendants filed timely responses to Plaintiff's objections.[3] (The Times' Resp. to Pl's. Obj. ("NYT Resp."), ECF No. 70; AP Defs.' Resp. to Pl.'s Obj. ("AP Resp."), ECF No. 71; NBC's Resp. to Pl.'s Objs. ("NBC Resp"), ECF No. 67.)

This Court overrules Plaintiff's objections and adopts Magistrate Judge Fox's recommendation. The motions to dismiss for failure to state a claim by The Times, the AP Group Defendants, and NBC are GRANTED because Plaintiff's Complaint has failed to state a claim upon which relief can be granted and Plaintiff's requested relief is barred by the First Amendment.

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that represented the defendants." (Pl.'s Obj., at 1-3.) This objection runs squarely into well-settled case law that, as the Second Circuit "noted over thirty years ago, [m]otions may be decided wholly on the papers, and usually are." *Greene v. WCI Holdings Corp.*, 136 F.3d 313, 315-16 (2d Cir. 1998) (quoting *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362, 366 (2d Cir. 1965) (internal quotation marks omitted)).

Plaintiff appears to also object to the Report on the ground that Magistrate Judge Fox has refused to address Defendants' purported "fraud upon the court by officers of the court and violations of Judiciary Law 487." (Pl.'s Obj., at 9.) Plaintiff baldly claims that the attorneys for Defendants "perjured themselves," "committed violations of Judiciary Law 487," "slandered plaintiff," and "presented false instruments." (*Id.*)

[3] On October 24, 2016, Plaintiff submitted a letter to this Court arguing that because Defendants did not respond to Plaintiff's October 13, 2016 objections within fourteen days of the entry of the Report on the docket (October 4, 2016), any responses would be untimely. Contrary to Plaintiff's assertion, Federal Rule of Civil Procedure 72(b) plainly provides that a "party may respond to another party's objections within fourteen days of being served with a copy." Fed. R. Civ. P. 72(b).

I. Legal Standard

This Court may accept, reject or modify, in whole or in part, the findings and recommendations set forth within the Report. *See* 28 U.S.C. § 636(b)(1)(C). When no objections to a Report are made, the Court may adopt the Report if "there is no clear error on the face of the record." *Adee Motor Cars, LLC v. Amato*, 388 F. Supp. 2d 250, 253 (S.D.N.Y. 2005) (citation omitted).

When there are objections to the Report, this Court must make a *de novo* determination as to the objected-to portions of the Report. 28 U.S.C. § 636(b)(1)(C); *see also Rivera v. Barnhart*, 423 F. Supp. 2d 271, 273 (S.D.N.Y. 2006). The district judge may also receive further evidence or recommit the matter to the magistrate judge with instructions. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(C). The Court need not conduct a *de novo* hearing on the matter, as it is sufficient that this Court "arrive at its own, independent conclusions" regarding those portions to which objections were made. *Nelson v. Smith*, 618 F. Supp. 1186, 1189-90 (S.D.N.Y. 1985) (quoting *Hernandez v. Estelle*, 711 F.2d 619, 620 (5th Cir. 1983)); *see United States v. Raddatz*, 447 U.S. 667, 675-76 (1980).

The pleadings of parties appearing *pro se* are generally accorded leniency and should be construed "to raise the strongest arguments that they suggest." *See Belpasso v. Port Auth. of N.Y & N.J.*, 400 F. App'x 600, 601 (2d Cir. 2010) (quoting *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999)). However, even a *pro se* party's objections must be specific and clearly aimed at particular findings in the Report, such that no party is allowed a "second bite at the apple" by merely relitigating a prior argument. *Pinkney v. Progressive Home Health Servs.*, No. 06 Civ. 5023,

2008 WL 2811816, at *1 (S.D.N.Y. July 21, 2008) (internal citation and quotation marks omitted). Furthermore, where a litigant's objections are conclusory, repetitious, or perfunctory, the standard of review is clear error. *McDonough v. Astrue*, 672 F. Supp. 2d 542, 547-48 (S.D.N.Y. 2009).

II. Aiding and Abetting Conspiracy to Defraud and Conspiracy Against Rights Claim

Plaintiff objects to the Report's finding that 1) Plaintiff failed to allege any material misrepresentation of a fact by any media defendant, (Report, at 9), and that 2) no private cause of action for a "conspiracy against rights" lies pursuant to 18 U.S.C. § 241, (*id.*). (Pl.'s Obj., at 3, 5, 9.) Without citing any relevant legal authority and relying only upon his own assertions, Plaintiff claims that "the August 15, 2016 deposition testimony of Arthur Greene did prove the existence of fraud by over 24 state justices, Governor Cuomo, Attorney General Eric Schneiderman, Manhattan District Attorney Cyrus Vance, the Media Defendants[,] and their attorneys." (*Id.* at 5.) According to Plaintiff, "[t]he role of the media was to hide the scandal from the public, and then, . . . deny any wrongdoing" by government officials. (*Id.* at 6.)

Plaintiff's objections have no legal basis. First, as the Report properly states, "[t]here is no substantive tort of conspiracy. Hence, there are no separable elements of a cause of action of conspiracy to allege." (Report, at 8 (citing *Goldstein v. Siegel*, 19 A.D.2d 489, 492 (App. Div. 1963).) Furthermore, Plaintiff has not sufficiently, nor with any particularity, alleged any fraudulent predicate actions or misstatements by Defendants on which to base his conspiracy to

defraud claim that could meet the heightened pleading standard set forth by Federal Rule of Civil Procedure 9(b). *See* Fed. R. Civ. P. 9(b); (Report, at 9).

As to Plaintiff's conspiracy "against rights" claim, Plaintiff may not bring a civil claim under a criminal statute where courts have found no private cause of action lies. *See, e.g.*, *Moriani v. Hunter*, 462 F. Supp. 353, 355 (S.D.N.Y. 1978) ("In addition, 18 U.S.C. §§ 241, 242 are criminal statutes, which do not create private rights of action for their violation.")

Accordingly, the Report properly found that Plaintiff's has failed to allege conspiracy claims based on either underlying fraudulent behavior or deprivation of rights by Defendants. (*Id.* at 9.)

III. Fifth and Fourteenth Amendment Claim

Plaintiff does not explicitly object to the Report's finding that Plaintiff's § 1983 claim suffers from a fatal lack of allegations that Defendants in this action acted "under the color of state law." (Report, at 9.) Accordingly, the Report correctly held that Plaintiff failed to state a claim under § 1983.

IV. Negligence Claims[4]

Plaintiff does not explicitly object to the Report's findings on negligent misrepresentations by Defendants to Plaintiff. The Report held that a successful negligence claim must allege a duty of care on behalf of a defendant to a plaintiff. (Report, at 8 (citing *Greenberg, Trager & Herbst, LLP v. HSBC Bank USA*, 17 N.Y.3d 565, 576 (2001)).) The Report then found that, under New York law, Defendants do not have a legally-binding duty to the Plaintiff "to prevent any part of the government from deceiving the people." (*Id.* at 11.)

Because Plaintiff failed to allege any duty—a necessary element of any negligence cause of action—the Report properly found that his negligence claims fails. *See Greenberg*, 17 N.Y.3d at 576.

V. First Amendment Bar

Finally, the Report held that granting the equitable remedy of a mandatory injunction "compelling defendants to publish what they prefer to withhold would

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[4] This Court notes that Plaintiff's purported fourth and fifth causes of action, gross negligence and willful misconduct, are not separate causes of action, but rather a standard of care under New York common law that goes to the undertaking of a defendant's duty. *See, e.g., Greenapple v. Capital One, N.A.*, 939 N.Y.S.2d 351, 353 (2012) ("[Notwithstanding that the purchase agreement between plaintiff and Goldberg premises Goldberg's liability only upon demonstration of gross negligence or willful misconduct, the complaint nevertheless states a cause of action for breach of fiduciary duty under this diminished standard of care . . . ."); *Food Pageant, Inc. v. Consol. Edison Co.*, 54 N.Y.2d 167, 172 (1981) ("[G]ross negligence had been termed as the failure to exercise even slight care . . . .").

run afoul of [D]efendants' First Amendment rights." (Report, at 12.)

Plaintiff objects with the legally unsupported assertions that "the Media Defendants colluded in a terrible crime," that "the first amendment [sic] was not intended to permit the press to cover up the criminal actions of the judicial and law enforcement branches of government[,]" and that "[c]ompelling the NEWS AGENCIES to be truthful to the public is not a violation of the First Amendment." (Pl.'s Obj., at 11.)

As the United States Supreme Court has noted,

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258-59 (1974). Such direction by this Court or any governmental entity as requested by Plaintiff would be exactly the type of interference against which the First Amendment guarantees the freedom of the press and freedom of speech. Therefore, the Report properly held that the relief Plaintiff seeks is barred by the First Amendment. (*See* Report, at 12 (quoting *Passaic Daily News v. N.L.R.B.*, 736 F.2d 1543, 1557 (D.C. Cir. 1984) (internal citations omitted) ("The Supreme Court has implied consistently that newspapers

have absolute discretion to determine the contents of their newspapers.")).)

VI. Conclusion

Having reviewed Magistrate Judge Fox's Report and Recommendation, this Court overrules Plaintiffs objections and adopts the Report in full.

Defendants' motions to dismiss are GRANTED with prejudice. Plaintiff is denied leave to amend, as amendment would be futile.

The Clerk of the Court is directed to close the motions at ECF Nos. 9, 19, and 22.

SO ORDERED.

/s/ George B. Daniels
United States District Judge

Dated: New York, New York
January 10, 2016

REPORT AND RECOMMENDATION OF THE DISTRICT COURT OF NEW YORK (OCTOBER 4, 2016)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES H. BRADY,

Plaintiff,

v.

ASSOCIATED PRESS TELECOM; NBC NEWS NEW YORK; WCBS-TV NEW YORK; THE NEW YORK TIMES COMPANY; THE NEW YORK POST; NEW YORK DAILY NEWS; THE WALL STREET JOURNAL; NEWSDAY MEDIA GROUP; and JOHN DOES 1-50,

Defendants.

16 Civ. 2693 (GBD) (KNF)

Before: Kevin Nathaniel FOX,
United States Magistrate Judge

To the Honorable George B. Daniels, United States District Judge

Background

The plaintiff commenced this action seeking "$100 million in punitive damages" and "a mandatory

injunction requiring the named media Defendant journalists to follow their own Journalism Code of Ethics" because the defendants "have deliberately, and in violation of their duty to the public, kept the largest public corruption scandal in US history out of the news." The plaintiff asserts that he "had the contract description of his '12th Floor and Roof Unit' apartment in Manhattan commercial co-op attacked and rewritten multiple times in attempts to void the $100 million worth of development rights that were contractually appurtenant to Plaintiff's apartment." The plaintiff alleges that the previous lawsuits he filed in state courts "were rigged and the Justices did not permit oral arguments or deposition of any witnesses because they knew the whole house of cards build [sic] on sand would collapse if these individuals were ever asked to explain why Plaintiff's contract does not mean what it says on its face." According to the plaintiff, the defendants "betrayed the public trust by suppressing from the news indisputable evidence that over 24 New York State Justices unlawfully rewrote or permitted other Justices to rewrite the offering plan contract description of my commercial apartment to void the $100 million dollars worth of are [sic] rights that were appurtenant to my '12th Floor and Roof Unit Apartment.'" The plaintiff alleges that "the media disregarded its duty to report to the public when shown that New York state judicial employees were repeatedly rewriting the contract description of Manhattan apartments with the criminal intent of voiding the contract's rights for the benefit of deep-pocketed New York City developers and their prestigious law firms." The plaintiff contends that "the media failed in its duty to report that Governor Cuomo, Attorney General Eric Schneider-

man, Manhattan District Attorney Cyrus Vance, and most shamefully United States Attorney for the Southern District of New York Preet Bharara, were made well aware of the criminal activity and did absolutely nothing about it, making them as culpable as the corrupt judicial officials and employees." The plaintiff alleges that "the press [has a] duty to inform the public of this public corruption." The plaintiff asserts the following claims: (1) "aiding and abetting conspiracy to defraud"; (2) "violation of Fifth and Fourteenth Amendment"; (3) "conspiracy against rights"; (4) "willful misconduct"; and (5) "gross negligence."

Before the Court are motions to dismiss the complaint, pursuant to Rule12(b)(6) of the Federal Rules of Civil Procedure, made by: (i) The New York Times Company ("The Times"); (ii) Associated Press, CBS Broadcasting Inc., Daily News, L.P., Dow Jones & Company, Inc. and Newsday LLC (collectively "AP group defendants"); and (iii) NBCUniversal Media LLC ("NBC"). The plaintiff opposes the motions.

The Times's Contentions

The Times asserts that "[t]he crux of the complaint is Plaintiff's contention that The Times conspired with other news organizations to keep his allegations against the public officials out of the news," but "Plaintiff's lawsuit rests on the plainly unconstitutional premise that The Times has a legal duty to report on a subject simply because a particular reader—in this case, Plaintiff—deems it newsworthy." According to The Times, the plaintiff's "pursuit of a mandatory injunction compelling The Times to publish various stories and of $100 million in punitive damages for The Times's failure to publish those stories already is frivolous."

The Times contends that the plaintiff has no constitutional right to force it to publish any story and the mandatory injunction he seeks would violate the First Amendment. The Times asserts that the plaintiff's conspiracy claim fails as a matter of law because, to establish a claim of aiding and abetting fraud under New York law, the plaintiff must establish the existence of a fraud, but the complaint fails to allege any fraud by the public officials or that the plaintiff relied on any statement by the public officials. Moreover, the plaintiff failed to make any factual allegations in connection with his civil conspiracy claim, including that any conscious agreement existed among the purported conspirators or that an overt act in furtherance of any conspiracy was committed. According to The Times, the plaintiff's conspiracy against rights claim must be dismissed because no private right of action exists under 18 U.S.C. § 241. The plaintiff's negligence claim also fails because "[i]t is well established that a negligence claim brought by a reader against a newspaper over its content must be dismissed unless the plaintiff alleges a 'special relationship' or fraud," and no special relationship with The Times or fraud is alleged by the plaintiff.

AP Group Defendants' Contentions

The AP group defendants contend that "[t]his is a meritless lawsuit alleging that Defendant news organizations are liable to Plaintiff, *pro se*, for failing to report on alleged corruption relating to a sale of air rights in a Manhattan co-op. Plaintiff seeks a court order forcing Defendants to investigate and publish a story about his conspiracy claims and awarding him a hundred million dollars to punish Defend-

ants for not doing so sooner." The AP group defendants maintain that the plaintiff has a "vexatious litigation history" because "[f]or nearly a decade, Plaintiff has waged a battle over his loss of air rights in a co-op." According to the AP group defendants, the plaintiff seeks an unconstitutional relief because "the Second Circuit is clear that an order instructing Defendants to publish a story is unconstitutional." Since the plaintiff seeks "coerced newsgathering and speech by Defendants and penalties for their alleged failures in this regard," the complaint is "constitutionally defective." The AP group defendants assert that the plaintiff's aiding and abetting conspiracy to defraud claim is not pleaded adequately and no legal claim for aiding and abetting a conspiracy to defraud exists in New York. Even if construed as a common law fraud claim, it must fail because the plaintiff "makes no factual allegations at all as to each Defendant individually as he must," and his general allegations established only that the defendants knew of the litigation and chose not to report on it. The AP group defendants maintain that a 42 U.S.C. § 1983 ("Section 1983") claim must fail because the plaintiff did not and cannot plead that the defendants are state actors and "there is no federally enforceable right to one's desired news coverage." The AP group defendants assert that the plaintiff's conspiracy against rights claim, based on 18 U.S.C. § 241 fails because that is a criminal statute providing no private right of action. According to the AP group defendants, the plaintiff's willful misconduct and gross negligence claims fail because the defendants owe no duty to the plaintiff to report on matters the plaintiff believes are newsworthy, and the plaintiff failed to plead any cognizable duty that the defend-

ants owed him. In support of the motion, the AP group defendants submitted a declaration by their attorney with exhibits consisting of state-court decisions concerning the plaintiff's previous lawsuits that he referenced in his complaint and copies of unpublished opinions cited by the defendants.

NBC's Contentions

NBC contends that the complaint does not allege any facts to support a claim on any cognizable legal theory; rather, the action against the defendants "appears to be Plaintiff's chosen means of expressing his personal dismay that his real estate dispute did not receive his desired level of publicity." NBC asserts that the First Amendment bars the plaintiff's equitable claim to force NBC to publish his story and to listen to his speech and he has no constitutional claim for damages. The plaintiff failed to allege aiding and abetting or conspiracy liability, as no allegations of fraud by the public officials or any agreement among the purported conspirators are made. NBC contends that the plaintiff has no private right of action under 18 U.S.C. § 241. According to NBC, "it is well established that '[i]n the absence of fraud or a special relationship between [the publisher and the reader] publishers owe no duty of care to readers or to the public at large," and any tort claim must fail because neither a special relationship with NBC was alleged nor that the plaintiff was defrauded by content published by NBC. Furthermore, the complaint should be dismissed with prejudice, without granting the plaintiff leave to replead because the relief sought is barred by the First Amendment and "under no circumstances could Plaintiff's basis for requesting it amount to a cause of action."

Plaintiff's Contentions

The plaintiff contends that the defendants' "argument that they are not bound to report public corruption is proof of violations of Judicial Law 487, and fraud upon the court by officers of the court." According to the plaintiff, "Defendants NBC News and the Associated Press, along with other media agencies, filed a complaint in federal court arguing that under the First Amendment, the public had a right to documents under the First Amendment pertaining to names of possible co-conspirators in what is known as the 'George Washington Bridge scandal.'" The plaintiff asserts that, "[r]ather than perform their duties to protect the public from 'deception in government,' Media Defendants have colluded with the corrupt Judges and judicial state employees who facilitated the defrauding of Plaintiff under his Offering Plan contract." The plaintiff asserts that the AP group defendants' inclusion of exhibits containing the state-court decisions in the plaintiff's prior actions violates "Judiciary Law 487" when "these decisions conclusively prove Plaintiff's claims of judicial corruption." The plaintiff asserts that "the public and media defendants' shareholders have a First Amendment right to know about this case" and the plaintiff "has a constitutional right to equal protection under the law." The plaintiff contends that he alleged his claims sufficiently.

AP Group Defendants' Reply

The AP group defendants assert that in his "*ad hominem* attacks at Defendants and their counsel contained in the Plaintiff's Opposition to the motion to dismiss, Plaintiff utterly fails to contest any of the

numerous, dispositive legal arguments Defendants laid out in their opening memorandum." The plaintiff "cites no case that challenges the clearly established principle that the 'choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." According to the AP group defendants, the plaintiff failed to respond to their substantive arguments and he failed to articulate what equal protection right he believes the defendants violated or how they can be liable under Section 1983, since they are not state actors. The plaintiff failed to identify any factual allegations demonstrating that he pleaded sufficiently his claim of aiding and abetting a conspiracy to commit fraud; rather, he contends only that he asserted the elements of that claim. However, the complaint is devoid of any facts supporting his aiding and abetting a conspiracy to commit fraud claim.

NBC's Reply

NBC contends that the plaintiff's opposition consists of "*ad hominem* attacks on the defendants and their counsel, accusing the undersigned of violating Section 487 of the New York Judiciary Law simply by virtue of making the present motion." The plaintiff failed to show any way in which he could state a claim to relief that is plausible on its face.

Legal Standard

"It is well established that the submissions of a *pro se* litigant must be construed liberally and

interpreted 'to raise the strongest arguments that they suggest.'" *Triestman v. Federal Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (citation omitted).

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.
>
> *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007)).

"Conclusory allegations that the defendant violated the standards of law do not satisfy the need for plausible factual allegations." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 191 (2d Cir. 2010) (citing *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965). On a motion pursuant to Rule 12(b)(6), all facts alleged in the complaint are assumed to be true and all reasonable inferences are drawn in the plaintiff's favor. *See Interpharm, Inc. v. Wells Fargo Bank, Nat'l Ass'n*, 655 F.3d 136, 141 (2d Cir. 2011).

"There is no substantive tort of conspiracy. Hence, there are no separable elements of a cause of action of conspiracy to allege." *Goldstein v. Siegel*, 19 A.D.2d 489, 492, 244 N.Y.S.2d 378, 382 (App. Div. 1st Dep't 1963). "Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort." *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y.2d

968, 969, 510 N.Y.S.2d 546, 547 (1986) (citation omitted). "The elements of a cause of action, for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559, 883 N.Y.S.2d 147, 150 (2009). To state a claim under Section 1983, a plaintiff must allege that: "(1) the defendant acted under color of state law; and (2) as a result of the defendant's actions, the plaintiff suffered a denial of her federal statutory rights, or her constitutional rights or privileges." *Annis v. Cty. of Westchester*, 136 F.3d 239, 245 (2d Cir. 1998). "To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty and damages." *Greenberg, Trager & Herbst, LLP v. HSBC Bank USA*, 17 N.Y.3d 565, 576, 934 N.Y.S.2d 43, 48 (2011). "[A] party is grossly negligent when it fails to exercise even slight care or slight diligence." *Goldstein v. Carnell Assocs., Inc.*, 74 A.D.3d 745, 747, 906 N.Y.S. 2d 905, 905-06 (App. Div. 2d Dep't 2010) (quotation marks and citations omitted).

Application of Legal Standard

The plaintiff failed to allege any material misrepresentation of a fact by any defendant, thus, failing to plead fraud. Absent plausible factual allegations stating a claim of fraud, no conspiracy to defraud can exist. The plaintiff failed to allege any factual content in support of his claims for aiding and abetting conspiracy to defraud, fraud and conspiracy. The plaintiff's claim of conspiracy against rights, 18 U.S.C. § 241, is based on a criminal statute. No private right of action exists under this criminal statute. *See*

Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 190, 114 S. Ct. 1439, 1455 (1994) (refusing "to infer a private right of action from 'a bare criminal statute.'"). The plaintiff failed to allege that the defendants acted under the color of state law; thus, he failed to state a claim under Section 1983.

The plaintiff asserted in his complaint that the defendants had a duty to expose "this massive corruption scandal" by reporting the plaintiff's "story." The AP group defendants contend that the plaintiff "failed to plead any cognizable duty that Defendants owed to him," while The Times and NBC contend "it is well established" that "absent fraud or a special relationship between" the plaintiff and the defendants, publishers owe no duty of care to readers or the public at large. The Times and NBC failed to show that "it is well established" that publishers owe no duty of care to readers or the public at large because they did not support their contention with any binding precedent. Although claiming that its proposition is "well established," NBC made citation to an unpublished Second Circuit summary order, *McMillan v. Togus Reg'l Office*, 120 Fed. Appx. 849 (2005), involving the dismissal of "claims against the National Academy of Sciences and the Institute of Medicine for allegedly issuing false, inaccurate, and incomplete reports regarding Agent Orange." *Id.* at 852. The *McMillan* court stated:

> In the absence of fraud or a special relationship between them, which is not alleged, publishers owe no duty of due care to readers or to the public at large. No cause of action therefore arises (absent fraud) even if published information is false and the

> falsity results in injury to the plaintiff when the plaintiff, like McMillan, is merely a reader or member of the public. *See, e.g.*, *First Equity Corp. of Florida v. Standard & Poor's Corp.*, 869 F.2d 175, 179 (2d Cir. 1989).

However, in this circuit, "an unpublished summary order, is not precedential." *Hoefer v. Bd. of Educ. of the Enlarged City Sch.*, 820 F.3d 58, 65 (2d Cir. 2016). Even if it were precedential, neither *McMillan* nor *First Equity Corp. of Florida*, on which The Times relies for its proposition that "a negligence claim brought by a reader against a newspaper over its content must be dismissed unless the plaintiff alleges a 'special relationship' or fraud," applies here because both involve a publisher's liability to readers or subscribers for negligent misrepresentations, not a publisher's liability for failure to publish. Similarly, the case on which the AP group defendants rely for the proposition that the plaintiff "failed to plead any cognizable duty that Defendants owed him," *Euryclea Partners, LP v. Seward & Kissel, LLP*, 46 A.D.3d 400, 849 N.Y.S.2d 510 (App. Div. 1st Dep't 2007), also involved "a cause of action for negligent misrepresentation." *Id.* at 402, 849 N.Y.2d at 512. The plaintiff does not allege negligent misrepresentation; rather, he alleges that the defendants are liable because they failed in their duty to expose "this massive corruption scandal" by reporting the plaintiff's "story." None of the defendants makes citation to any binding authority for the proposition that a negligence claim, such as the one the plaintiff asserts here, based on a publisher's failure to publish a story, must be dismissed absent an allegation of a special relationship or fraud.

In his opposition to the motions, the plaintiff asserts that he is not suing the defendants "because they failed to publish 'Plaintiff's speech," but because they failed in their duty to expose corruption of public officials, relying on dicta from the concurring opinion in *New York Times v. United States*, 403 U.S. 713, 717, 91 S. Ct. 2140, 2143 (1971) (Black, J., concurring), that "paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people." However, no such duty exists on the part of the publisher to the plaintiff under New York law. Accordingly, since the plaintiff failed to allege that the defendants owed him a duty of care under New York law, he failed to plead plausible factual content stating a claim to relief.

The defendants contend that the First Amendment precludes the remedy the plaintiff seeks, namely, forcing the defendants "to uncover alleged wrongdoing relating to Plaintiff's unsuccessful litigation over air rights" and publish it (AP group defendants) and "to publish his story and listen to his speech (The Times and NBC), each making citation to *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831 (1974). The issue in *Miami Herald Publ'g Co.* was "whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press." *Id.* at 243, 94 S. Ct. at 2832. Where "governmental coercion" is implicated, the Supreme Court said it "brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years." *Id.* at 254, 94 S. Ct. at 2838. The Supreme Court found

that the statute "fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Id.* at 258, 94 S. Ct. at 2839. Although this case does not involve government compulsion, commanding the defendants to gather information and publish the content the plaintiff wishes, would implicate, similarly, the defendants' First Amendment rights. As the AP group defendants note, "[t]he Supreme Court has implied consistently that newspapers have absolute discretion to determine the contents of their newspapers." *Passaic Daily News v. N.L.R.B.*, 736 F.2d 1543, 1557 (D.C. Cir. 1984). Thus, granting the equitable remedy of compelling the defendants to publish what they prefer to withhold would run afoul of the defendants' First Amendment rights.

The Court finds that granting leave to the plaintiff to amend the complaint would be futile, because the relief the plaintiff seeks is barred by the First Amendment and, in the circumstance of this case and under the most liberal interpretation of the plaintiff's allegations, no plausible factual content can allow the court to draw the reasonable inference that the defendants may be liable for the alleged misconduct.

Recommendation

For the foregoing reasons, I recommend that the defendants' motions, Docket Entry Nos. 9, 19 and 22, be granted, without leave to replead.

Filing of Objections to this Report and Recommendation

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties

shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable George B. Daniels, 500 Pearl Street, Room 1310, New York, New York, 10007, and to the chambers of the undersigned, 40 Centre Street, Room 425, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge Daniels. Failure to file objections within fourteen (14) days will result in a waiver of objections and will preclude appellate review. *See Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466 (1985); *Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003).

Respectfully submitted,

/s/ Kevin Nathaniel Fox
United States Magistrate Judge

Dated: New York, New York
October 4, 2016

Copy mailed to: James H. Brady

ORDER OF THE SECOND CIRCUIT DENYING PETITION FOR REHEARING (APRIL 25, 2018)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES H. BRADY,

Plaintiff-Appellant,

v.

ASSOCIATED PRESS TELECOM, NBC NEWS NEW YORK, WCBS-TV NEW YORK, THE NEW YORK TIMES COMPANY, NEW YORK POST, NEW YORK DAILY NEWS, WALL STREET JOURNAL, NEWSDAY MEDIA GROUP,

Defendants-Appellees,

JOHN DOE, 1-50,

Defendants.

Docket No. 17-268

Appellant, James H. Brady, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Clerk of Court

SUPREME COURT
PRESS