DAVID I. LEWITTES, Plaintiff, -against- JUSTICE JOAN B. LOBIS, KENNETH DAVID BURROWS, and BENDER, BURROWS & ROSENTHAL, L.L.P., Defendants.

04 Civ. 0155 (JSR) (AJP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2004 U.S. Dist. LEXIS 16320

August 19, 2004, Decided

PRIOR HISTORY: Lewittes v. Lewittes, 2 A.D.3d 295, 770 N.Y.S.2d 297, 2003 N.Y. App. Div. LEXIS 13601 (N.Y. App. Div. 1st Dep't, 2003)

DISPOSITION: Summary judgment for defendants recommended.

LexisNexis(R) Headnotes

COUNSEL: [*1] For Plaintiff: David I. Lewittes, Pro se, New York, NY; Joel Lewittes, Parker, Chapin, et al., New York, NY.

For Defendants: Hilary B. Miller, Law Office of Hilary B. Miller, Greenwich, CT.

JUDGES: Andrew J. Peck, United States Chief Magistrate Judge. Honorable Jed S. Rakoff, United States District Judge.

OPINIONBY: ANDREW J. PECK

OPINION: REPORT AND RECOMMENDATION

ANDREW J. PECK, United States Chief Magistrate Judge:

To the Honorable Jed S. Rakoff, United States District Judge:

Plaintiff David Lewittes brings this action against New York State Supreme Court Justice Joan Lobis, Kenneth David Burrows, and Burrows' law firm, Bender Burrows & Rosenthal, L.L.P. ("BBR"), pursuant to 42 U.S.C. § 1983. (Dkt. No. 15: Amended Compl.) n1 Presently before this Court is defendants' summary judgment motion and plaintiff's cross motion for partial summary judgment. (Dkt. Nos. 21-23, 26-31, 34-37.) For the reasons set forth below, the Court should grant summary judgment in favor of all defendants.

n1 Plaintiff Lewittes' original complaint, filed "pro se" (although he is a non-practicing attorney) before his father appeared to represent him, was extremely prolix, running to 373 paragraphs covering 181 pages. (Dkt. No. 1: Compl.)

[*2]

FACTS

Lewittes' Allegations Against Defendant Lobis

In 2002, Justice Lobis presided over a matrimonial action for divorce between Lewittes and his ex-wife, Marilyn Blume. (Dkt. No. 15: Am. Compl. P 8.) Lobis signed a judgment terminating the matrimonial action on August 19, 2002. (Am. Compl. P 9.) Three days later, Blume brought an application before Justice Lobis by order to show cause, which Justice Lobis signed. (Am. Compl. PP 10-11.) According to Lewittes, the order "deprived [Lewittes] of his rights, privileges, and immunities under the Constitution and laws in that it, in the absence of due process, deprived plaintiff of his right to liberty, specifically the right of companionship, care, and management of his children, as a parent, and also, without due process of law, deprived plaintiff of his

property right and his right to equal protection under the law." (Am. Compl. P 11; see also id. P 19.) n2

n2 According to Lewittes, Justice Lobis prohibited him "from visiting his children at school or elsewhere" and "suspended all of [Lewittes'] access to his children upon Blume's plainly false and contrived allegations of sexual abuse by plaintiff." (Am. Compl. PP 25-26.)

[*3]

Lewittes acknowledges the legal doctrine that judges have absolute immunity from civil suits, but Lewittes argues that Justice Lobis is not immune from this suit because, by entertaining Blume's application three days after termination of the matrimonial action, she was acting in the "clear absence of jurisdiction." (Am. Compl. PP 6, 11.) Lewittes asserts that "a judge is denied immunity when the judge has acted in the clear absence of jurisdiction and must have known that he was acting in the clear absence of jurisdiction." (Am. Compl. P 6.) Lewittes argues that "three days after Lobis signed the Judgment terminating the matrimonial action, there was no action between Blume and [Lewittes]. Blume never commenced a new action. . . . There, accordingly, was a clear absence of jurisdiction, and any judge, having, three days earlier, signed a judgment terminating the action, must have known that there was a clear lack of subject-matter jurisdiction." (Am. Compl. PP 12-13.)

Lewitte's Allegations Against Defendants Burrows and BBR

Lewittes' amended complaint seeks damages from Burrows as "a co-conspirator or through joint efforts with Lobis, both for such deprivations [*4] for which Lobis has no judicial immunity and for deprivations for which Lobis herself has immunity from a suit for damages. Damages from BB&R are sought arising from Burrow's actions as a member of that firm, from in or about May 2003 to date." (Am. Compl. P 20.) Specifically Lewittes challenges Justice Lobis' orders that he pay Burrows' fees as guardian ad litem for Lewittes' children. (Am. Compl. PP 7-31, 34-39.) n3

n3 Lewittes' divorce has spawned other "collateral" litigation. (See Dkt. No. 22: Defs. Br. at 23 .) For example, Lewittes' brother, Michael, sued Blume (and her brother) for defamation and trademark infringement for alleging on their website, www.lewittes.com, that Michael is homosexual. See Lewittes v. Cohen, 2004 U.S. Dist. LEXIS 9467, 03 Civ. 189, 2004 WL 1171261 (S.D.N.Y. May 26, 2004).

ANALYSIS

I. SUMMARY JUDGMENT STANDARDS IN SECTION 1983 CASESn4

n4 For additional decisions authored by this Judge discussing the summary judgment standards in Section 1983 cases, in language substantially similar to that in this entire section of this Report and Recommendation, see, e.g., Nonnenmann v. City of New York, 2004 U.S. Dist. LEXIS 8966, 02 Civ. 10131, 2004 WL 1119648 at *11-13 (S.D.N.Y. May 20, 2004) (Peck, M.J.); Hall v. Perilli, 2004 U.S. Dist. LEXIS 8397, 03 Civ. 4635, 2004 WL 1068045 at *3-4 (S.D.N.Y. May 13, 2004) (Peck, M.J.); Baker v. Welch, 2003 U.S. Dist. LEXIS 22059, 03 Civ. 2267, 2003 WL 22901051 at *4-6 (S.D.N.Y. Dec. 10, 2003) (Peck, M.J.) (citing my earlier decisions); Salahuddin v. Coughlin, 999 F. Supp. 526, 534 (S.D.N.Y. 1998) (Rakoff, D.J. & Peck, M.J.).

[*5]

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986); Lang v. Retirement Living Pub. Co., 949 F.2d 576, 580 (2d Cir. 1991).

The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment - here, defendants. See, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970); Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 36 (2d Cir. 1994); Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1223 (2d Cir. 1994). [*6] The movant may discharge this burden by demonstrating to the Court that there is an absence of evidence to support the non-moving party's case on an issue on which the non-movant has the burden of proof. See, e.g., Celotex Corp. v. Catrett, 477 U.S. at 323, 106 S. Ct. at 2552-53.

To defeat a summary judgment motion, the non-moving party must do "more than simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Instead, the non-moving party must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); accord, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. at 587, 106 S. Ct. at 1356.

In evaluating the record to determine whether there is a genuine issue as to any material fact, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. at 255, 106 S. Ct. at 2513; see also [*7] , e.g., Chambers v. TRM Copy Ctrs. Corp., 43 F.3d at 36; Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d at 1223. The Court draws all inferences in favor of the nonmoving party - here, Lewittes - only after determining that such inferences are reasonable, considering all the evidence presented. See, e.g., Apex Oil Co. v. DiMauro, 822 F.2d 246, 252 (2d Cir.), cert. denied, 484 U.S. 977, 108 S. Ct. 489, 98 L. Ed. 2d 487 (1987). "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." Chambers v. TRM Copy Ctrs. Corp., 43 F.3d at 37.

In considering a motion for summary judgment, the Court is not to resolve contested issues of fact, but rather is to determine whether there exists any disputed issue of material fact. See, e.g., Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 58 (2d Cir. 1987); Knight v. United States Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986), [*8] cert. denied, 480 U.S. 932, 107 S. Ct. 1570, 94 L. Ed. 2d 762 (1987). To evaluate a fact's materiality, the substantive law determines which facts are critical and which facts are irrelevant. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. at 248, 106 S. Ct. at 2510. While "disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment[,] factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248, 106 S. Ct. at 2510 (citations omitted); see also, e.g., Knight v. United States Fire Ins. Co., 804 F.2d at 11-12.

II. THE DOCTRINE OF ABSOLUTE IMMUNITY FOR STATE COURT JUDGES

The common law rule of absolute judicial immunity protects judges from civil damage suits under § 1983 relating to the exercise of their judicial functions. E.g., Mireles v. Waco, 502 U.S. 9, 9-12, 112 S. Ct. 286, 287-88, 116 L. Ed. 2d 9 (1991) ("A long line of this Court's precedents acknowledges that, generally, a judge is immune from a suit for money damages."); Stump v. Sparkman, 435 U.S. 349, 355-56, 98 S. Ct. 1099, 1104, 55 L. Ed. 2d 331 (1978) [*9] ("The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was 'a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself.' For that reason, the Court held that 'judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.' Later, we held that this doctrine of judicial immunity was applicable in suits under . . . 42 U.S.C. § 1983, for the legislative record gives no indication Congress intended to abolish this long-established principle.") (citations & fns. omitted); Pierson v. Ray, 386 U.S. 547, 553-55, 87 S. Ct. 1213, 1217-18, 18 L. Ed. 2d 288 (1967) ("Few doctrines were far more solidly established at common law than the immunity of judges from liability for damages for acts committed within their [*10] judicial jurisdiction," and this doctrine was not abolished by § 1983); D'amato v. Rattoballi, No. 03H 7539, 83 Fed. Appx. 359, 360, 2003 WL 22955858 at *1 (2d Cir. Dec. 8, 2003) ("It is well-established that a judge is entitled to absolute immunity from liability for damages under section 1983 for actions performed in her judicial capacity, and that the judge 'will not be deprived of immunity [even] if the action [she] took was in error, was done maliciously, or was in excess of [her] authority.'"); Carley v. Lawrence, No. 01-7315, 24 Fed. Appx. 66, 67, 2001 WL 1486227 at *1 (2d Cir. Nov. 20, 2001) ("This Court has held that a judge is entitled to absolute immunity from liability for damages under § 1983 for actions performed in his judicial capacity."); Montero v. Travis, 171 F.3d 757, 760 (2d Cir. 1999) ("It is . . . well established that officials acting in a judicial capacity are entitled to absolute immunity against § 1983 actions, and this immunity acts as a complete shield to claims for money damages."); Tucker v. Outwater, 118 F.3d 930, 933 (2d Cir. ("Since the seventeenth century, the common law [*11] has immunized judges from damage claims arising out of their judicial acts. . . . The Supreme Court has specifically applied the doctrine of judicial immunity to actions brought pursuant to 42 U.S.C. § 1983."), cert. denied, 522 U.S. 997, 118 S. Ct. 562, 139 L. Ed. 2d 402 (1997); Fields v. Soloff, 920 F.2d 1114, 1119 (2d Cir. 1990) ("Judicial immunity is by now a well-established doctrine. . . . A judge defending against a section 1983

suit is entitled to absolute immunity from damages for actions performed in his judicial capacity."). n5

n5 See, e.g., Rolle v. Berkowitz, 2004 U.S. Dist. LEXIS 2035, 03 Civ. 7120, 2004 WL 287678 at *2 (S.D.N.Y. Feb. 11, 2004 ("Judges have absolute immunity from suit for judicial acts performed in their judicial capacities."); Sharp v. Bivona, 304 F. Supp. 2d 357, 363-64 (E.D.N.Y. 2004); Saint-Fleur v. City of New York, 2000 U.S. Dist. LEXIS 8814, 99 Civ. 10433, 2000 WL 280328 at *4-5 (S.D.N.Y. Mar. 14, 2000 (Peck, M.J.); Abrams v. Sprizzo, 1998 U.S. Dist. LEXIS 17527, 98 Civ. 5838, 1998 WL 778001 at *1 (S.D.N.Y. Oct. 29, 1998) (Rakoff, D.J. & Peck, M.J.), aff'd mem., 201 F.3d 430 (2d Cir. 1999); Sanchez-Preston v. Judge Luria, 1996 U.S. Dist. LEXIS 20123, No. CV-96-2440, 1996 WL 738140 at *4 (E.D.N.Y. Dec. 17, 1996); Fariello v. Campbell, 860 F. Supp. 54, 67-68 (E.D.N.Y. 1994); Levine v. County of Westchester, 828 F. Supp. 238, 243 (S.D.N.Y. 1993), aff'd mem., 22 F.2d 1090 (2d Cir. 1994).

[*12]

Absolute judicial immunity exists "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." Bradley v. Fisher, 80 U.S. 335, 347, 20 L. Ed. 646 (1871); accord, e.g., Mireles v. Waco, 502 U.S. at 10-11, 112 S. Ct. at 287-88; Cleavinger v. Saxner, 474 U.S. 193, 199-200, 106 S. Ct. 496, 499, 88 L. Ed. 2d 507 (1985); Stump v. Sparkman, 435 U.S. at 356-57, 98 S. Ct. at 1105; Pierson v. Ray, 386 U.S. at 554, 87 S. Ct. at 1218 (judicial "immunity applies even when the judge is accused of acting maliciously and corruptly"); D'amato v. Rattoballi, 83 Fed. Appx. 359, 2003 WL 22955858 at *1; Carley v. Lawrence, 24 Fed. Appx. 66, 2001 WL 1486227 at *1; Tucker v. Outwater 118 F.3d at 932; Young v. Selsky, 41 F.3d 47, 51 (2d Cir. 1994), cert. denied, 514 U.S. 1102, 115 S. Ct. 1837, 131 L. Ed. 2d 756 (1995); Carp v. Supreme Court, 1998 U.S. Dist. LEXIS 6570, No. 5:98-CV-201, 1998 WL 236187 at *1 (N.D.N.Y. May 5, 1998) (Pooler, D.J.). n6

n6 See also, e.g., Saint-Fleur v. City of New York, 2000 U.S. Dist. LEXIS 8814, 2000 WL 280328 at *5; Sanchez-Preston v. Judge Luria, 1996 U.S. Dist. LEXIS 20123, 1996 WL 738140 at *4; Fariello v. Campbell, 860 F. Supp. at 68; Levine v. County of Westchester, 828 F. Supp. at 243.

[*13]

It goes without saying that the decisions in this Circuit have applied these principles to hold that suits against New York State judges are foreclosed by the doctrine of absolute immunity: "A claim for money damages against state court judges is foreclosed by absolute immunity from civil liability conferred upon judges acting within the scope of their judicial capacities." Mulligan v. Travis, 1999 U.S. Dist. LEXIS 14606, No. 97-CV-6722, 1999 WL 759980 at *3 (E.D.N.Y. Sept. 20, 1999); see, e.g., DePonceau v. Pataki, 315 F. Supp. 2d 338, 343 (W.D.N.Y. 2004) ("Several of the defendants are either state court judges or court employees, who would have immunity. 'Judges performing judicial functions within their jurisdictions are granted absolute immunity.'"); Rolle v. Berkowitz, 2004 U.S. Dist. LEXIS 2035, 2004 WL 287678 at *2 ("[State j]udges have absolute immunity from suit for judicial acts performed in their judicial capacities."); Sharp v. Bivona, 304 F. Supp. 2d at 363 ("In addition, the claims against [State] Justice Bivona must be dismissed under the doctrine of absolute judicial immunity. It is well settled that judges are absolutely immune from suit for [*14] any actions taken within the scope of their judicial responsibilities or within his or her jurisdiction."); Weissbrod v. Housing Part of Civil Court of City of New York, 293 F. Supp. 2d 349, 355 (S.D.N.Y. 2003); L.B. v. Town of Chester, 232 F. Supp. 2d 227, 237 (S.D.N.Y. 2002) ("[State] Magistrate Masella is protected by absolute judicial immunity that protects judges from suits for civil damages under 42 U.S.C. § 1983 relating to the exercise of their judicial functions."); Carlino v. Hammer, 1992 U.S. Dist. LEXIS 4927, 91 Civ. 0466, 1992 WL 84843 at *2 (S.D.N.Y. Apr. 16, 1992) ("The Supreme Court has stated that even where plaintiffs allege that a state judge has participated in a corrupt conspiracy resulting in an injunction that injured plaintiffs, dismissal of the action against the state judge on absolute immunity grounds is proper."); Natale v. Koehler, 1991 U.S. Dist. LEXIS 9285, 89 Civ. 6566, 1991 WL 130192 at *3 (S.D.N.Y. July 9, 1991) (Leval, D.J.); Pizzolato v. Baer, 551 F. Supp. 355, 356 (S.D.N.Y. 1982) ("The Attorney General of the State of New York is correct in his assertion, on behalf of [then-State] Judge Baer, [*15] that he enjoys absolute immunity from civil liability for the claims asserted here arising out of his judicial acts."), aff'd, No. 82-7921, 742 F.2d 1430 (table) (2d Cir. May 19, 1983); Holland v. Rubin, 460 F. Supp. 1051, 1052 (E.D.N.Y. 1978) ("Plaintiff's claim for money damages against the State court judges is foreclosed by the absolute immunity from civil liability conferred upon judges acting within the scope of their judicial capacities."); see also cases cited on pages 6-7 & fn.5 above.

Specifically, Lewittes claim arises from Justice Lobis' handling of his divorce action. Not surprisingly, disgruntled ex-spouses often bring claims against state court judges who have presided over divorce and child custody issues. State Supreme Court Justices sitting in the matrimonial part and Family Court judges, of course, are shielded by the same absolute immunity doctrine: "Family court judges are entitled to the same protections from harassment and intimidation resulting from actions taken in their judicial capacity as those afforded to other state and federal judges. Given the inherently emotional nature of their work, family court judges may be [*16] particularly susceptible to harassment." Sanchez-Preston v. Luria, 1996 U.S. Dist. LEXIS 20123, 1996 WL 738140 at *5; see, e.g., Carley v. Lawrence, 24 Fed. Appx. 66, 2001 WL 1486227 at *1 ("Plaintiff's claims against Judge Lawrence are based upon orders that he issued from the bench while presiding over a matter in Family court. Therefore, Judge Lawrence is entitled to absolute immunity for those acts."); Sharp v. Bivona, 304 F. Supp. 2d at 363-64 (Plaintiff's "claims against Justice Bivona stem from his judicial decisions while he presided love her matrimonial proceedings. . . . Thus, Justice Bivona is entitled to absolute judicial immunity against damages claims resulting from the acts of which the plaintiff complains."); Arena v. Department of Soc. Servs. of Nassau County, 216 F. Supp. 2d 146, 153 (E.D.N.Y. 2002) ("All of the plaintiff's claims against Judge Lawrence stem from his judicial decisions made while he presided over proceedings in the Nassau County Family Court solely from actions as a judge. There is no evidence proffered, nor plausible claim suggested that Judge Lawrence was without jurisdiction to decide the matters at issue before him [*17] or that he acted outside his judicial capacity. . . . As such, Judge Lawrence is entitled to absolute judicial immunity from the claims seeking monetary damages."); DeJose v. New York State Dep't of State, 1990 U.S. Dist. LEXIS 18304, No. CV 89-3761, 1990 WL 263501 at *1-2 (E.D.N.Y. Nov. 13, 1990) (Raggi, D.J.), aff'd, 90-7481, 923 F.2d 845 (table) (2d Cir. Dec. 12, 1990), cert. denied, 500 U.S. 921, 114 L. Ed. 2d 110, 111 S. Ct. 2024 (1991).

As the Supreme Court has made clear, judicial "immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." Mireles v. Waco, 502 U.S. at 11-12, 112 S. Ct. at 288 (citations omitted). n7

n7 Accord, e.g., Sharp v. Bivona, 304 F. Supp. 2d at 364; Rolle v. Berkowitz, 2004 U.S. Dist. LEXIS 2305, 2004 WL 287678 at *2; Saint-Fleur v. City of New York, 200 U.S. Dist. LEXIS 8814, 2000 WL 280328 at *5; Pollack v. Nash, 58 F. Supp. 2d 294, 303 (S.D.N.Y. 1999); Jones v. Newman, 1999 U.S. Dist. LEXIS 10171, 98 Civ. 7460, 1999 WL 493429 at *6 (S.D.N.Y. June 30, 1999); Reisner v. Stoller, 51 F. Supp. 2d 430, 442 (S.D.N.Y. 1999); Amaker v. Coombe, 1998 U.S. Dist. LEXIS 14523, 96 Civ. 1622, 1998 WL 637177 at *3 (S.D.N.Y. Sept. 16, 1998); Carr v. Village of New York Mills, New York, 1998 U.S. Dist. LEXIS 5526, No. CivA96CV0042, 1998 WL 187395 at *2 (N.D.N.Y. April 15, 1998) (Pooler, D.J.); Sanchez-Preston v. Judge Luria, 1996 U.S. Dist. LEXIS 20123, 1996 WL 738140 at *4.

[*18]

Thus, to prevail on any claim against Justice Lobis, Lewittes would have to show that Justice Lobis either was not acting in her judicial capacity or was acting in the complete absence of jurisdiction. (See pages 6-10 above.) Lewittes concedes that Justice Lobis was acting in a judicial capacity. n8 Nevertheless, he asserts that she was acting in the complete absence of jurisdiction. (E.g., Am. Compl. P 12; Dkt. No. 30: Lewittes Opp. Br. at 4-13.)

n8 The Supreme Court has "made clear that 'whether an act by a judge is a "judicial" one relates to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.'" Mireles v. Waco, 502 U.S. at 12, 112 S. Ct. at 288 (quoting Stump v. Sparkman, 435 U.S. at 362, 98 S. Ct. at 1108). Here, Justice Lobis, sitting in the matrimonial part of State Supreme Court, ruled on an order to show cause regarding parental visiting rights for minor children involved in the parents' divorce - a function normally performed by a judge.

[*19]

III. BECAUSE JUSTICE LOBIS DID NOT ACT IN THE CLEAR ABSENCE OF JURISDICTION, SHE IS ENTITLED TO ABSOLUTE JUDICIAL IMMUNITY

The test to determine whether a judge acted in the clear absence of jurisdiction has both an objective and a subjective prong. "This test, composed both of an objective element - that jurisdiction is clearly absent, i.e., that no reasonable judge would have thought jurisdiction proper - and of a subjective element - that the judge whose actions are questioned actually knew or must have known of the jurisdictional defect - protects judicial acts from hindsight examination while permitting redress in more egregious cases, such as where a judge knowingly acts outside his territorial jurisdiction." Tucker v. Outwater, 118 F.3d 930, 934 (2d Cir. 1997) (quoting Maestri v. Jutkofsky, 860 F.2d 50, 53 (2d Cir. 1988), cert. denied, 489 U.S. 1016, 109 S. Ct. 1132, 103 L. Ed. 2d 193 (1989)).

Lewittes argues that Justice Lobis acted in the clear absence of jurisdiction by deciding issues brought to her by Blume and/or Burrows three days after she had terminated the matrimonial action. (E.g., Dkt. [*20] No. 15: Am. Compl. P 12.) This act, he asserts, is so egregious and erroneous that Justice Lobis must have known she was acting without jurisdiction. He states:

> Clearly, three days after Lobis signed the Judgment terminating the matrimonial action, there was no action between Blume and plaintiff [Lewittes] . . . Blume never commenced a new action. . . . There, accordingly, was a clear absence of jurisdiction, and any judge, having, three days earlier, signed a judgment terminating the action, must have known that there was a clear lack of subject-matter jurisdiction. Lobis, who further was put on notice of such clear absence of jurisdiction in the papers, of plaintiff herein, submitted to her and orally, without question, in fact, knew that she clearly lacked all jurisdiction.

(Am. Compl. PP 12-13.) Lewittes defends this argument in his Memorandum of Law in opposition to Defendants' Joint Motion for Summary Judgment. (Dkt. No. 30: Lewittes Opp. Br. at 7.) Lewittes attacks the cases he asserts were relied upon by defendants as inapplicable, yet he does not cite to a single case supporting his argument that since, he claims, "the proper method of invoking jurisdiction [*21] is by a plenary action," actions similar to Justice Lobis' are in the clear absence of jurisdiction. (See Lewittes Opp. Br. at 7-11.) Upon review of Lewittes' briefs and the cases he cites therein, Lewittes has failed to cite a single case in which a matrimonial part Supreme Court Justice (or Family Court judge) acted in the clear absence of jurisdiction by deciding issues brought to the judge's attention by a spouse or guardian shortly after the judge had terminated the original matrimonial action.

Defendants submitted an affidavit from Justice Jacqueline Silberman, "the Administrative Judge of the Supreme Court, Civil Branch, New York County and the Administrative Judge for Matrimonial Matters for the State of New York." (Dkt. No. 21: Silberman Aff. P 1; see also id. PP 7-8.) Justice Silbermann makes clear that for judicial efficiency, where "either new cases involving the same parties or related cases [to a case] previously before a" matrimonial judge are filed, they are assigned to the original judge. (Silbermann Aff. PP 14-16 & Ex. A: Ops. Manual.) In addition, even after a judgment has been entered, the original matrimonial judge retains jurisdiction:

> 18. Similarly, [*22] the presiding matrimonial judge retains jurisdiction and authority to hear and render a determination upon application by the parties to a matrimonial action where a judgment has been issued but new disputes regarding the marital or custodial relationship arise between the parties.
>
> 19. It is the practice of the clerk's office of this court to accept notices of motion for filing and to accept an order to show cause for presentation to the judge in all matrimonial litigation, even after the judgment has been signed. The Operations Manual states, in pertinent part, that
>
> > [a] matrimonial matter should be marked disposed when, but not before, a judgment of divorce is granted and all ancillary issues (e.g., maintenance, child support, custody, equitable distribution) have been decided. A judgment of divorce alone will not trigger a disposed marking. If a postjudgment motion is made, the matrimonial action should continue in the status of 'disposed,' but with 'motion pending.' Memorandum of Justice Jacqueline W. Silbermann, October 28, 1997.
>
> See Exhibit "B", annexed hereto. Therefore, if a motion by a party is filed

> with the Supreme Court, New York County after entry [*23] of a judgment of divorce in the matter and issues contained in the application are related to the enforcement of the judgment, it is appropriate for the clerk's office to accept the application, whether by order to show cause or motion filed by either party, and to send that matter to the justice who was previously assigned to the case.

(Silbermann Aff. PP 18-19; see also Silbermann Aff. Ex. B: Ops. Manual excerpt.) Justice Lobis' action in deciding the issues raised in Blume's order to show cause application, even after the judgment of divorce was entered on August 19, 2002, thus was consistent with the New York Supreme Court's practices in matrimonial actions. (See Silbermann Aff. P 33.) n9

> n9 Defendants also argue that Justice Lobis' decision was proper because the divorce Judgment contained an express reservation of jurisdiction to enforce the divorce Stipulations. (See Dkt. No. 22: Defs. Br. at 6-7, 9-13.) The August 27, 2002 judgment of divorce provides that:
>
> > ORDERED and ADJUDGED that the parties' Stipulation of Settlement dated January 14, 2002, a copy of which is on file with the Court and incorporated by reference into this judgment, shall survive and not merge in this judgment, and the parties are hereby directed to comply with every legally enforceable term and provision of such Stipulation as if such term or provision were set forth in its entirety herein, and the Family Court shall be granted concurrent jurisdiction with the Supreme Court for the purposes of specifically enforcing such provisions of the Stipulation as are capable of specific performance, to the extent permitted by law, and of making further judgment as it finds appropriate under the circumstances existing at the time application for that purpose is made, or both.
>
> (Dkt. No. 1: Compl. Ex. 1: 8/27/02 Judgment at p. 8.) Lewittes claims that in any event a "plenary action" was necessary. (See, e.g., Dkt. No. 15: Am. Compl. P 12; Dkt. No. 30: Lewittes Opp. Br. a 9.) The Court need not decide the retention of jurisdiction issue.

[*24]

The propriety of the first matrimonial judge deciding subsequent applications to modify a divorce judgment or handle related proceedings is recognized in the state case law. For example, in Maggiore v. Maggiore, 49 A.D.2d 1021, 1021, 374 N.Y.S.2d 177, 177 (4th Dep't 1975), a Supreme Court Justice granted a judgment of divorce and decided custody matters, and then a year later the husband sought to modify the prior judgment based on new developments, that application was heard by a different judge, and on appeal, the Appellate Division held:

> An opportunity was given the Court to transfer the matter to the original Justice who had handled it. Rather than transferring it, the second Justice undertook to delineate reasonable visitation rights and struck from the order that part of the visitation provision which required the husband's mother to be present. Although it denied custody, the Court then went on to make more extended visitation privileges for respondent.
>
> The first Justice had taken testimony, on the issue of visitation and made an order on that issue. The action of the second Justice in purporting to clarify or correct the judgment of the first Justice [*25] was an irregular and improper procedure. The matter should have been referred to the Judge who signed the original judgment. Such is the settled practice. It accords with the aim of sparing the time and effort of the second Justice to familiarize himself with a matter already familiar to a colleague. Deviating from this practice is wasteful of judicial time and, if countenanced, would cause confusion and vexatious litigation contraproductive to the orderly administration of justice. The rationale for the referral to the original Justice is pointedly apt in a matrimonial case involving, as it does, so many complex human entanglements and requiring

> considerable investment of judicial time for a single justice to educate himself.
>
> Even though the power to modify a judgment of another Judge may exist, the long-continued course of practice, recognized and enforced by the courts, prohibits its exercise in any but exceptional cases and where it is not feasible to send the matter to the Judge who made the original order. We, therefore, conclude that the failure of the second Justice in this case to refer the proceeding to the first Justice was an abuse of discretion which requires reversal. [*26]

Maggiore v. Maggiore, 49 A.D.2d at 1021-22, 374 N.Y.S.2d at 177-78 (emphasis added, citations omitted); see also, e.g., Harrington v. Harrington, 60 A.D.2d 982, 984, 401 N.Y.S.2d 342, 344 (4th Dep't 1978) ("[A] contrary decision could be interpreted as a precedent countenancing an effort by an unsuccessful litigant in a contested matrimonial action to relitigate the issue of custody before a different judge. Such practice offends established rules against attempts to overrule a determination made by one judge in a matter by making a motion to vacate or modify the determination before another judge of coordinate jurisdiction.").

It should be noted further that Lewittes raised on appeal to the First Department his claim that Justice Lobis lacked jurisdiction to decide the order to show cause. (See Dkt. No. 21: Sugarman Aff. PP 58-59 & Ex. D: Lewittes 1st Dep't Pre-Argument Statement P 8: "The court below had no jurisdiction over one of the two motion sequences, there having been no underlying action.") The First Department affirmed Justice Lobis' decision. Lewittes v. Lewittes, 2 A.D.3d 295, 770 N.Y.S.2d 297 (1st [*27] Dep't 2003).

Even assuming arguendo that Lewittes were correct (which he is not) that Justice Lobis could not decide the motion brought on by order to show cause in the absence of the commencement of a new, plenary action (see Dkt. No. 27: Lewittes S.J. Br. at 8) - an action that in any event would have been assigned to Justice Lobis as a related case - such an "error" by Justice Lobis would not trigger the clear absence of jurisdiction exception to absolute judicial immunity. See, e.g., Allen v. Kleiman, 1991 U.S. Dist. LEXIS 17820, 91 Civ. 1179, 1991 WL 274329 at *1 (S.D.N.Y. Dec. 6, 1991) (In § 1983 suit against State Supreme Court Justice who presided over Allen's criminal trial, Allen claimed he could not be criminally prosecuted until the State determined his tax liability collaterally to the criminal prosecution. Absolute judicial immunity applied: "Even assuming, arguendo, that plaintiff were correct, he would have shown only error, not clear absence of jurisdiction."), aff'd, No. 92-7084, 963 F.2d 1522 (table) (2d Cir. Apr. 29, 1992).

Lewittes relies on the Second Circuit case of Maestri v. Jutkofsky, 860 F.2d 50 (2d Cir. 1988), [*28] cert. denied, 489 U.S. 1016, 109 S. Ct. 1132, 103 L. Ed. 2d 193 (1989), stating that this case "plainly demonstrates" Justice Lobis' judicial usurpation. (Lewittes Opp. Br. at 5; Dkt. No. 27: Lewittes S.J. Br. at 5-6; Dkt. No. 39: Lewittes S.J. Reply Br. at 4-9.) While Lewittes is correct that Maestri is the leading Second Circuit case establishing the test for determining what is a clear absence of jurisdiction, Maestri does not support his claim. The cases make quite clear that there is a difference between an action is erroneous or even in "excess of jurisdiction" and one that is in "the clear absence of all jurisdiction over the subject matter" such that absolute judicial immunity is unavailable. The Second Circuit's decision in Tucker v. Outwater, 118 F.3d 930 (2d Cir. 1997), makes that quite clear, and the Court therefore quotes from that decision at length:

> Stump guides the determination of whether a judge acts in the clear absence of all jurisdiction or merely in excess of jurisdiction. In Stump, a mother petitioned an Indiana Circuit Court for authority to have her "somewhat retarded" fifteen-year old daughter sterilized. [*29] Circuit Judge Stump approved the petition the same day in an ex parte proceeding without a hearing and without notice to the daughter or appointment of a guardian ad litem. The daughter was sterilized, having been told that she was having her appendix removed. Approximately two years later, the daughter learned that she had been sterilized. She sued, among others, Judge Stump. The district court dismissed the case against the judge on the ground that he was entitled to absolute immunity. The Court of Appeals reversed, holding that Judge Stump had acted in the clear absence of all jurisdiction. The Court of Appeals also held that the judge had forfeited whatever jurisdiction he had "because of his failure to comply with elementary principles of procedural due process." Stump, 435 U.S. at 355, 98 S. Ct. at 1104. The Supreme Court reversed, holding that Stump was entitled to judicial immunity. The Court found that Stump had acted within the broad jurisdictional grant conferred upon his court. Furthermore, the Court found that the

Court of Appeals had "misconceived the doctrine of judicial immunity" in holding that the judge's failure to comply with elementary [*30] principles of due process precluded an immunity defense of his action. Id. at 359, 98 S. Ct. at 1106. The Court stated:

> A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors. The Court made this point clear in Bradley, where it stated: "This erroneous manner in which [the court's] jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever. . . . "

Id. (internal citations omitted).

By reference to an illustration from Bradley, Stump further distinguished between an "excess of jurisdiction" and "the clear absence of all jurisdiction over the subject matter."

> Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But [*31] where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend.

Id. at 356 n. 6, 98 S. Ct. at 1104 n.6 (citing Bradley, 80 U.S. at 351). Bradley provided an example:

> Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of usurped authority. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and [*32] trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked.

See 80 U.S. at 352.

In Maestri v. Jutkofsky, 860 F.2d 50 (2d Cir. 1988), the case relied upon by the district court here to reject the immunity defense, we elaborated on the distinction between a judicial act in excess of jurisdiction and an act in the clear absence of jurisdiction:

> Because scrutiny of a judge's state of mind would hinder the adjudicatory process in the very manner that the judicial immunity doctrine is designed to prevent, a judge will be denied immunity only where it appears, first, that the judge acted in the clear absence of jurisdiction, and second, that the judge must have known that he or she was acting in the clear absence of jurisdiction. [*33] This test, composed both of an objective element--that jurisdiction is clearly absent, i.e., that no reasonable judge would have thought jurisdiction proper - and of a subjective element - that the

> judge whose actions are questioned actually knew or must have known of the jurisdictional defect--protects judicial acts from hindsight examination while permitting redress in more egregious cases, such as where a judge knowingly acts outside his territorial jurisdiction.

Id. at 53.

Maestri considered the immunity defense raised by Joseph Jutkofsky, the Town Justice of the Town of Taghkanic, New York. Justice Jutkofsky issued a warrant for the arrest of plaintiffs Maestri and Zook for their conduct in the Town of Germantown, New York. Maestri and Zook sued Justice Jutkofsky, among others, alleging deprivation of their rights pursuant to 42 U.S.C. § 1983. The district court dismissed the suit against Justice Jutkofsky on the ground of judicial immunity. This Court reversed, holding that Justice Jutkofsky acted in the clear absence of all jurisdiction and must have known that he was acting in the clear absence of all jurisdiction [since [*34] under state law a complaint and warrant could only issue out of the town where the criminal offense had occurred].

Tucker v. Outwater, 118 F.3d at 933-34 (emphasis in original). Here, Justice Lobis and her court clearly had jurisdiction over the subject matter of matrimonial actions and related child custody matters. Even if Lewittes were correct that a plenary action was required before Justice Lobis could reconsider child custody matters (or related guardian/fee matters), there is no doubt Justice Lobis had jurisdiction over the subject matter. Thus, even if she acted in error or in "excess of jurisdiction," Justice Lobis did not act in "the clear absence of all jurisdiction" over the subject matter. Justice Lobis thus is entitled to absolute judicial immunity.

Indeed, Lewittes points to no decision except Maestri that has found that a judge acted in the clear absence of all jurisdiction. (See Dkt. No. 27: Lewittes S.J. Br. at 5-6; Dkt. No. 30: Lewittes Opp. Br. at 5-6.) This Court's research has not found (1) another Second Circuit decision, or (2) any district court decision within this Circuit, that has found a judge to have acted in the clear [*35] absence of all jurisdiction so as to be deprived of absolute judicial immunity. n10

> n10 Lewittes' argument would appear to, for example, strip immunity from a federal district court judge who decides a diversity action if it is later decided that the parties were not truly diverse. In such a case, it is true that the district court lacked subject matter jurisdiction. A judge who did not recognize this flaw in the diversity allegation, however, should still have absolute judicial immunity. The Court can imagine other examples where Lewittes' argument would deprive judges of absolute immunity for run of the mill errors that in some sense are "jurisdictional." That is not the law, nor should it be.

For these reasons, Justice Lobis did not act in the clear absence of jurisdiction, and accordingly is absolutely immune from suit. The Court should grant summary judgment to Justice Lobis dismissing all of Lewittes' claims, with prejudice. n11

> n11 This Court therefore need not reach the other grounds advanced by defendants for summary judgment for Justice Lobis. (See Dkt. No. 22: Defs. Br. at 25-45.)

[*36]

IV. LEWITTES' CLAIMS AGAINST BURROWS AND BBR ARE BARRED BY QUASIJUDICIAL IMMUNITY

Lewittes' remaining claims are against Burrows (and Burrows' law firm, BBR). (E.g., Dkt. No. 27: Lewittes S.J. Br. at 20-25.)

The doctrine of quasi-judicial immunity is important in maintaining the integrity of the judicial process by shielding persons who execute court orders. "The rationale for immunizing persons who execute court orders is apparent. Such persons are themselves 'integral parts of the judicial process.'" Wilkinson v. Russell, 973 F. Supp. 437, 441 (D. Vt. 1997) (quoting Briscoe v. LaHue, 460 U.S. 325, 335, 103 S. Ct. 1108, 1116, 75 L. Ed. 2d 96 (1983)), aff'd, 182 F.3d 89 (2d Cir. 1999), cert. denied, 528 U.S. 1155, 145 L. Ed. 2d 1072, 120 S. Ct. 1160 (2000). "Whether an official is entitled to absolute or qualified immunity depends on the nature of the official's functions at issue. 'Immunity is justified and defined by the functions it protects and serves, not by the persons to whom it attaches.'" DeRosa v. Bell, 24 F. Supp. 2d 252, 256 (D. Conn.1998) (citing Forrester v. White, 484 U.S. 219, 227, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988)). [*37]

New York case-law holds that guardians appointed by the court to assist with matters of child custody are entitled to quasi-judicial immunity. In Bluntt v. O'Connor, 291 A.D.2d 106, 737 N.Y.S.2d 471 (4th

Dep't), appeal denied, 98 N.Y.2d 605, 773 N.E.2d 1017, 746 N.Y.S.2d 279 (2002), relied upon by defendants (Dkt. No. 22: Defs. Br. at 22-23), the Appellate Division looked to decisions in other States and found that "most courts that have considered suits by disgruntled parents against attorneys appointed by courts to protect children in custody disputes have granted, on public policy grounds, absolute quasi-judicial immunity to the attorneys for actions taken within the scope of their appointments." Bluntt v. O'Connor, 291 A.D.2d at 116, 737 N.Y.S.2d at 478 (citing cases). The Appellate Division explained why quasi-judicial immunity was appropriate:

> The record in this case illustrates why quasi-judicial immunity is needed. Available remedies were not utilized. No request to the court for replacement of the Law Guardian was ever made and no appeal was perfected by plaintiff from any order made by Judge Rosa. Nevertheless, plaintiff brought [*38] two meritless lawsuits against Judge Rosa, and she brought this lawsuit against defendant, who was required to provide her own defense. Law Guardians are now compensated in New York for services in trial courts at the rate of $ 40 per hour for in-court time and $ 25 per hour for out-of-court time . . .
>
> Exposure of attorneys to tort liability to those they have been appointed to represent has not been mentioned in the cited articles as a factor affecting the willingness of qualified attorneys to accept appointments, but it is apparent that such exposure would exacerbate the problem. At least with respect to a Law Guardian appointed to represent a young child in a visitation dispute between parents, that disincentive is against public policy and should be eliminated. We agree with the Supreme Court of Wisconsin that there are other available remedies if a Law Guardian is derelict in performing his or her duties.

Id. at 118-19, 737 N.Y.S.2d at 480 (citations omitted).

In Bradt IV v. White, 190 Misc. 2d 526, 740 N.Y.S.2d 777 (Sup. Ct. Greene Co. 2002), the court likewise held that a guardian for a child in a custody proceeding "has quasi-judicial [*39] immunity from civil liability for conduct directly relating to the performance of the law guardian's duty to further the best interests of the children." Bradt IV v. White, 190 Misc. 2d at 528, 740 N.Y.S.2d at 779. Like the Bluntt court, the court in Bradt IV found "numerous cases throughout this country holding that a guardian ad litem is entitled to quasi-judicial immunity." Bradt IV v. White, 190 Misc. 2d at 529, 740 N.Y.S.2d at 779 (citing cases). While Lewittes here claims that Burrows was a law guardian and not a guardian ad litem (compare Dkt. No. 27: Lewittes S.J. Br. at 20; Dkt. No. 30: Lewittes Opp. Br. at 13, with Defs. Br. at 22), the distinction is immaterial: "The [guardian's] roles are so intertwined as to warrant treatment of the law guardian for immunity purposes in the same manner as a guardian ad litem whose role is to promote the best interests of the child." Bradt IV v. White, 190 Misc. 2d at 531, 740 N.Y.S.2d at 782; see also, e.g., Offutt v. Kaplan, 884 F. Supp. 1179, 1192 (N.D. Ill. 1995) (guardian ad litem has absolute immunity). The Bradt IV court further noted [*40] that "the remedy for any alleged violation of an order of the Greene County Family Court is to petition that court for appropriate relief." Bradt IV v. White, 190 Misc. 2d at 535, 740 N.Y.S.2d at 784. In that regard, this Court notes that Lewittes challenged Burrows' actions and fees not only before Justice Lobis but also on appeal to the First Department, which ruled against Lewittes. n12 The Court agrees with the New York cases and holds that a law guardian or guardian ad litem appointed by the court in a matrimonial action is entitled to quasi-judicial immunity. The Court therefore should grant summary judgment to defendants Burrows and BBR dismissing Lewittes' claims. n13

n12 The First Department held:

> In addition, having, pursuant to the Stipulation, appointed Kenneth David Burrows as the children's law guardian in post-judgment proceedings, the court was clearly authorized to award Mr. Burrows legal fees without requiring him to commence a plenary action. The award to Mr. Burrows was proper notwithstanding the absence of a hearing upon his fee request, no hearing having been requested by defendant, who raised no complaint respecting the reasonableness of Mr. Burrow's fees or the need for his services.

Lewittes v. Lewittes, 2 A.D.3d 295, 296, 770 N.Y.S.2d 297, 298-99 (1st Dep't 2003). [*41]

n13 District Court decisions in this Circuit have held that a law guardian is not a state actor and thus could not be held liable under Section 1983. See, e.g., Arena v. Department of Soc. Serv. of Nassau, 216 F. Supp. 2d 146, 155 (E.D.N.Y. 2002); Elmasri v. England, 111 F. Supp. 2d 212, 221 (E.D.N.Y. 2000) ("Guardians ad litem, although appointed by the court, exercise independent professional judgment in the interests of the clients they represent and are therefore not state actors for purposes of Section 1983"); Storck v. Suffolk County Dep't of Social Servs., 62 F. Supp. 2d 927, 941-42 (E.D.N.Y. 1999) ("It has been held that guardians ad litem, although appointed by the court, exercise independent professional judgment in the interests of the clients they represent and are therefore not state actors for purposes of Section 1983."); Di Costanza v. Henriksen, 1995 U.S. Dist. LEXIS 10540, 94 Civ. 2464, 1995 WL 447766 at *2 (S.D.N.Y. July 28, 2995); Levine v. County of Westchester, 828 F. Supp. 238, 244 (S.D.N.Y. 1993). Thus, even if Burrows did not have immunity, he could not be sued for violating § 1983, absent an allegation, which Lewittes has made, that Burrows conspired with Lobis. (Dkt. No. 15: Am. Compl. P 5.) "To prove a § 1983 conspiracy, a plaintiff must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." E.g., Pangburn v. Culbertson, 200 F.3d 65, 72 (2d Cir. 1999). Even when the state actor is a judge that is immune from suit, "it does not follow, however, that the action against the private parties accused of conspiring with the judge must also be dismissed." Dennis v. Sparks, 449 U.S. 24, 27, 101 S. Ct. 183, 186, 66 L. Ed. 2d 185 (1980). "To act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting . . . 'under color' of law for purposes of § 1983 actions." Dennis v. Sparks, 449 U.S. at 27-28, 101 S. Ct. at 186; see also, e.g., Storck v. Suffolk County Dep't of Social Servs., 62 F. Supp. 2d at 940 ("Liability for participating in a Section 1983 conspiracy may be imposed on private individuals even if the state actor is immune from liability.").

Lewittes' amended complaint, however, asserts no factual basis for his conclusory conspiracy claim, except that Burrows moved for payment of his fees and Justice Lobis approved the fees (which decision was affirmed by the First Department, see page 22 n.12 above). Lewittes' conspiracy allegations are entirely conclusory, and therefore should be dismissed. See, e.g., Norley v. HSBC Bank USA, 2003 U.S. Dist. LEXIS 21976, 03 Civ. 2318, 2003 WL 22890402 at *4 (S.D.N.Y. Dec. 9, 2003) ("The fact that Justice Kornreich granted or denied a litigant's motion, or that Referee Lowenstein arrived at a figure for an award of attorneys' fees when given that assignment by the Court, are insufficient bases from which to infer the evidence of a conspiracy between judicial officers and a litigant."); see also, e.g., Wade v. Pataki, No. 02-0355, 75 Fed. Appx. 45, 46, 2003 WL 22134542 at *1 (2d Cir. Sept. 16, 2003) ("The district court's conclusion that the defendants were entitled to summary judgment on the conspiracy claim was also proper, as appellant presented no evidence, beyond bald assertions and conclusory allegations, to establish a conspiracy among the defendants to deprive him of due process rights."); Webb v. Goord, 340 F.3d 105, 110-11 (2d Cir. 2003) ("The plaintiffs have not alleged, except in the most conclusory fashion, that any such meeting of the minds occurred among any or all of the defendants. Their conspiracy allegation must therefore fail."), cert. denied, 157 L. Ed. 2d 897, 124 S. Ct. 1077 (2004); Taylor v. Windsor Locks Police Dep't, No. 02-0100, 71 Fed. Appx. 877, 2003 WL 21697441 at *2 (2d Cir. July 22, 2003); Silverman v. City of New York, No. 02-9048, 64 Fed. Appx. 799, 801, 2003 WL 1970472 at *1 (2d Cir. Apr. 23, 2003) ("The § 1983 conspiracy claim fails because [plaintiff's] allegations are unspecific, conclusory and unsupported."); Pangburn v. Culbertson, 200 F.3d 65, 72 (2d Cir. 1999); Almonte v. Florio, 2004 U.S. Dist. LEXIS 335, 02 Civ. 6722, 2004 WL 60306 at *5 n.13 (S.D.N.Y. Jan. 13, 2004) ("Plaintiff's conspiracy claims, which are vague, conclusory and not supported by admissible evidence, must be dismissed.").

[*42]

CONCLUSION

For the reasons stated above, defendants' summary judgment motion should be granted. n14

n14 Lewittes' motion for Rule 11 sanctions for defendants' allegedly frivolous summary judgment motion (Dkt. No. 26) is denied, since defendants' motion was successful.

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 ten (10) 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 the Court, with courtesy copies delivered to the chambers of the Honorable Jed S. Rakoff, 500 Pearl Street, Room 1340, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Rakoff. Failure to [*43] file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 513 U.S. 822, 115 S. Ct. 86, 130 L. Ed. 2d 38 (1994); Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.), cert. denied, 506 U.S. 1038, 113 S. Ct. 825, 121 L. Ed. 2d 696 (1992); Small v. Secretary of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

Dated: New York, New York

August 19, 2004

Respectfully submitted,

Andrew J. Peck

United States Chief Magistrate Judge