U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, 3rd Floor
New York, New York 10007

June 20, 2011

BY FACSIMILE (212) 805-6111
Hon. Henry B. Pitman
United States Magistrate Judge
United States District Court
500 Pearl Street, Suite 750
New York, New York 10007

Re: *Den Hollander v. Members of the Board of Regents*, 10 Civ. 9277 (LTS) (HBP)

Dear Judge Pitman:

I write on behalf of the United States Department of Education and the Secretary of Education (collectively, "the Federal Defendants") to address the concerns that the Court raised in its June 3, 2011 order, regarding materials submitted along with the Federal Defendants' pending motion to dismiss in the above-referenced action. As set forth below, the Federal Defendants respectfully submit that their motion to dismiss should not be converted into a motion for summary judgment and that no factual submissions from the parties are necessary for purposes of deciding their motion. In any event, the Federal Defendants do not intend to further supplement the record with factual submissions if the Court converts its motion to one for summary judgment, and rest on their submissions to date.

As the Court noted, the Federal Defendants attached to their letter motion to dismiss copies of decisions from this Court and from the Second Circuit Court of Appeals in a prior case between the same parties, *see Hollander v. Inst. for Research on Women & Gender*, No. 08 Civ. 7286 (LAK) (KNF), 2009 WL 1025960 (S.D.N.Y. Apr. 15, 2009), *aff'd*, 372 F. App'x 140, 142 (2d Cir. 2010) ("*Hollander I*"), as well as a copy of the brief submitted by the Federal Defendants in that case. The New York State defendants also referred in their briefs to pleadings and decisions from the *Hollander I* case. In light of these submissions, the Court stated its intent to convert the defendants' motions to dismiss to motions for summary judgment, and invited any appropriate additional factual submissions from the parties. The Court also expressed some confusion as to the particular basis under Federal Rule of Civil Procedure 12(b) for the defendants' motions to dismiss, in light of the general restriction in Rule 12(d) that 12(b)(6) motions are to be based on the pleadings only.

The Federal Defendants respectfully submit that there is no need for the Court to convert their motion to one for summary judgment. As this Court has previously explained, "'[w]hen a motion to dismiss is premised on the doctrine of collateral estoppel, a court is permitted to take judicial notice of and consider the complaints and the record generated in both actions without having to convert the motion to dismiss into a summary judgment motion.'" *Griffin v. Goldman, Sachs & Co.*, No. 08 Civ. 2992 (LMM), 2008 WL 4386768, at *2 (S.D.N.Y. Sept. 23, 2008) (quoting *Drance v. Citigroup*, 05 Civ. 0001 (RCC) (KNF), 2006 U.S. Dist. LEXIS 85169 (S.D.N.Y. Aug. 9, 2006)); *accord Duggan v. Local 638, Enter. Ass'n of Steam, Hot Water, Hydraulic, Sprinkler*, No. 06 Civ. 2236 (JFB) (ETB), 2006 WL 3545006, at *4 n.5 (E.D.N.Y. Dec. 8, 2006); *World Wrestling Entm't, Inc. v. Jakks Pac., Inc.*, 425 F. Supp. 2d 484, 508 n.16 (S.D.N.Y. 2006). This is because "[i]n deciding a motion to dismiss, the Court may consider, in addition to the factual allegations of the complaint, 'documents attached to the complaint as an exhibit or incorporated in it by reference, . . . *matters of which judicial notice may be taken*, or . . . documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.'" *Malone v. N.Y. Pressman's Union No. 2*, No. 07 Civ. 9583 (LTS) (GWG), 2011 WL 2150551, at *4 (S.D.N.Y. May 31, 2011) (quoting *Brass v. Am. Film Tech., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993)) (emphasis added). Courts may take "judicial notice of matters of public record, such as pleadings and court orders from prior litigation between the parties." *Castagna v. Luceno*, No. 09 Civ. 9332 (CS), 2011 WL 1584593, at *5 (S.D.N.Y. Apr. 26, 2011) (internal quotation marks omitted). This supplementation of the material considered by the Court, beyond the four corners of the complaint, does not run afoul of the prescription in Federal Rule of Civil Procedure 12(d), or require that the Federal Defendants' motion be converted into a motion for summary judgment. *See Mabry v. Neighborhood Defender Serv.*, __ F. Supp. 2d __, 2011 WL 335867, at *6 (S.D.N.Y. 2011); *Arcari v. 46th St. Dev. LLC*, No. 10 Civ. 3619 (PKC), 2011 WL 832809, at *4 (S.D.N.Y. Mar. 2, 2011); *Green v. Gonzalez*, No. 09 Civ. 2636 (PAC) (KNF), 2010 WL 5094324, at *1 n.3 (S.D.N.Y. Nov. 22, 2010) (holding that conversion to summary judgment not required under Rule 12(d) when court is taking judicial notice of documents filed in other courts not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings).

Here, the Federal Defendants' motion to dismiss is based on the affirmative defense of issue preclusion, or collateral estoppel; the Federal Defendants argue that Plaintiff has no right to re-litigate his standing to bring this action because the courts in *Hollander I* already concluded he had no standing to bring the very same First Amendment claims he now wishes to litigate for the second time. Collateral estoppel is a defense under Federal Rule of Civil Procedure 12(b)(6). *See Austin v. Downs, Rachlin & Martin*, 270 F. App'x 52, 53 (2d Cir. 2008). Further, in the event the Court decides to proceed to the merits of Plaintiff's First Amendment claim, the Federal Defendants have moved to dismiss pursuant to Rule 12(b)(6), on the ground that this claim does not state a valid cause of action. In making this motion, the Federal Defendants have adopted by reference the arguments set forth in their brief in *Hollander I*, but the Federal Defendants have asked the Court for an opportunity to re-brief those issues at this juncture should the Court determine that a full re-briefing of these arguments is warranted.

For these reasons, the Federal Defendants respectfully submit that the Court does not need to convert its motion to a summary judgment motion in order to consider its collateral estoppel or other grounds for dismissing Plaintiff's complaint. If, however, the Court determines to convert the motion nevertheless, the Federal Defendants rest on their submissions to date.

We thank the Court for its consideration of this matter.

Respectfully,

PREET BHARARA
United States Attorney

By: _____
JEAN-DAVID BARNEA
Assistant United States Attorney
Telephone: (212) 637-2679
Facsimile: (212) 637-2717

cc: **BY EMAIL-PDF**
Roy Den Hollander (*pro se*)
545 East 14th Street, 10D
New York, NY 10009

Clement J. Colucci (counsel for the New York State defendants)
Assistant Attorney General
New York State Department of Law
120 Broadway
New York, NY 10271