



On April 6, 2008, plaintiff entered the Ash Creek Cafe during its lunch service. He ordered a cheese burger and paid the bill for it at the bar of the restaurant. He was punched and pushed out of the restaurant by a staff member. Once outside the restaurant, he was arrested for breach of the peace by defendant Officer Love.

### **Discussion**

A motion for summary judgment will be granted where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). “Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper.” Bryant v. Maffucci, 923 F. 2d 979, 982 (2d Cir. 1991).

The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. Am. Int’l Group, Inc. v. London Am. Int’l Corp., 664 F. 2d 348, 351 (2d Cir. 1981). In determining whether a genuine factual issue exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

If a nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, then summary judgment is appropriate. Celotex Corp., 477 U.S. at 323. If the nonmoving party submits evidence which is “merely colorable,” legally sufficient opposition to the motion for summary judgment is not met. Liberty Lobby, 477 U.S. at 24.

Defendants Michael Friedman, Ash Creek Cafe, Jane Doe and John Doe move for summary judgment on plaintiff’s constitutional claims pursuant to 42 U.S.C. § 1983 because they are not state actors.

Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

Section 1983 applies to conduct by private parties only where the conduct is “fairly attributable” to the state. Bernas v. Cablevision Systems Corp., 215 F. App'x 64, 68 (2d Cir. 2007). A private party may be said to act under color of state law and may be liable under Section 1983 if that party acted in concert or in a joint action with state officials. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970). In this instance, it is undisputable that the moving parties are private parties. The evidence evinces no inference that the moving defendants acted in any way in concert or in a joint action with state officials. Accordingly, the Court will grant summary judgment on the plaintiff's Section 1983 claims against the moving defendants.

To the extent that the complaint may be construed as alleging state law actions against the moving defendants, the Court will decline to exercise its supplemental jurisdiction over such claims against the moving defendants. Supplemental jurisdiction over state law claims is a matter of discretion, Zigmund v. Foster, 205 F.3d 1327 (2d Cir. 2000), and the court may decline to exercise supplemental jurisdiction where the court has dismissed all claims over which it has original jurisdiction. See 28 U.S.C. § 1367(c)(3).

**Conclusion**

For the foregoing reasons, defendants' Motion for Summary Judgment [doc. #24] is GRANTED.

\_\_\_\_\_/s/\_\_\_\_\_  
Warren W. Eginton  
Senior U.S. District Judge

Dated at Bridgeport, Connecticut this \_\_28th\_\_ day of October, 2011.