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# [***McLaughlin v. Barron***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RGX-CXC1-JNS1-M37T-00000-00&context=)

United States District Court for the Southern District of New York

January 24, 2018, Decided; January 24, 2018, Filed

13 Civ. 0807 (NSR) (PED)

**Reporter**

2018 U.S. Dist. LEXIS 12507 \*; 2018 WL 1872535

DON ALAN MCLAUGHLIN, Plaintiff, - against - DITTER A. BARRON, ET AL., Defendants.

**Subsequent History:** Adopted by, Request denied by, Dismissed by, in part [*McLaughlin v. Barron, 2018 U.S. Dist. LEXIS 26948 (S.D.N.Y., Feb. 20, 2018)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPB-GPR1-JGBH-B3VF-00000-00&context=)

**Prior History:** [*McLaughlin v. Chong, 2016 U.S. Dist. LEXIS 42614 (S.D.N.Y., Mar. 29, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JDS-HDB1-F04F-04F1-00000-00&context=)

**Core Terms**

damages, Defaulting, allegations, Driver, amended complaint, entity, state actor, deprivation, recommend, inquest, towing, default judgment, respectfully, rights

**Counsel:** **[\*1]**Don Alan McLaughlin, Plaintiff, Pro se, New York State, Non-domestic.

For Officer Ditter A. Barron, Officer Antonio G. Cuervo, Officer Glen C. Hochman, City of White Plains, Defendants: John J. Walsh, II, Hodges Walsh & Messemer, LLP, White Plains, NY; Paul Edward Svensson, Hodges, Walsh & Slater, L.L.P., White Plains, NY.

For Officer Jose Formoso, Defendant: Paul Edward Svensson, Hodges, Walsh & Slater, L.L.P., White Plains, NY.

**Judges:** PAUL E. DAVISON, UNITED STATES MAGISTRATE JUDGE. HONORABLE NELSON S. ROMAN, UNITED STATES DISTRICT JUDGE.

**Opinion by:** PAUL E. DAVISON

**Opinion**

**REPORT AND RECOMMENDATION**

**TO: THE HONORABLE NELSON S. ROMAN**,

**UNITED STATES DISTRICT JUDGE**

**I. INTRODUCTION**

Plaintiff Don Alan McLaughlin ("Plaintiff"), appearing *pro se*, brings this action against the City of White Plains and numerous other defendants, seeking redress pursuant to *42 U.S.C. § 1983* for civil rights violations alleged to have occulted in connection with a February 16, 2011 incident in which Plaintiff was arrested and his automobile was towed and impounded. On August 4, 2016, the Court entered a default judgment against Brendan's Auto Body ("Brendan's"), and Unknown Driver for Brendan's Auto Body ("Unknown Driver") (collectively, the "Defaulting Defendants"),**[\*2]** Dkt. 121, and referred the matter to me for a damages inquest. Dkt. 122.

For the reasons set forth below, I respectfully recommend that the Court conclude that Plaintiff's allegations do not support a finding of liability as to either Brendan's or Unknown Driver. Accordingly, Plaintiff's request for a damage award against those defendants should be **DENIED**, and the Amended Complaint dismissed insofar as it asserts *§ 1983* claims against those defendants.

**II. PROCEDURAL HISTORY**

Plaintiff commenced this action on February 1, 2013. Dkt. 2. Plaintiff filed an amended complaint on March 3, 2014. Dkt. 14. The docket reflects that defendant Brendan's was served with the amended complaint on June 23, 2014, and proof of service was filed with the court on July 1, 2014.[[1]](#footnote-0)1 Dkt. 31.

On May 10, 2016, your Honor entered an Order directing defendants Brendan's and Unknown Driver to appear and show cause why a default should not be entered against them. Dkt. 103. On August 4, 2016, after the defendants failed to appear for the show cause hearing, the Court entered a partial default judgment against Brendan's and Unknown Driver.[[2]](#footnote-1)2 Dkt. 121, The matter was referred to me for a damages inquest. Dkt. 122.

**[\*3] III. THE INQUEST**

After discussion at a conference on February 8, 2017, Plaintiff elected to proceed by way of a written inquest submission, and was granted leave to make his submission by April 10, 2017. Plaintiff did not request an evidentiary healing.

On April 10, 2017, Plaintiff filed a motion, affidavit, memorandum of law ("P. Mem."), and accompanying exhibits for an order pursuant to [*Fed. R. Civ. P. 55 (b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JDD-2XH2-8T6X-72R7-00000-00&context=). Dkts. 196-98. On April 27, 2017, Plaintiff filed additional papers in reference to the inquest. Dkts. 202-03, In his submissions, Plaintiff equates the seizure of his automobile with the wrongful (human) imprisonment at issue in [*Trezevant v. Tampa, 741 F.2d 336, 341 (11th Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VNJ0-003B-G50G-00000-00&context=) (sustaining $25,000 compensatory award for 23-minute confinement of plaintiff), and, extrapolating from that anthropomorphic premise, seeks compensatory damages in excess of $4 million along with punitive damages of $3 million. Dkt. 203, ¶ 21. Defendants Brendan's and Unknown Driver have not responded.

**IV. BACKGROUND**

In his Amended Complaint,[[3]](#footnote-2)3 Plaintiff alleges the following facts: On February 16, 2011 at approximately 4:30 p.m., Plaintiff was traveling with a friend, Stacey Cumberbatch, within the City of White Plains, New York. Dkt. 14, ¶ 17. After turning onto Maple Avenue**[\*4]** from Waller Avenue, Plaintiff observed emergency turret lights behind him and pulled over. *Id.* Police Officer Ditter A. Barron approached Plaintiff's vehicle and then requested that Plaintiff present his driver's license and registration. *Id.* ¶ 19. Soon thereafter, two additional police vehicles arrived at the scene, and Barron, along with Officer Antonio G. Cuervo and Officer Glen C. Hochman approached Plaintiff's vehicle and opened the driver side door. *Id.* ¶¶ 24-26. After repeated requests for identification, Plaintiff began searching through his wallet for identification. *Id.* ¶ 30. At that point, Barron, Cuervo, and Hochman forceably removed him from his vehicle and began kicking and beating him. *Id.* ¶¶ 31-34. They put him into the police car and searched his vehicle. *Id.* ¶¶ 36.

His vehicle was subsequently towed by a defendant Unknown Driver to Defendant Brendan's premises. *Id.* ¶ 36. On February 18, 2011, after he was released from custody, Plaintiff paid $25.00 (described by Plaintiff as "ransom") to a police officer to authorize the release of his vehicle from Brendan's. *Id.* ¶ 52. Later that day, Plaintiff paid $214.75 ("ransom") to Rosemary Walsh, Brendan's employee, to**[\*5]** release his ("stolen") vehicle. *Id.* ¶ 53. Plaintiff alleges that all defendants acted "wantonly, recklessly, willfully and maliciously," and "in concert with additional state officers[.]" *Id.* ¶ 54.

**V. LEGAL STANDARDS**

**A. Default**

When a defendant defaults, the court must accept all well-pleaded allegations in the complaint as true, except those pertaining to the amount of damages. [*Fed. R. Civ. P. 8(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=); [*Finkel v. Romanowicz, 577 F.3d 79, 83 n.6 (2d Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4X03-5C90-TXFX-43BD-00000-00&context=). However, the Court "is also required to determine whether the [plaintiff's] allegations establish [the defendant's] liability as a matter of law." [*Id. at 84*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4X03-5C90-TXFX-43BD-00000-00&context=). This is because "even after [a] default,... it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit conclusions of law." [*In re Industrial Diamonds* ***Antitrust*** *Litig., 119 F. Supp. 2d 418, 420 (S.D.N.Y. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:41NS-RNV0-0038-Y2SD-00000-00&context=) (citing 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2688, at 63 (3d ed. 1988)). Thus, "a district court retains discretion under [[*Federal Rule of Civil Procedure] 55(b)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JDD-2XH2-8T6X-72R7-00000-00&context=) once a default is determined to require proof of necessary facts and need not agree that the alleged facts constitute a valid cause of action . . . ." *Id.* (quoting [*Au Bon Pain Corp. v. Artect, Inc., 653 F.2d 61, 65 (2d Cir. 1981))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1590-0039-W1J5-00000-00&context=).

After determining whether the plaintiff has stated a valid legal claim, the court must then determine whether the plaintiff**[\*6]** has provided adequate support for its requested damages. *See* [*Gucci Am., Inc. v. Tyrrell-Miller, 678 F. Supp. 2d 117, 119 (S.D.N.Y. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XM2-5PR0-YB0N-V0SF-00000-00&context=) (citing [*Credit Lyonnais Sec. (USA), Inc. v. Alcantara, 183 F.3d 151, 155 (2d Cir. 1999))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WX8-7G10-0038-X4NK-00000-00&context=). The court may determine the adequacy of the plaintiff's damages claim based on its submitted proofs. *See, e.g.,* [*Garden City Boxing Club, Inc. v. Hernandez, No. 04 Civ. 2081, 2008 U.S. Dist. LEXIS 115454, at \*5 (S.D.N.Y. Oct. 15, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YKS-SW71-652J-D006-00000-00&context=); [*Finkel v. Romanowicz, 577 F.3d 79, 84 (2d Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4X03-5C90-TXFX-43BD-00000-00&context=). A plaintiff must therefore substantiate a claim with evidence to prove the extent of damages. *Malletier v. Carducci Leather Fashions, Inc., 648 F. Supp. 2d. 501, 503 (S.D.N.Y. 2009)*. Proof of damages must be based upon admissible, authenticated evidence. [*House v. Kent Worldwide Machine Worts, Inc., 359 Fed. App'x. 206, 207-08 (2d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XG7-2FB0-YB0V-D00V-00000-00&context=) (summary order).

The court must conduct an inquiry sufficient to establish damages to a "reasonable certainty." [*Credit Lyonnais Sec. (USA), Inc. v. Alcantara, 183 F.3d 151, 155 (2d Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WX8-7G10-0038-X4NK-00000-00&context=). If a plaintiff fails to demonstrate its damages to a reasonable certainty, the court should decline to award any damages, even though liability has been established through default. *Lenard v. Design Studio, 889 F. Supp. 2d 518, 526-528 (S.D.N.Y. 2012)* (citing [*Griffiths v. Francillon, No. 10 Civ. 310, 2012 U.S. Dist. LEXIS 54681, at \*2 (E.D.N.Y. Jan. 30, 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55FC-W4F1-F04F-00M7-00000-00&context=) (recommending that no damages be awarded because motion papers alone were insufficient to support an award of damages), *report and recommendation adopted*, [*2012 U.S. Dist. LEXIS 54683, at \*3 (E.D.N.Y. Apr. 13, 2012))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55FC-W4F1-F04F-00M8-00000-00&context=).

**B. *Section 1983* Liability**

To establish a claim arising under *Section 1983*, a plaintiff must allege: "(1) the deprivation of any rights, privileges, or immunities secured by the Constitution and its laws; (2) by a person acting under the color of state law." [*Martin v. City of New York, No. 11 Civ. 600, 2012 U.S. Dist. LEXIS 56632, at \*20 (S.D.N.Y. April 19, 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55GG-TRV1-JCNC-8083-00000-00&context=) (citing *42 U.S.C. § 1983*); [*Sykes v. James, 13 F.3d 515, 519 (2d Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9JP0-003B-P0PD-00000-00&context=).

**IV. DISCUSSION**

Plaintiff brings a single cause of action against the Defaulting Defendants, the tenth cause of action, in which he claims**[\*7]** pursuant to *42 U.S.C. § 1983* that Defendant violated Plaintiff's *Fourth amendment* right to be free from unlawful seizure of his property and Plaintiff's *Fifth* and *Fourteenth Amendment* right to be free of the deprivation of property without due process of law. Dkt 14, ¶¶ 112-14.

**A. Deprivation of rights**

Plaintiff's allegation that the Defaulting Defendants participated in the unlawful seizure of his car is sufficient to establish the first element of Plaintiff's *Fourth Amendment* claim.

To prevail on his due process claim, the plaintiff must show that he "possessed a protected liberty or property interest, and that he was deprived of that interest without due process." [*McMenemy v. City of Rochester, 241 F.3d 279, 286 (2d Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42H1-HWK0-0038-X54B-00000-00&context=) (quoting [*Hynes v. Squillace, 143 F.3d 653, 658 (2d Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SNM-F3D0-0038-X267-00000-00&context=) (internal quotations omitted)). A property seizure "occurs when there is some meaningful interference with an individual's possessory interests in [his] property." [*Soldal v. Cook County, Illinois, 506 U.S. 56, 61, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S5B-0B00-003B-R4YN-00000-00&context=).

Here, Plaintiff alleges a property right to his vehicle and that he was deprived of that right. Dkt. 14, ¶¶ 112-114. Reading Plaintiff's allegations liberally, I find Plaintiff adequately alleges that he suffered a deprivation of his right to his property. Accordingly, I respectfully recommend that the Court find that Plaintiff adequately pleads this element of his claim. I turn next to the second element of a *42 U.S.C. § 1983* claim.

**B. [\*8]  Under Color of State Law**

The Defaulting Defendants are a private towing company, and its employee driver, hired by the City of White Plains to tow Plaintiff's vehicle. Plaintiff argues that these defendants were acting under color of state law because (i) they conspired with state actors and are therefore state actors, Dkt. 198 at 9-10; (ii) the White Plains Police Department has a significant measure of control over them, Dkt. 198 at 10-12, and (iii) they performed a function that is the exclusive prerogative of the state (the White Plains Police Department). Dkt. 198 at 12-13.

In order to state a claim under *§ 1983*, a plaintiff must allege that he was injured by either a state actor or a private party acting under color of state law. [*Ciambriello v. County of Nassau, 292 F.3d 307, 323-324 (2d Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:460J-06W0-0038-X4GT-00000-00&context=) (citations omitted). "Because the United States Constitution ***regulates*** only the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes 'state action.'" *Id.* A private entity's activity can be considered "state action" in three situations; (1) the entity acts using the coercive power of the state or is controlled by the state (the "compulsion test"); (2)**[\*9]** the entity willfully participates in joint activity with the state or its functions are entwined with state policies (the "joint action" or "close nexus" test); or (3) the state has delegated a public function to the entity (the "public function" test). [*Fabrikant v. French, 691 F.3d 193, 207 (2d Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56BV-5RM1-F04K-J1FK-00000-00&context=) (citing [*Sybalski v. Indep. Grp. Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4TP6-PGY0-TX4N-G1G6-00000-00&context=). The fundamental question under each test is whether the private entity's challenged actions are "fairly attributable" to the state. *Id.* (citing [*Rendell-Baker v. Kohn, 457 U.S. 830, 838, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5FM0-003B-S4JY-00000-00&context=). Whether conduct may be fairly attributable to the State is necessarily fact-specific, as "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient." [*Sykes v. Bank of Am., 723 F.3d 399, 406 (2d Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58YS-6JN1-F04K-J009-00000-00&context=) (citation omitted).

Here, Plaintiff alleges that the Defaulting Defendants, a private entity and a private citizen, acted jointly with state actors or conspired with state actors to deprive Plaintiff of his constitutional rights. However, Plaintiff's allegations about Defendant's "state action" are limited to the following: the state defendants "acted in concert when defendants John Doe, Driver for [Defendant] Brendan's Auto Body and [Defendant] Brendan's Auto Body, deprived [Plaintiff] McLaughlin of the rights secured to him by the Constitution**[\*10]** ... These officers did knowingly and willfully search McLaughlin's person and property without a valid or lawful wan-ant violating clearly established law and acted in concert with [] John Doe, Driver for [Defendant] Brendan's Auto Body and [Defendant] Brendan's Auto Body, in seizing of [Plaintiff] McLaughlin's private conveyance." Dkt. 14, ¶ 113. Plaintiff provides a single allegation in his Amended Complaint that could be read to support his theories: "On 2-18-11, plaintiff paid ransom of $25.00 to Police Officer JOHN DOE, on behalf of the DEPARTMENT OF PUBLIC SAFETY, CITY OF WHITE PLAINS, N.Y. to "authorize" the release of his stolen automobile from Brendan's Auto Body..." Dkt. 14, ¶ 52.

Although private entities may be held liable under *Section 1983* "if there is a sufficiently 'close nexus between the State and the challenged action,'" [*Sykes v. Bank of Am., 723 F.3d 399, 406 (2d Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58YS-6JN1-F04K-J009-00000-00&context=) (quoting [*Brentwood Aca d. v. Term. Secondary Sch Athletic Ass'n, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42D7-KHP0-004C-1017-00000-00&context=), a "merely conclusory allegation that a private entity acted in concert with a state actor does not suffice to state a *§ 1983* claim against the private entity." [*Ciambriello v. Cnty. of Nassau, 292 F.3d 307, 324 (2d Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:460J-06W0-0038-X4GT-00000-00&context=).

Without more, the facts as alleged in the Second Amended Complaint do not establish the second element of a *42 U.S.C. § 1983* claim.[[4]](#footnote-3)4 Accordingly, I respectfully recommend that the Court find**[\*11]** that the Amended Complaint fails to establish the Defaulting Defendants' liability under *42 U.S.C, § 1983* as a matter of law and that there is no basis to award damages notwithstanding any default.[[5]](#footnote-4)5

**V. CONCLUSION**

For the foregoing reasons, I respectfully recommend that the Court deny Plaintiff's request for damages, and dismiss his *§ 1983* claims against the Defaulting Defendants.

Dated: January 24, 2018

White Plains, New York

Respectfully submitted,

/s/ Paul E. Davison

**PAUL E. DAVISON**

**UNITED STATES MAGISTRATE JUDGE**

**End of Document**

1. 1Because I conclude below that Plaintiff's allegations do not support a finding of liability against either defendant, I do not reach the question whether this Court can enter judgment against an unidentified, unserved John Doe defendant. *See* [*Navinka Capital Grp., LLC v. Doe, No. 14 Civ. 5968, 2017 U.S. Dist. LEXIS 2926, at \* 11 (E.D.N.Y. Jan. 6, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MKN-28H1-F04F-03DM-00000-00&context=) (courts "have generally held that judgments cannot be issued against an anonymous defendant.") (citing cases). (Copies of this and other unreported cases cited herein will be provided to Plaintiff *pro se.*). [↑](#footnote-ref-0)
2. 2Plaintiff's proposed default judgment order, which the Court entered, references a "certificate of Ruby J. Krajick, clerk of Court, noting the default[.]" Dkt. 121. The docket does not reflect a certificate from the Clerk of Court. [↑](#footnote-ref-1)
3. 3On September 15, 2016, *after* the Court entered a partial default judgment, Plaintiff filed a Second Amended Complaint which modified his allegations and claims against the Defaulting Defendants in certain respects. Dkt. 135. Because this Court granted the partial default judgment on the basis of Plaintiff's (First) Amended Complaint, the Amended Complaint remains the operative pleading for purposes of this inquest. [↑](#footnote-ref-2)
4. 4Courts have rejected the notion that private towing companies operating under municipal contracts are state actors. *See* [*Calderon v. Burton, 457 F. Supp. 2d 480, 488 (S.D.N.Y. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MBC-9T90-TVW3-P394-00000-00&context=)(McMahon, J.) ("Numerous cases hold that companies that provide services to municipalities pursuant to contracts are not thereby transformed into state actors—at least where, as here, the function performed (towing cars) has not been historically, traditionally and exclusively the prerogative of the state.") (citing [*Rendell-Baker v. Kohn, 457 U.S. 830, 840-41, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5FM0-003B-S4JY-00000-00&context=); [*Blum v. Yaretsky, 457 U.S. 991, 1004, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5FP0-003B-S4K3-00000-00&context=); [*Black by Black v. Indiana Area School Dist., 985 F.2d 707, 711 (3d Cir. 1993))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HXS0-003B-P4S4-00000-00&context=). [↑](#footnote-ref-3)
5. 5In light of this conclusion, I have not completed an inquest as to what damages Plaintiff may be entitled to. If this Court disagrees with my analysis of the "state actor" question, I request that the Court remand the matter to me for further analysis as to damages. [↑](#footnote-ref-4)