COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2021-P-0338

Barnstable, ss.

MICHAEL J. BASSICHIS and others
Plaintiffs-Appellants

v.

MICHAEL I. FLORES
Defendant-Appellee

On Appeal from a Judgment of Dismissal under Rule 12(b)(6)
Entered in the Superior Court

BRIEF OF THE APPELLANTS

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STATEMENT OF ISSUES

1. Whether the motion judge committed reversible error in ruling that the "litigation privilege" provided absolute immunity to defendant-attorney from any form of civil liability for his active participation in a scheme to defraud the plaintiffs and perversion of legal proceedings to accomplish that result.

STATEMENT OF THE CASE

On July 10, 2020, the plaintiffs, Michael J. Bassichis and his spouse, Sylvia E. Freed (collectively "Bassichis"), Lower Cape Plastering LLC, and Max Makowsky, commenced this action by filing a complaint and jury claim in the Superior Court. (A.5;7-18). The complaint contains three counts, all based on the conduct of the defendant, Attorney Michael I. Flores, in orchestrating and actively participating in a scheme to defraud the plaintiffs. As set forth in the complaint, the scheme involved a divorce proceeding in the Barnstable Probate and Family Court commenced by the defendant on behalf of his client, Kim C. von Thaden ("Ms. von Thaden"), against William H. von Thaden ("Mr. von Thaden"). (A.10-11). At the time the defendant filed the divorce complaint, and throughout the divorce

proceeding, Mr. von Thaden owed the plaintiffs (and other creditors) a substantial amount of money.

The von Thaden divorce was based on an irretrievable breakdown of the marriage which occurred in 2016 shortly after Mr. von Thaden's business failed. It is the plaintiffs' contention, however, that the defendant, in conjunction with both Mr. and Ms. von Thaden, used the divorce proceeding for a further, illegitimate purpose. The ulterior purpose was to transfer all of Mr. von Thaden's assets to Ms. Von Thaden through a "consent judgment" that was purposefully made to look like a judgment entered in a contested divorce. (A.11). A "consent judgment" is a judgment the provisions and terms of which are first settled and agreed to by the parties to the action which is thereafter submitted to the court for its approval. Black's Law Dictionary. The second aspect of the scheme was to have Mr. von Thaden file a petition under Chapter 7 of the Bankruptcy Code after the divorce decree became final. (A.11;15).

In Count I, the plaintiffs allege that the defendant's active participation in the scheme subjects him to liability under G.L. c. 109A (Uniform

Fraudulent Transfer Act) (UFTA)). (A.15-16). G.L. c. 109A, §§ 8 provides a wide range of equitable remedies available to the trial court. (A.16). Bakwin v. Mardirosian, 467 Mass. 631, 637 (2014). In consolidated actions in the Barnstable Superior Court against Mr. and Ms. Von Thaden, the plaintiffs are seeking avoidance of the transfer of Mr. von Thaden's assets to the extent necessary to satisfy plaintiff's claims. (A.16;40-41). See G.L. c. 109A, §§ 8(a)(1), §9(b) and (b)(1), and Fleet Nat'l Bank v. Merriam, 45 Mass.App.Ct. 592, 595 (1998)(judgment creditor must be returned to the same position he held with respect to the transferor prior to the fraudulent transfer). Attorney Flores is not a party to the consolidated actions in the Barnstable Superior Court against Mr. and Ms. Von Thaden.

Plaintiffs' complaint in the present action contains explicit factual allegations concerning the manner in which the defendant, in conjunction with the von Thadens, carried out the scheme. The scheme included purposeful misrepresentation of pertinent facts to the court in the divorce proceeding - facts that the defendant knew from his wide experience in divorce proceedings the judge would rely on in

equitably dividing marital property pursuant to G.L. c. 208, § 34. (A.12-13). The scheme involved having Mr. von Thaden acknowledge in open court the validity of the misrepresented facts, thereby providing what appears to be a factual and legal basis justifying an award of all marital property to Ms. Von Thaden. (A.12-17).

In Count II, the plaintiffs allege that the defendant engaged in a civil conspiracy with Ms. Von Thaden and Mr. von Thaden through the concerted action described above. (A.17). Restatement (Second) of Torts, § 876 (1979); Kurker v. Hill, 44 Mass.App.Ct. 184, 188-189 (1998). With respect to the "concerted action" or "common plan" type of civil conspiracy, "the plaintiffs must show an underlying tortious act in which two or more persons acted in concert and in furtherance of a common design or agreement." Bartle v. Berry, 80 Mass.App.Ct. 372, 383-384 (2011). The "key to this cause of action is a defendant's substantial assistance, with the knowledge that such assistance is contributing to a common tortious plan." Kurker v. Hill, *supra* at 189.

In Count III, the plaintiffs allege that the defendant's actions were in violation of G.L. c. 93A.

(A.17). Bassichis and Makowsky's claims are brought under § 9 of the statute; Lower Cape Plastering's claim is brought under § 11.

The complaint in the instant action does not presently contain a count for abuse of process. In preparing this brief, however, plaintiffs recognize that all the elements of that tort are set forth in the complaint as well, i.e., that (i) "process" was used; (ii) for an ulterior or illegitimate purpose; (iii) resulting in damage to the plaintiffs. Jones v. Brockton Public Markets, Inc., 369 Mass. 387, 389 (1975), citing Quaranto v. Silverman, 345 Mass. 423, 426 (1963). If this case is remanded to the Superior Court, the plaintiffs will seek to amend their complaint to add a count for abuse of process. Mass.R.Civ.P. 15(a). To be clear, the plaintiffs do not assert that the defendant's filing of the complaint in the divorce action was itself an abuse of process. The abuse came in the manipulation of the divorce proceeding to accomplish the transfer of Mr. von Thaden's assets to Ms. Von Thaden in fraud of his creditors.

The defendant responded to the complaint by filing a motion to dismiss pursuant to Mass.R.Civ.P.

12(b)(6). (A.19-20). Defendant's motion to dismiss was accompanied by a supporting memorandum. (A.21-26). The plaintiffs filed an Opposition to the motion to dismiss. (A.27-38). On September 29, 2020, the court held a hearing on defendant's motion to dismiss. (A.5). The court (Gildea, J.) allowed the motion to dismiss and issued a Memorandum of Decision and Order on December 28, 2020. (A.5; 39-44). A copy of the Memorandum of Decision is included in the Addendum to this brief. Judgment on the Motion to Dismiss entered on February 23, 2021. (A.5;45). Plaintiffs filed a timely notice of appeal on March 3, 2021. (A.5;46).

STATEMENT OF THE FACTS

The facts are taken from the plaintiffs' complaint along with such additional facts which could reasonably be inferred from the factual allegations in the complaint.

In 2016, Mr. von Thaden and Ms. von Thaden had been married for twenty-five years. (A.8). A marriage of that duration is considered a "long term marriage." See, e.g., Casey v. Casey, 79 Mass.App.Ct. 623, 624 (2011) (17-year marriage).

During the entire marriage, Mr. von Thaden owned and operated a construction business. Mr. von Thaden's business was the primary, if not exclusive, source of income for the von Thaden family. (A.8). Over the course of the marriage, the earnings from Mr. von Thaden's business were substantial and permitted the family to enjoy a high standard of living. (A.8). During the marriage, Mr. von Thaden accumulated a large investment portfolio in his own name. (A.8). By virtue of Mr. von Thaden's earnings, the von Thadens also acquired four parcels of real estate located in Orleans, MA. The combined market value of the real estate exceeded $1.6 million in 2016. (A.10). Title to all the real estate was held in the parties' names as trustees of the Von Thaden Realty Trust, a nominee trust. Mr. von Thaden and Ms. von Thaden were each 50% beneficiaries of the realty trust. Each, therefore, held a 50% ownership interest in the real estate as a tenant in common. (A.10). Calvin C. v. Amelia A., 99 Mass.App.Ct. 714, 724-725 n.13 (2021).

By 2014, however, Mr. von Thaden's business was no longer profitable. In that year, Mr. von Thaden began withdrawing money from his investment portfolio to cover the shortfalls in his business operations,

and to maintain his family at the standard of living they were accustomed to. (A.8). Also, in 2014, Mr. von Thaden's investment accounts suffered significant losses due to market fluctuations. (A.13). In the latter part of June 2016 Mr. von Thaden abruptly closed his business and liquidated its few remaining assets, leaving significant debts and numerous creditors, including the plaintiffs. (A.8-10). In addition to the approximate $121,000 owed to the plaintiffs, Mr. von Thaden owed about $600,000 to other unsecured creditors. (A.10).

In August 2016, Lower Cape Plastering commenced an action in the Orleans District Court against Mr. von Thaden. (A.9). The judgment that entered in that action was partially satisfied by a pre-judgment attachment. Lower Cape Plastering then commenced an action in the Barnstable Superior Court to collect the balance of the judgment. (A.40).

In September 2016 Makowsky commenced an action in the Barnstable Superior Court seeking the $45,000 he was owed on a promissory note executed by Mr. von Thaden. (A.10;40).

In April 2017, Bassichis commenced an action in the Barnstable Superior Court against Mr. von Thaden

seeking damages in the underlying amount of $55,386.35. (A.9;40).

The three actions were consolidated in the Superior Court. Ms. Von Thaden is a defendant in all three of the pending Superior Court actions based on her active participation in the fraudulent transfer of Mr. von Thaden's assets in the divorce proceeding and her receipt of all such assets. (A.10-14). Northborough Nat'l Bank v. Risley, 384 Mass. 348 (1981); Richman v. Leiser, 18 Mass.App.Ct. 308, 315 n.6 (1984). (A "transfer" is broadly defined in G.L. c. 109A to include a "release"). Ms. Von Thaden is not represented by the defendant in the consolidated actions.

The defendant's involvement began in 2016 when he was retained by Ms. Von Thaden shortly after Mr. von Thaden closed his business. (A.10). It was the defendant who orchestrated the scheme by which Mr. von Thaden and Ms. Von Thaden would present an agreed-upon judgment to the Barnstable Probate and Family Court awarding all marital property to Ms. Von Thaden. (A.11). As part of the scheme, Mr. von Thaden appeared pro se throughout the divorce proceeding and acknowledged to the court his agreement to the award

of 100% of the marital assets to Ms. Von Thaden. The scheme involved the defendant making material misrepresentations, or eliciting such misrepresentations from the von Thadens, at the hearing on the von Thaden divorce. The scheme involved the defendant preparing and filing with the court an agreed statement of facts, including material facts that were false or misleading. The scheme involved the sale of the Orleans real estate, with all net proceeds paid initially to the defendant, without a cent being paid to Mr. von Thaden. After the divorce judgment became final, Mr. von Thaden filed a petition under Chapter 7 of the Bankruptcy Code, accompanied by schedules indicating that all his property was exempt under Federal law. Mr. von Thaden obtained a discharge of all personal liability on his debts. (A.10-14).

The defendant knew that if the divorce judgment were based on a straight-forward marital agreement, there was a risk that it could be voided by the Chapter 7 trustee. The defendant, therefore, scheduled a "trial" in the von Thaden divorce for June 15, 2017. (A.12). In his opening statement on that occasion, the defendant informed the court that

the case was being submitted as an "adversarial matter" because it was Mr. von Thaden's intent to file for bankruptcy after the divorce became final,

> and as a result, settling this case by agreement would be perilous for both parties if a bankruptcy is filed because the trustee has the ability to claw back, as it were, and void state court agreements, judgments that are based on agreements, so we are seeking a ruling from you, a judgment from you, that allocates to my client under ...Chapter 208, section 34, her share of marital assets, as well as an award of alimony, to essentially insure that any future bankruptcy proceeding - the bankruptcy court gives due deference to the fact that a state court has divided the assets and awarded alimony, which is a little different than a negotiated agreement.

(A.12).

Following a two-hour hearing, the defendant, with Mr. von Thaden's cooperation, prepared and submitted to the court a proposed judgment that awarded all marital assets to Ms. von Thaden. The proposed judgment also obligated Mr. von Thaden to pay all credit cards and other unsecured marital debt. (A.12-14). Mr. von Thaden introduced no evidence as to his substantial financial and other contributions over the course of the 25-year marriage. Mr. von Thaden confirmed throughout the trial that he was in full agreement with the proposed judgment. (A.12-14).

The defendant knew of Mr. von Thaden's substantial contributions during the 25-year

marriage. The defendant also knew that, without Mr. von Thaden's full cooperation, it was highly unlikely that the Probate Court judge, taking into consideration the factors the court would have normally considered pursuant to G.L. c. 208, § 34 , would award 100% of the marital assets to Ms. Von Thaden and assign all the marital debt to Mr. von Thaden. See, e.g., Moriarty v. Stone, 41 Mass.App.Ct. 151, 157 (1996) (In a long-term marriage in which the parties have accumulated substantial assets, "the parties' respective contributions to the marital partnership remain the touchstone of an equitable division of the marital estate").

In order to secure the court's approval of the agreed-upon judgment, the defendant purposefully misrepresented salient facts to the court. In accordance with the scheme, Mr. von Thaden acknowledged in open court that all the misrepresented facts were true. As the defendant and the parties intended, the misrepresented facts provided the basis for the Probate Court judge to accept the defendant's argument that Mr. von Thaden had "dissipated" almost a million dollars in marital assets between 2014 and 2016. (A.12-14).

As part of the scheme, the defendant purposefully withheld relevant information regarding Mr. von Thaden's investment and bank accounts. For instance, the defendant withheld from the court the fact that the vast majority of the money withdrawn from the investment accounts was directly deposited in Mr. von Thaden's business checking account and used to pay legitimate business and family expenses. The records for Mr. von Thaden's business checking account indicated that between January 1, 2014 and June 22, 2016, Mr. von Thaden transferred $334,300 from the business account to the family checking account. This money was used to pay mortgages on the Orleans properties; real estate taxes; credit cards; car loans, and other family expenses in order to maintain the high standard of living that the von Thaden family had become accustomed to. The defendant, joined by the parties, purposefully misled the court by asserting that the money was "dissipated" by Mr. von Thaden. (A.12-14).

Mr. von Thaden presented no evidence on his own behalf. In particular, Mr. von Thaden introduced no evidence regarding the factors the court would normally consider under G.L. c. 208, § 34. Mr. von

Thaden stated in open court that he was in full agreement with the proposed findings of fact and rationale submitted by the defendant. Mr. von Thaden stated in open court that he had indeed dissipated almost a million dollars of marital property between 2014 and 2016, and that all remaining marital property should be awarded to Ms. von Thaden.(A.12-13). Presented only with the parties' agreement, supported by the misrepresented facts, the Probate and Family Court judge entered judgment in the form drafted by the defendant. Judgment nisi entered on July 12, 2017. (A.12-14). Three of the Orleans properties were sold before the end of the month. (A.14).

As alleged in the plaintiffs' complaint, the judgment in the von Thaden divorce was nothing more than a consent judgment. However, through his actions, the defendant made the judgment appear to be the result of an actively litigated case, culminating in detailed findings and rationale by the judge, which findings and rationale supported the award of all marital property to Ms. Von Thaden. The detailed findings and rationale were, however, prepared by the defendant and presented to the judge as fully agreed-

to by the parties. The court adopted the findings and rationale essentially verbatim. (A.14).

As noted above, during the last week of July 2017, three of the Orleans properties were sold by the von Thadens to third-party purchasers for a combined $1.64 million. The net proceeds from the three sales (after payment of mortgages, real estate taxes, brokers' commissions, and other expenses of sale) totaled $ 638,552.48. The defendant was actively involved in the sale of the Orleans real estate, and the entire net proceeds were paid directly to the defendant. (A.14). The plaintiffs presently lack knowledge as to what portion of these funds were retained by the defendant. On August 29, 2017, Mr. von Thaden conveyed his 50% interest in the fourth Orleans property to Ms. von Thaden for $1.00. As a result of the conveyances in July and August 2017, Mr. von Thaden was left insolvent and unable to pay his debts. (A.14).

The judgment in the von Thaden divorce became final and absolute on or about October 10, 2017 (90 days after entry of the judgment nisi). Approximately two months later, on December 15, 2017, Mr. von

Thaden filed a voluntary petition under Chapter 7 of the Bankruptcy Code. (A.15).

In Schedule A/B of his petition, Mr. von Thaden listed assets having a total value of $4,800, including a computer ($500); clothing ($500); tools ($3,500); and cash ($300). All of Mr. von Thaden's assets were exempt under federal bankruptcy law. The case was docketed as a "No Asset" case. In Schedule E/F of his petition, Mr. von Thaden listed liabilities totaling $727,758.00. (A.15).

The bankruptcy trustee, who had the exclusive authority to pursue a fraudulent transfer action during the pendency of the bankruptcy case, chose not to do. The basis for this decision was undoubtedly that the plaintiffs were the only creditors seeking to pursue that claim, and they were already doing so in the three actions in the Superior Court. Mr. von Thaden received a discharge under 11 U.S.C. § 727 on April 18, 2019. The bankruptcy case was closed on May 3, 2019 without any distribution to Mr. von Thaden's creditors. (A.15).

The plaintiffs continue to pursue fraudulent transfer claims against Mr. and Ms. Von Thaden in the three consolidated actions in the Barnstable Superior

Court. (A.40-41). The claims against Mr. von Thaden are *in rem* only. See One to One Interactive, LLC v. Landrith, 76 Mass.App.Ct. 142, 149 (2010) and Christakis v. Jeanne D'Arc Credit Union, 471 Mass. 365, 369 (2015), citing 11 U.S.C. § 524(a)(1)(2) (a discharge in bankruptcy operates as an injunction against any act to collect the debt as a personal liability of the debtor. The debt itself is not extinguished by the discharge; it remains in existence but just cannot be enforced against the debtor personally).

Ms. von Thaden's chief argument in the consolidated actions is that the plaintiffs are seeking to "collaterally attack" the divorce judgment, an argument that has gained some traction in the Superior Court despite the plaintiffs' argument that the judgment in the von Thaden divorce has no res judicata effect as to the plaintiffs. DeGiacomo v. Quincy, 476 Mass. 38, 44 (2016), quoting from Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard"). See also, Williams v.

Massa, 431 Mass. 619, 631 (2000)(Although broad powers are conferred upon the Probate and Family Courts in assigning marital property between the parties to a divorce, "those powers do not extend so far as to permit adjudication as to the rights of parties not before the court").

STANDARD OF REVIEW

The Superior Court judge, acting on defendant's motion under rule 12(b)(6), ruled that all three counts of the plaintiffs' complaint are barred by the "litigation privilege" because, as the judge put it, "it is the [defendant's] words themselves that form the basis for the plaintiff's claim[s]... ." (See page 6 of the Memorandum of Decision). On page 5 of the Decision, the judge further stated: "The absolute privilege which attaches to those statements protects the maker from any civil liability thereon... . To rule otherwise would make the privilege valueless if an individual would then be subject to liability under a different theory." In reaching this conclusion, the judge rejected the plaintiffs' argument that the gravamen of the complaint was the defendant's conduct in orchestrating and actively

participating in the fraudulent transfer of assets through Mr. von Thaden's collusive suffering of judgment in the divorce proceeding. (A.33-34). See, e.g., Gillette Co. v. Provost, 91 Mass.App.Ct. 133, 141(2017) ("The privilege does not attach... where it is not the statements themselves that are said to be actionable, such as where the statements are being used as evidence of the defendant's misconduct").

An appellate court reviews the allowance of a motion to dismiss pursuant to Mass.R.Civ.P. 12(b)(6) de novo. Galiastro v. Mortgage Elec. Registration Sys., 467 Mass. 160, 164 (2014) and case cited. See also, Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011)(orders on motions to dismiss are legal conclusions that an appellate court reviews de novo).

The sufficiency of the factual allegations in a complaint is tested under Mass.R.Civ.P. 12(b)(6) by application of several well-established principles.

First, the court must accept as true all the facts alleged in the complaint and draw all reasonable inferences from those facts in the plaintiffs' favor. Blank v. Chelmsford Ob/Gyn, P.C.,

420 Mass. 404, 407 (1995); Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 (2004); Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 223 (2011); Magliacane v. City of Gardner, 483 Mass. 842, 848 (2020).

Second, under the principles of notice pleading codified in Mass.R.Civ.P. 8(a), a complaint is sufficient if "it sketches the bare silhouette of a cause of action." Stevens v. Nagel, 64 Mass.App.Ct. 136, 140 (2005), citing and quoting from Brum v. Dartmouth, 44 Mass.App.Ct. 318, 322 (1999), S.C. 428 Mass. 684 (1999) and another case. Additional facts supporting the cause of action are developed through discovery. Jensen v. Daniels, 57 Mass.App.Ct. 811 n.11 (2003).

Third, there is no requirement that a complaint state the correct substantive theory of the case. "[A] complaint is not subject to dismissal if it would support relief on *any* theory of law." Gallant v. Worcester, 383 Mass. 707, 709 (1981), quoting from Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 89 (1979) (emphasis in original).

Fourth, "[w]hat is required at the pleading stage are factual allegations plausibly suggesting (not

merely consistent with) an entitlement to relief." Greenleaf Arms Realty Trust I, LLC v. New Boston Fund, Inc., 81 Mass.App.Ct. 282, 288 (2012); Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). See also, Harrington v. Costello, 467 Mass. 720, 724 (2014) (a complaint is sufficient to withstand a motion to dismiss if the factual allegations "plausibly suggest" entitlement to relief, i.e., the allegations raise the right to relief "above the speculative level"). "The critical question [at the pleading stage] is whether the claim, viewed holistically, is made plausible by 'the cumulative effect of the factual allegations' contained in the complaint." Lopez v. Commonwealth, 463 Mass. 696, 712 (2012).

Fifth, under rule 12(b)(6), "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Flomenbaum v. Commonwealth, 451 Mass. 740, 750-751 (2008), quoting from Nader v. Citron, 372 Mass. 96, 98 (1977).

Sixth, "[i]n passing on a rule 12(b)(6) motion, a court is not to consider the unlikelihood of the

plaintiff's ability to produce evidence to support otherwise legally sufficient complaint allegations... however improbable appear the facts alleged... and not withstanding expressions of denial and incredulousness as to the ultimate proof by the defendants." Brum v. Dartmouth, *supra* at 322(internal citations omitted).

In sum, an appellate court must determine "whether the factual allegations in the complaint are sufficient, as a matter of law, to state a recognized cause of action or claim, and whether such allegations suggest an entitlement to relief." Dunn v. Genzyme Corporation, 486 Mass. 713, 717 (2021). See also, Dartmouth v. Greater New Bedford Regional Vocational Tech. High Sch. Dist., 461 Mass. 366, 374 (2012); Shapiro v. City of Worcester, 464 Mass. 261, 266 (2013); A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transp. Auth., 479 Mass. 419, 424 (2018).

ARGUMENT

This case concerns the non-evidentiary privilege known as the "litigation privilege." "The litigation privilege generally precludes civil liability based on statements by a party, counsel or witness in the

institution of, or during the course of, a judicial proceeding, as well as statements preliminary to litigation that relate to the contemplated proceeding." Haverhill Stem LLC v. Jennings, 99 Mass.App.Ct. 626, 636 (2021) (internal quotations and citations omitted). "The immunity provided by this doctrine rests upon long recognized policy considerations." Sullivan v. Birmingham, 11 Mass.App.Ct. 359, 361 (1981), quoting from Sriberg v. Raymond, 370 Mass. 105, 109 (1976). With respect to parties to judicial proceedings, the privilege "is based upon the public interest in according to all [persons] the utmost freedom of access to the courts of justice for the settlement of private disputes." Restatement (Second) of Torts, § 587, comment a (1977). With respect to witnesses, the "function of witnesses is of fundamental importance in the administration of justice. The final judgment of the tribunal must be based upon the facts as shown by their testimony, and it is necessary therefore that a full disclosure not be hampered by fear of private suits for defamation." Restatement (Second) of Torts, § 588, comment a (1977). With respect to attorneys, the privilege "is based upon a public policy of

securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for the clients." Restatement (Second) of Torts, § 586, comment a (1977). See Correllas v. Viveiros, 410 Mass. 314, 320 n.5 (1991), quoting §§ 587 and 588 of the Restatement.

The Appeals Court expressed the policy considerations underlying the litigation privilege in Gillette Co. v. Provost, *supra* at 141, quoting from Correllas v. Viveiros, supra at 320:

> The privilege has its origins in two policy considerations, both concerned with giving litigants the freedom to speak freely in order to promote the interests of justice. First, "an absolute privilege is favored because any final judgment may depend largely on testimony of [a] party or witness, and full disclosure, in the interests of justice, should not be hampered by fear of an action for defamation."

It is obvious that the policy considerations underlying the litigation privilege all focus on the truth-seeking function of the adversary system of justice in this country, with the "trial [serving] as the pivotal truth-seeking event." In the Matter of a Juvenile, 485 Mass. 831, 835 (2020). See also, Commonwealth v. Edwards, 444 Mass. 526, 535 (2005) (Massachusetts adopts the doctrine of forfeiture by wrongdoing because it furthers the truth-seeking

function of the adversary process) and Alberts v. Devine, 395 Mass. 59, 67 (1985) (as a general matter, "society is entitled to every person's evidence in order that the truth may be discovered"). In an early case, Hoar v. Wood, 44 Mass. 193, 194 (1841), Chief Justice Shaw expressed the policy considerations supporting the privilege:

> Great latitude of remark and observation is properly allowed to all persons, both parties and counsel, in the conduct and management of all proceedings in the course of the administration of justice. It is for the interest of the public, that great freedom be allowed in complaints and accusations, however, severe, if honestly made, with a view to have them inquired into, to have offenses punished, grievances redressed, and the laws carried into execution ...and they are only restrained by this rule, viz., that they shall be made in good faith, to courts or tribunals having jurisdiction of the subject, and power to hear and decide the matter of complaint, or accusation, and that they are not resorted to as a cloak for private nuisance.

The Court indicated in Hoar case that the privilege accorded to parties and their counsel to speak freely and without threat of retribution does not apply when the legal proceedings themselves are not *bona fide*, i.e., are not carried out "with a view to elicit the truth from a witness... ." Hoar v. Wood, 44 Mass. 193, 197 (1841). This writer is not aware of a single case in Massachusetts where the litigation privilege

(and that is exactly what it is, a "privilege" available only to those who participate in, or contemplate, bona fide legal proceedings) has been extended to legal proceedings undertaken for a purpose perverse to the search for truth.

In Haverhill Stem LLC v. Jennings, 99 Mass.App.Ct. 626, 636 (2021), the Appeals Court stated the "[t]he purpose of the doctrine is to protect parties, counsel, and witnesses so that they may speak freely while asserting their legal rights or participating in judicial proceedings." "In order for the litigation privilege to apply, the key inquiry is 'whether a proceeding is sufficiently judicial or quasi judicial in nature." The Patriot Group, LLC v. Edmands, 96 Mass.App.Ct.478, 485 (2019), quoting from Fisher v. Lint, 69 Mass.App.Ct. 360, 366 (2007). Plaintiffs suggest that a legal proceeding that is disguised as a search for the truth but is in actuality a collusive suffering of judgment by a debtor to effect a transfer of assets to his spouse or other insider in fraud of creditors, is not the type of legal proceedings that would satisfy the requirement of being "sufficiently

judicial in nature" to allow the parties or their counsel to assert the litigation privilege.

Based on the factual allegations in the plaintiffs' complaint, the von Thaden divorce was in no sense a search for the truth, nor was it an adversarial process. The parties (who were the only witnesses) were encouraged and guided by the defendant to testify falsely on the matters that the defendant knew the court would rely on in making a division of marital property. The proposed findings of fact and rationale prepared by the defendant and submitted to the court as an agreement of the parties had a single purpose: to prevent, not assist, the judge in carrying out his judicial duty to fairly and equitably divide the marital assets according to law.

Another principle that pervades Massachusetts case law is that the litigation privilege applies first and foremost to the "content" of statements made during judicial proceedings or made preliminary to judicial proceedings if contemplated in good faith. Sriberg v. Raymond, *supra* at 108; Correllas v. Viveiros, *supra* at 320-321. See also, Aborn v. Lipson, 357 Mass. 71, 72 (1970) ("It is well established that statements made by a witness or

party during trial, if 'pertinent to the matter in hearing,' are protected with an absolute privilege against an action for defamation. It is more important that witnesses be free from the fear of civil liability for what they say than that a person who has been defamed by their testimony have a remedy"). The public policy that is served by a rule of full disclosure is based on the fundamental understanding and recognition that the interests of justice are best served by the free flow of information. The evidence presented to the court in the von Thaden divorce was carefully programmed to deceive the judge. The interests of justice are never served when the testimony of the witnesses is constrained or channeled to achieve a pre-conceived, illegitimate result.

In Rice v. Coolidge, 121 Mass. 393, 395-396 (1876), the Supreme Judicial Court considered a case in which the defendants were accused of suborning witnesses to testify falsely in a divorce trial in Iowa that had already gone to judgment. The Court assumed without deciding that the plaintiff could not maintain an action against the witnesses based on their testimony in the Iowa case.

> But it does not follow that [the plaintiff] may not maintain an action against those who, with malice and intent to injure her, procured and suborned those witnesses to testify falsely. The reasons why the testimony of witnesses is privileged are that it is given upon compulsion and not voluntarily, and that, in order to promote the most thorough investigation in courts of justice, public policy requires that witnesses shall not be restrained by the fear of being vexed by actions at the instance of those who are dissatisfied with their testimony. But those reasons do not apply to a stranger to a suit who procures and suborns false witnesses, and the rule should not be extended beyond those cases which are within its reasons.

The Court further indicated that although the parties to the Iowa divorce could not retry the case on its merits while the judgment remained in force, "yet any person who was not a party to the action, or in privity with a party, may in a collateral action impeach the judgment and overhaul the merits of the former action." Id. at 396.

In the instant case, the judge applied the litigation privilege without any consideration as to whether application of the privilege in this instance enhanced or diminished the truth-seeking function. This constituted error. Massachusetts law is more nuanced and requires a factual, case-by-case inquiry to determine if the defendant's conduct is consistent with the public policy objectives upon which the

privilege is based. "Whether an absolute privilege applies ....is determined on a case-by-case basis, after a fact-specific analysis." The Patriot Group, LLC v. Edmands, 96 Mass.App.Ct.478, 484 (2019), quoting from Mack v. Wells Fargo Bank, N.A., 88 Mass.App.Ct. 664, 668 (2015), which in turn quotes Giuffrida v. High Country Investor, Inc., 73 Mass.App.Ct. 225, 242 (2008). "The rule in Massachusetts has long been that absolute privilege is limited to comparatively few cases." Vigoda v. Barton, 348 Mass. 478, 484 (1965). The person asserting the litigation privilege bears the burden of showing that he or she is entitled to the privilege. Mack, *supra* at 668. Here, the defendant utterly failed to carry that burden.

The Superior Court judge also erred in failing to recognize that the privilege does not apply when liability is sought based on the attorney's own misconduct. Harmon Law Offices, P.C. v. Attorney General, 83 Mass.App.Ct. 830, 837 n.9 (2013) (noting that "a law firm may be liable under c. 93A if it engages in conduct beyond the functions of traditional representation"). In Kurker v. Hill, *supra* at 192, the Appeals Court stated that when the

attorney is personally engaged in tortious conduct with his clients, the privilege does not protect the attorney from liability for such conduct, and a dismissal of the action against the attorney under rule 12(b)(6) is improper. Id. at n.8. The privilege does not "encompass attorneys' conduct in counselling and assisting their clients in business matters generally." The Patriot Group, LLC v. Edmands, *supra* at 484, quoting from Mack v. Wells Fargo Bank, N.A., *supra* at 667, which in turn quotes from Kurker v. Hill, *supra* at 192. In a recent case, the Appeals Court held that "'the privilege does not attach ...where it is not the statements themselves that are said to be actionable,'... [but instead] the statements are being used as evidence of the defendants' misconduct." Haverhill Stem LLC v. Jennings, *supra* at 636-637, quoting from Gillette Co. v. Provost, *supra* at 141-142. See also, 58 Swansea Mall Drive, LLC v. Gator Swansea Prop., LLC, 2016 U.S. Dist. LEXIS 141384 (D.Mass. October 12, 2016) and Larson v. Perry, 2020 U.S. Dist. LEXIS 52937 (D.Mass. March 27, 2020). The Federal cases are included in the Addendum.

It is the plaintiffs' position that, where an attorney's conduct is wholly inconsistent with the public polices supporting the privilege, the attorney is not entitled to the privilege for essentially the same reasons that a party is not entitled to invoke the privilege when the party acts with malice and in bad faith. Robinson v. Van Auken, 190 Mass. 161, 166 (1906); Seelig v. Harvard Cooperative Society, 355 Mass. 532, 538 (1969). See also, Sheehan v. Tobin, 326 Mass. 185, 193 (1950) ("The lawful excuse afforded by the privileged occasion may be lost 'because of the publisher's lack of belief or reasonable grounds for belief in the truth of the defamatory matter...; because the defamatory matter is published for some purpose other than that for which the particular privilege is given...; because the publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege...; or because the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privilege,'" quoting from Restatement: Torts, § 599, comment a.

"It is important to keep in mind that when a party abuses process his tortious conduct injures not only the intended target but offends the spirit of the legal procedure itself." Board of Education v. Farmingdale Classroom Teachers Assoc., Inc., 38 N.Y. 2d 397, 400-401 (1975)("While it is true that public policy mandates free access to the courts for redress of wrongs... and our adversarial system cannot function without zealous advocacy, it is also true that legal procedure must be utilized in a manner consonant with the purpose for which that procedure was designed. Where the process is manipulated to achieve some collateral advantage, ...the tort of abuse of process will be available to the injured party." Id. at 404 (internal citations omitted). This case is included in the Addendum.

In Correllas v. Viveiros, *supra* at 323, the Supreme Judicial Court ruled that where the question of the application of the privilege is "somewhere on the borderline," the issue can only be determined after a "careful, fact-specific analysis." Accord, Fisher v. Lint, *supra* at 365-366. The Superior Court judge failed to recognize that, even if the judge himself honestly believed that the litigation

privilege applied, there exists a substantial question of fact as to whether the defendant lost the benefit of the protection afforded by the privilege by his abuse of the privilege. That is a question to be determined by the jury. Brow v. Hathaway, 95 Mass. 239, 243 (1866).

CONCLUSION

For the reasons set forth herein, the order allowing defendant's motion to dismiss should be reversed because the factual allegations of the complaint are sufficient to state a cause of action under all three counts of the complaint and the defendant has not carried his burden of showing that he is immune from civil liability under the litigation privilege. The case should be remanded to the Superior Court for further proceedings.

Respectfully submitted,
Michael J. Bassichis, Sylvia E. Freed, Lower Cape Plastering LLC and Max Makowsky, by their attorney

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Dated: June 22, 2021

ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2072CV0263

MICHAEL J. BASSICHIS and others[1]

vs.

MICHAEL I. FLORES

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

Michael Bassichis, Sylvia Freed, Lower Cape Plastering, LLC ("Lower Cape"), and Max Makowsky (collectively, the "plaintiffs") bring the instant action against the defendant, Michael Flores ("Attorney Flores" or "the defendant"), alleging he colluded with his client, Kimberly Von Thaden ("Ms. Von Thaden"), to place assets beyond the reach of the plaintiffs, who were creditors of Ms. Von Thaden's former husband, William Von Thaden ("Mr. Von Thaden"). Specifically, the plaintiffs claim that the defendant actively participated in a fraudulent transfer of property (Count I), that he committed civil conspiracy based on a concerted action (Count II), and that he violated G. L. c. 93A, §§ 9, 11. This matter is presently before the Court on the defendant's Motion to Dismiss, pursuant to Mass. R. Civ. P. 12(b)(6). For the reasons discussed below, the defendant's motion is ALLOWED.

BACKGROUND[2]

Mr. Von Thaden owned a successful construction business, Von Thaden Builders, Inc. ("Von Thaden Builders"), which for many years provided for the financial needs of his family.

[1] Sylvia E. Freed, Lower Cape Plastering, LLC, and Max Makowsky.

[2] The facts are taken from the complaint and for the purposes of this motion, the factual allegations as well as the reasonable inferences therefrom are taken as true. *Curtis* v. *Herb Chambers 1-95, Inc.*, 458 Mass. 674, 676 (2011). Additional facts are supplied by public documents, including those of this Court as well as the Probate Court, of which this court may take judicial notice. See *Reliance Co.* v. *City of Boston*, 71 Mass. App. Ct. 550, 555 (2008) (court may take judicial notice of records of other courts in related proceedings in motion to dismiss).

However, by 2014, the construction business was no longer profitable. Around the same time, Mr. Von Thaden's personal investment portfolio suffered substantial losses. Further contributing to his financial demise, Mr. Von Thaden developed a drug addiction.

During this time, each of the plaintiffs entered into contracts with Mr. Von Thaden or Von Thaden Builders. Michael Bassichis and Sylvia Freed hired Von Thaden Builders to raze their Wellfleet home. The project was never completed and they resorted to hiring a replacement contractor, costing them $55,386.35 more than the original contract with Von Thaden Builders. Lower Cape Plastering was a subcontractor on several of Von Thaden Builders' projects, and was never paid $20,500 for completed work. Max Makowsky made a personal loan to Mr. Von Thaden, of which $45,000 was never repaid.

Ms. Von Thaden, represented by Attorney Flores, filed for divorce in October of 2016. In his opening statement at the divorce trial, Attorney Flores represented to the Probate Court that the parties were essentially in agreement with regard to the division of property, namely, that Ms. Von Thaden would receive all assets. However, Ms. Von Thaden was nonetheless seeking a judgment after trial because Mr. Von Thaden anticipated filing for bankruptcy and a judgment after trial would place these assets beyond the reach of Mr. Von Thaden's creditors.

Ms. Von Thaden, through the defendant, presented a case of "dissipation;" Mr. Von Thaden had dissipated the marital assets to the extent that Ms. Von Thaden was entitled to all remaining assets. Mr. Von Thaden did not offer evidence in his defense. After reviewing the evidence, and in detailed Findings of Fact and Conclusions of Law, the Probate Court judge found both parties contributed equally to the marriage and valued the marital estate at approximately $776,000.[3] However, the court found that in the eighteen months leading up to

[3] More detailed findings as articulated by the Probate Court can be found in the plaintiffs' related cases, which have been consolidated: *Max Makowsky* vs. *William Von Thaden*; *Lower Cape Plastering, LLC* vs. *William Von Thaden*,

the divorce, Mr. Von Thaden had dissipated approximately $896,000 from retirement and college savings accounts, and encumbered the marital real estate in the amount of approximately $510,000. As a result, he concluded that Mr. Von Thaden had already taken his share of the marital assets, and found that an equitable distribution required the remaining assets be given to Ms. Von Thaden.

In December of 2017, Mr. Von Thaden filed for chapter 7 bankruptcy. The plaintiffs were named as creditors in that proceeding. On April 18, 2019, an order of Chapter 7 discharge entered in Mr. Von Thaden's bankruptcy case.

DISCUSSION

A. The Standard of Review

A motion to dismiss for failure to state a claim upon which relief may be granted, pursuant to Mass. R. Civ. P. 12(b)(6), permits "prompt resolution of a case where the allegations in the complaint clearly demonstrate that the plaintiff's claim is legally insufficient." *Harvard Crimson, Inc.* v. *President & Fellows of Harvard Coll.*, 445 Mass. 745, 748 (2006). To survive a motion to dismiss, a complaint must set forth the basis for the plaintiff's entitlement to relief with "more than labels and conclusions." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). At the pleading stage, Mass. R. Civ. P. 12(b)(6) requires the complaint to set forth "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief...." *Id.*, quoting *Bell Atl. Corp.*, 550 U.S. at 557. A motion to dismiss must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 (2004) (further citation omitted).

Kimberly Von Thaden, and both William and Kimberly in their capacities as Trustees and Beneficiaries of the Von Thaden Realty Trust; and *Michael Bassichis and Sylvia Freed* vs. *William Von Thaden, William and Kimberly as Trustees and Beneficiaries of Von Thaden Realty Trust, and Von Thaden Builders, Inc.* (Docket 1772CV00148).

The defendant contends that the plaintiffs' claims are barred by the litigation privilege. The litigation privilege protects an attorney's statements made prior to, in the institution of, or during and as part of a judicial proceeding. *The Patriot Group, LLC* v. *Edmands*, 96 Mass. App. Ct. 478, 484 (2019) (quotations omitted). In other words, "statements made in the course of a judicial proceeding that pertain to that proceeding are absolutely privileged and cannot support civil liability." *Id.* at 484-485 (internal quotations and further citations omitted). The privilege protects speech and communication; it does not protect actions taken by an attorney. *Gillette Co.* v. *Provost*, 91 Mass. App. Ct. 133, 134 (2017). In short, the statements cannot be the basis of civil liability, but they can be *evidence* of civil liability. *Id.* (emphasis added). The privilege is absolute; where it applies, it provides a complete defense to a claim even if the offensive statements are uttered maliciously or in bad faith. *Doe* v. *Nutter, McClennen & Fish*, 41 Mass. App. Ct. 137, 140 (1996).

Taking the allegations in the complaint as true, Ms. Von Thaden obtained a commitment from her husband to cooperate in transferring all the marital assets to her during their divorce. After obtaining his commitment, Ms. Von Thaden retained the defendant to represent her. The defendant "orchestrated" this "collusive divorce," after which Mr. Von Thaden would declare bankruptcy, through misrepresentations to the probate court alleging Mr. Von Thaden "dissipated" the marital estate. As a result of these misrepresentations, the probate court judge allowed all assets to be transferred to Ms. Von Thaden pursuant to the divorce. Evidence of these intentions were stated in the defendant's opening statement to the court at the trial; the defendant informed the court that Ms. Von Thaden wanted a trial to prevent Mr. Von Thaden's creditors from reaching assets transferred to her during the divorce. The plaintiffs contend that

the resulting conveyance of property to Ms. Von Thaden was fraudulent both because the parties intended to defraud creditors and because the transfers rendered Mr. Von Thaden insolvent.

The defendant's representations made in court while representing his client, even if made to mislead the court, to defraud creditors, or interfered with a business relationship, are protected by the litigation privilege. *Doe*, 41 Mass. App. Ct. at 140. Therefore, the statements made by the defendant in court during the divorce trial cannot be the basis of civil liability against the defendant. *Id.*

The plaintiffs argue, however, that the defendant *orchestrated* Ms. Von Thaden's plan to fraudulently transfer the martial property during the divorce proceeding, which is conduct as opposed to communications, and therefore is not protected by the privilege. This argument is unavailing. "The absolute privilege which attaches to those statements protects the maker from any civil liability based thereon... . To rule otherwise would make the privilege valueless if an individual would then be subject to liability under a different theory." *The Patriot Group, LLC*, 96 Mass. App. Ct. at 484 (internal quotations omitted). In essence, the flaw in the plaintiffs' argument is that it is the misrepresentations made to the court that form the basis of their claim; according to the complaint, if the defendant had not misrepresented the circumstances of the marital estate, Mr. Von Thaden would allegedly have been awarded a portion of the estate, which would have been available to creditors such as the plaintiffs. Therefore, it is the defendant's statements made in court, his misrepresentations, that constitute the basis of their claims. Characterizing the defendant's statements as "orchestrating" fraud does not allow the plaintiffs to redefine the "statements" as "conduct" to avoid the privilege. *Id.*

The plaintiffs cite to *Gillette Co.*, to support their argument that it is the defendant's conduct that underlies their claims. However, as discussed above, the facts of the present case

distinguishable from those in *Gillette Co.* In that case, Gillette Company sent letters threatening a start-up company with baseless lawsuits, and ultimately filed a baseless lawsuit, as a tactic to prevent new competition from entering the razor market. The court decided the litigation privilege did not attach in those circumstances where it was not the letters themselves that were said to be actionable, but rather the act of filing an allegedly groundless lawsuit, which was *evidence* of an unfair and deceptive business practice. *Gillette Co.*, 91 Mass. App. Ct. at 141. Here, as alleged in the complaint, it is the misrepresentations themselves that orchestrated the alleged fraud; Ms. Von Thaden allegedly created the plan to fraudulently convey the property and the defendant orchestrated it during the divorce trial. Therefore, it is the words themselves that form the basis for the plaintiffs' claim, which, as discussed above, are protected by the litigation privilege. *The Patriot Group, LLC*, 96 Mass. App. Ct. at 484. Cf. *Gillette Co.*, 91 Mass. App. Ct. at 141 (privilege does not attach where it is not the words themselves that are actionable).

The plaintiffs' remaining claims for conspiracy and violations of G. L. c. 93A are likewise barred by the litigation privilege. Specifically, both the conspiracy claims and the G. L. c. 93A claims hinge on the defendant's misrepresentations made to secure the conveyance of property to Ms. Von Thaden. Having decided the litigation privilege attaches in these circumstances, the plaintiffs' complaint fails to state a claim upon which relief may be granted.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendant's motion to dismiss is **ALLOWED**.

December 28, 2020

Mark C. Gildea
Justice of the Superior Court

A true copy, Attest:

Clerk

58 Swansea Mall Drive, LLC v. Gator Swansea Prop., LLC

United States District Court for the District of Massachusetts

October 12, 2016, Decided; October 12, 2016, Filed

CIVIL ACTION NO. 15-13538-RGS

Reporter
2016 U.S. Dist. LEXIS 141384 *

58 SWANSEA MALL DRIVE, LLC v. GATOR SWANSEA PROPERTY, LLC

Prior History: *58 Swansea Mall Drive, LLC v. Gator Swansea Prop., LLC, 2016 U.S. Dist. LEXIS 72061 (D. Mass., June 2, 2016)*

Core Terms

lease, default, notices, lawsuit, erect

Counsel: [*1] For 58 Swansea Mall Drive LLC, Plaintiff: Karen A. Pickett, LEAD ATTORNEY, Pickett Law Offices, P.C., Boston, MA.

For Gator Swansea Property LLC, Defendant: Benjamin Nigro, LEAD ATTORNEY, PRO HAC VICE, North Miami Beach, FL; Ricardo A. Reyes, LEAD ATTORNEY, PRO HAC VICE, Tobin & Reyes, P.A., Boca Raton, FL; Sanford F. Remz, LEAD ATTORNEYS, Anthony B. Fioravanti, Yurko Salvesen & Remz, P.C., Boston, MA.

Judges: Richard G. Stearns, UNITED STATES DISTRICT JUDGE.

Opinion by: Richard G. Stearns

Opinion

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS

STEARNS, D.J.

Defendant Gator Swansea Property, LLC, seeks to dismiss supplemental allegations and claims brought by plaintiff 58 Swansea Drive, LLC, as part of its Third Amended Complaint, asserting that they improperly rely on communications protected by the Massachusetts litigation privilege. At issue are four letters sent by Gator Swansea in July and August of 2016 claiming 58 Swansea in default of its lease for: (1) failure to make certain repairs; (2) non-payment of rent stemming from 58 Swansea's refusal to pay attorney's fees incurred by Gator Swansea in defending this case; and (3) 58 Swansea's permitting a tenant to erect a pylon sign panel on the leased premises. [*2] 58 Swansea alleges that these claims of default are brought in bad faith as part of a concerted campaign to force it out of the lease, in violation of *Mass. Gen. Laws ch. 93A, § 11*. 58 Swansea also seeks a declaration that its tenant has the right to erect the sign panel.[1]

In Massachusetts, "statements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding are absolutely privileged provided such statements relate to that proceeding." *Sriberg v. Raymond, 370 Mass. 105, 108, 345 N.E.2d 882 (1976)*; *see also Giuffrida v. High Country Investor, Inc., 73 Mass. App. Ct. 225, 242, 897*

[1] Gator Swansea styles its request as a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, but the motion in part attacks supplemental allegations offered by 58 Swansea in support of its Chapter 93A claim. To that extent, it is more properly understood as a motion to strike under *Rule 12(f)*. This point of procedure makes no difference to the outcome; *Rule 12(f)* motions are at times deployed to strike privileged matter from a complaint. *See Mansor v. JPMorgan Chase Bank, 183 F. Supp. 3d 250, 2016 U.S. Dist. LEXIS 55391, 2016 WL 1676482, at *2 (D. Mass. Apr. 26, 2016)*.

N.E.2d 82 (2008). The privilege also extends to statements "made preliminary to a proposed or contemplated judicial proceeding." Fisher v. Lint, 69 Mass. App. Ct. 360, 366, 868 N.E.2d 161 (2007). The privilege is intended to protect persons from retaliatory tort actions based on their participation in the judicial process. See Correllas v. Viveiros, 410 Mass. 314, 320, 572 N.E.2d 7 (1991); Restatement (Second) of Torts §§ 586-588. Gator Swansea claims that the default letters fall within the privilege because [*3] they "relate to" this action (or are in contemplation of future litigation over the lease). Consequently, 58 Swansea cannot assert them as a basis for liability.

This argument is meritless. The law draws a distinction between holding a speaker liable for the content of her speech, on the one hand, and using that speech as evidence of her misconduct, on the other. The litigation privilege applies in the former context, but not the latter. *See Capital Allocation Partners v. Michaud, 81 Mass. App. Ct. 1139, 967 N.E.2d 1157, 2012 WL 1948596, at *2 (Mass. App. Ct. 2012).* To give an illustration, the most common application of the privilege is to bar defamation actions brought against a speaker based on her statements in the course of a lawsuit for fear of undermining the truth-seeking function of the judicial process. *See, e.g.,* Correllas, 410 Mass. at 319-324; Sriberg, 370 Mass. at 108-109; Visnick v. Caulfield, 73 Mass. App. Ct. 809, 811-813, 901 N.E.2d 1261 (2009); Fisher, 868 N.E.2d at 167-170. Other causes of action that might impede the participation of litigants, counsel, or witnesses in the judicial process are also barred insofar as they rest on the content of a speaker's statements. For example, in Doe v. Nutter, McClennen & Fish, 41 Mass. App. Ct. 137, 668 N.E.2d 1329 (1996), the Massachusetts Appeals Court rejected the plaintiff's argument that a law firm's threat to sue in response to a Chapter 93A demand letter that she sent to a client of the firm gave rise to claims of invasion of privacy, intentional infliction of emotional distress, [*4] and violations of the Massachusetts Civil Rights Act. Id. at 138, 140-141.

By contrast, 58 Swansea's supplemental claims and allegations neither target the speaker (counsel who sent the letters) nor are they based on the potentially defamatory content of the letters themselves. Instead, the Complaint cites the notices of default as evidence of Gator Swansea's alleged bad faith in its dealings over the lease. Where a party uses legal mechanisms, such as letters from counsel, to terminate a contract in bad faith or to extract concessions from a plaintiff in arguable violation of Chapter 93A, the litigation privilege does not shield it from liability. *See Capital Allocation Partners, 81 Mass. App. Ct. 1139, 967 N.E.2d 1157, 2012 WL 1948596, at *1-2.* Moreover, the letter regarding the sign panel is evidence of the dispute that exists between the parties over interpretation of the terms of the lease. To suggest that no claims could ever arise from such a letter would lead to the absurd result that notices of default would never be admissible in litigation over a lease if they were sent prior to a "contemplated" lawsuit — as virtually all such notices are.

ORDER

For the foregoing reasons, defendant's motion to dismiss is DENIED.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

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Larson v. Perry

United States District Court for the District of Massachusetts

March 27, 2020, Decided; March 27, 2020, Filed

Civil Action No. 19-cv-10203-IT

Reporter
2020 U . S . Dist. LEXIS 52937 *

SONYA LARSON, Plaintiff, v. DAWN DORLAND PERRY, COHEN BUSINESS LAW GROUP, PC, and JEFFREY A. COHEN, Esq., Defendants.

Core Terms

defamation, plagiarized, print

Counsel: **[*1]** For Sonya Larson, Plaintiff: Andrew D. Epstein, LEAD ATTORNEY, Barker, Epstein & Loscocco, Boston, MA.

For Dawn Dorland Perry, Defendant: Howard M. Cooper, LEAD ATTORNEY, Todd & Weld, Boston, MA; Elizabeth E. Olien, Suzanne M. Elovecky, Todd & Weld, Boston, MA.

For Cohen Business Law Group, PC, Jeffrey A Cohen, Esquire, Defendants: Mark William Shaughnessy, Matthew H. Greene, LEAD ATTORNEYS, Boyle | Shaughnessy Law PC, Boston, MA.

Judges: Indira Talwani, *United States District* Judge.

Opinion by: Indira Talwani

Opinion

MEMORANDUM & ORDER

TALWANI, D.J.

Before the court are Defendants' Motions to Dismiss [#11], [#25]. Defendants Cohen Business Law Group, PC and Jeffrey A. Cohen seek dismissal of the Amended Complaint [#52] ("Complaint") on the basis that the court does not have personal jurisdiction over them. Further, these Defendants argue that, even if jurisdiction does exist, Plaintiff's claims against them fail as a matter of law because Defendants' alleged conduct is shielded by Massachusetts' litigation privilege. For the reasons set forth below, the court finds that it may exercise personal jurisdiction over these two Defendants under the undisputed facts that give rise to this action. The court further finds that **[*2]** the question of whether the litigation privilege bars this action is a fact-intensive inquiry not suitable for resolution on the pleadings. Accordingly, Defendants Cohen Business Law Group, PC and Jeffrey A. Cohen's Motion to Dismiss [#11] is DENIED.

Defendant Dawn Dorland Perry's motion seeks dismissal on the grounds that Plaintiff has not properly pleaded her claim of defamation and that,

even if Plaintiff has satisfied her pleading requirements, Plaintiff's action is barred because Defendant Dawn Dorland Perry is a limited purpose public figure and Plaintiff has not pleaded actual malice. Defendant Dawn Dorland Perry further seeks dismissal of Plaintiff's intentional interference with contract claims on the basis that Plaintiff failed to adequately plead that a third party breached a contract with Plaintiff. The court finds that Plaintiff has properly pleaded her defamation claim and that the question of whether Plaintiff is a limited purpose public figure is one that cannot be resolved on the pleadings. However, the court finds that Plaintiff has failed to plead an intentional interference with contract claim because the pleadings do not support Plaintiff's legal conclusion that [*3] third parties breached their agreements with Plaintiff. Accordingly, Defendant Dawn Dorland Perry's Motion to Dismiss [#25] is ALLOWED IN PART and DENIED IN PART.[1]

I. Factual Allegations Made in the Complaint

In or around 2015, Defendant Dawn Dorland Perry ("Dorland") donated a kidney to an anonymous recipient. Am. Compl. ¶ 9 [#52]. In July 2015, Dorland wrote a half-page letter to the anonymous recipient. Id. ¶ 10. This letter is referred to herein as the "Dorland Letter."

In 2015, Plaintiff Sonya Larson ("Larson") started writing a fictional short story called "The Kindest." Id. ¶¶ 18-19. The story is about a woman living in Boston who receives a kidney donation from a wealthy woman. Id. The Kindest includes a brief letter. Id. This letter is referred to herein as the "Larson Letter."

In February 2016, Larson entered into an agreement with Plympton Inc. ("Plympton"). Id. ¶ 27. This agreement gave Plympton the rights to sublicense The Kindest for publication to Audible, a company that publishes audiobooks online. Id. ¶¶ 27-28.

Plympton ultimately did sublicense to Audible. Id. ¶ 28. After The Kindest was accepted for publication, Larson changed the Larson Letter that she incorporated [*4] into the story so as to differentiate it from the Dorland Letter. Id. ¶ 29. Plympton paid Larson $125 for publishing the story with Audible. Id. ¶ 30.

In June 2016, Larson read a portion of The Kindest that did not contain the Larson Letter at a book reading. Id. ¶ 21. A mutual acquaintance of Larson and Dorland attended the reading and posted about The Kindest on Facebook. Id. ¶ 22. When Dorland learned that Larson wrote a story about kidney donation, she began accosting Larson with allegations that Larson had misappropriated Dorland's life experiences. Id. ¶¶ 22-23.

In August 2017, American Short Fiction ("ASF") agreed to publish a "slightly different version" of The Kindest in its magazine and online. Id. ¶ 31. ASF paid Larson $300 for the right to publish The Kindest for the duration of Larson's copyright. Id. Around May 2018, shortly after ASF published the online version of The Kindest, Dorland told ASF that Larson's story "plagiarized" the Dorland Letter. Id. ¶ 37.

Also in May 2018, the Boston Book Festival ("BBF") informed Larson that The Kindest won a competition she had entered earlier that year. Id. ¶ 35. As a result, The Kindest would be featured by BBF from August through [*5] October 2018. Id. In June 2018, Larson entered an agreement with BBF that granted BBF the right to publish The Kindest online and print and distribute up to 30,000 copies of The Kindest in the Boston area. Id. ¶ 36. Around that same time, Dorland heard that Larson had won the BBF competition and Dorland also told BBF that Larson had plagiarized the story. Id. ¶ 38.

In both cases, Dorland called and emailed staff at

[1] Defendant Dawn Dorland Perry has also requested a hearing on her motion. See Def.'s Mot. Hr'g [#28]. In light of the ongoing public health crisis and the court's determination that it can properly adjudicate the pending motions without oral argument, this request is denied.

the ASF and BBF "relentlessly" to tell them that Dorland had plagiarized the story. Id. ¶ 39. In addition to allegations of plagiarism, Dorland at various times demanded that ASF and BBF note that Dorland was an author of the work, that the work be pulled from both ASF and BBF, that ASF publish one of Dorland's works instead, and that Dorland be paid several thousand dollars. Id. Dorland also contacted and made similar allegations to the Bread Loaf Writers' Conference, a writer's organization with which Larson held a fellowship. Id. ¶ 41.

As a result of Dorland's accusations, ASF decided to remove The Kindest from ASF's website earlier than ASF had envisioned it would and in violation of its agreement with Larson. Id. ¶ 67. The BBF suggested to Larson that she change the language **[*6]** in the Larson Letter that was part of The Kindest before publication of the story so as to further distinguish it from the Dorland Letter. Id. ¶ 42. Larson agreed to modify the Fictional Letter and, after doing so, the BBF proceeded to print approximately 30,000 copies of the revised version of The Kindest. Id. ¶¶ 43-44. This version of The Kindest was registered with the ***United States*** Copyright Office with an effective date of December 17, 2018. Id. ¶ 44.

After these changes were made, Dorland allegedly continued to contact members of various writing communities in the ***United States*** to make similar complaints that Larson had plagiarized her. Id. ¶ 45.

The Dorland Letter was registered with the ***United States*** Copyright Office with an effective date of June 10, 2018. Id. ¶ 14. Also around June 2018, Dorland contacted the Boston Globe "to help her publicize her false claim of plagiarism" and otherwise "disparage Larson's reputation." Id. ¶ 52.

In late June 2018, Dorland hired Defendant Jeffrey Cohen, an attorney, of Cohen Business Law Group, PC to represent her. Id. ¶ 46. (Defendants Jeffrey Cohen and Cohen Business Law Group, PC are collectively referred to as the "Cohen Defendants" unless **[*7]** otherwise appropriate). In early July 2018, the Cohen Defendants were provided a copy of the version of The Kindest that was printed by BBF. Id. ¶ 47. On July 3, 2018, the Cohen Defendants sent a letter to the BBF alleging that The Kindest contained the Dorland Letter "in whole or in part." Id. ¶ 50; Exhibit 8, Cohen Letter [#52-8]. The Cohen Defendants demanded that BBF cease printing, copying, or distributing The Kindest and that unless BBF acknowledged that the Dorland Letter was incorporated into The Kindest, BBF would be liable for copyright infringement, including statutory damages of $150,000. Id.

In July 2018, the Cohen Defendants sent another demand letter to the BBF. This letter sought monetary compensation and full attribution to Dorland for The Kindest. Id. ¶ 55. Days before BBF was supposed to distribute Larson's story, the Cohen Defendants doubled the monetary demand. Id. Also in July 2018, the Boston Globe published an article based on statements made by Dorland accusing Larson of plagiarism. Id. ¶ 53.

The BBF ultimately rescinded its selection of The Kindest as the competition winner. Id. ¶ 57. After the BBF rescinded its selection, the Boston Globe published a second **[*8]** story publicizing the cancellation. Id. ¶ 54.

Although BBF had decided to not publish The Kindest, Dorland continued to call and email members of Larson's writing group through September 2018 to communicate that Larson had engaged in plagiarism and "artistic betrayal." Id. ¶ 60.

II. Procedural Background

Larson filed her Complaint [#1] in this ***District*** on January 30, 2019. The Cohen Defendants filed a Motion to Dismiss [#11] for lack of subject-matter jurisdiction, lack of personal jurisdiction, and failure to state a claim, pursuant to *Fed. R. Civ. P. 12(b)(1), (2),* and *(6),* and Dorland filed a Motion to Dismiss [#25] for failure to state a claim pursuant

to *Fed. R. Civ. P. 12(b)(6)*.

Plaintiff subsequently filed an Amended Complaint [#52] ("Complaint") with leave of court. The Complaint alleges: Intentional Interference by Dorland with Larson's ASF Contract (Count I) and Larson's BBF Contract (Count II); Intentional Interference with Larson's BBF Contract by Cohen Law (Count III) and by Attorney Cohen (Count IV); Unfair and Deceptive Acts and Practices by Cohen Law in Violation of *Mass. Gen. Laws ch. 93A* (Count V) and by Attorney Cohen (Count VI); Defamation against Dorland (Count VII); and Declaration of Rights - Declaratory Judgment (Count **[*9]** VIII). Am. Compl. ¶¶61-120 [#52]. Defendants filed Notices [#53], [#54] requesting dismissal of the Complaint on the basis of their arguments raised in their Motions to Dismiss [#11], [#25] the original Complaint [#1]. Plaintiff filed Oppositions [#55], [#56] to the renewed motions.

On February 26, 2020, the court held a hearing concerning the court's subject-matter jurisdiction over the action. Based on the parties' representations, the court found that there was an actual and ongoing controversy as to whether the version of The Kindest printed by BBF infringed on Dorland's copyright and that the controversy was of sufficient immediacy to provide the court jurisdiction to address Count VIII of the Complaint under the *federal Declaratory Judgment Act, 28 U.S.C. § 2201(a)*. The court found further that once the court's jurisdiction as to Count VIII is established, subject-matter jurisdiction extends to the remaining claims since they form part of the same case or controversy. See *28 U.S.C. § 1367*. Accordingly, the Cohen Defendants' Motion to Dismiss [#11] was denied in open court to the extent that they sought dismissal for lack of subject-matter jurisdiction. The court now addresses the remaining arguments raised in the **[*10]** Motions to Dismiss [#11], [#25].

III. Discussion

A. The Cohen Defendants' Motion to Dismiss

1. Personal Jurisdiction

The Cohen Defendants move to dismiss the Complaint as to the claims against them on the basis that the court does not have personal jurisdiction over them.

Two types of personal jurisdiction are recognized under the federal Constitution: "'general' (sometimes called 'all-purpose') jurisdiction and 'specific' (sometimes called 'case-linked') jurisdiction." *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1780, 198 L. Ed. 2d 395 (2017)*. Plaintiff does not argue that the court possesses general jurisdiction over the Cohen Defendants. Pl.'s Opp'n 12-15 [#55]. Instead, Larson asks the court to exercise specific personal jurisdiction over the Cohen Defendants. For specific jurisdiction, the court must consider: (1) whether the claims arise out of or are related to the defendant's in-state activities ("relatedness"), (2) whether the defendant has purposefully availed itself of the laws of the forum state ("purposeful availment"), and (3) whether the exercise of jurisdiction is reasonable under the circumstances ("reasonableness"). *Nowak v. Tak How Investments, Ltd., 94 F.3d 708, 712-13 (1st Cir. 1996)*.

It is Plaintiff's burden to establish that personal jurisdiction exists over Defendants. *A Corp. v. All Am. Plumbing, Inc., 812 F.3d 54, 58 (1st Cir. 2016)*. At this stage of the litigation, the **[*11]** court proceeds using the prima facie standard. *Rodriguez v. Fullerton Tires Corp., 115 F.3d 81, 84 (1st Cir. 1997)*. To do so, the court does not find facts, but merely determines "whether the facts duly proffered, fully credited, support the exercise of personal jurisdiction." Id. The facts proffered cannot merely be "unsupported allegations" but must consist of "evidence of specific facts" that allow a determination that jurisdiction exists. *A Corp., 812 F.3d at 58* (internal citations omitted). The court accepts Plaintiff's properly documented

allegations as true and construes them in the light most favorable to her. Id.

Here, the facts central to the jurisdictional analysis are not in dispute. On July 3, 2018, Cohen Law sent a letter to the BBF alleging that The Kindest contained the Dorland Letter and that "any decision to publish The Kindest would necessarily infringe [Dorland's] rights." Exhibit 8, Cohen Defendants' July 3, 2018 Letter [#52-8]. The letter stated that unless BBF complied with the terms set forth by Cohen, BBF would face "the full measure of penalties for statutory copyright infringement under *17 U.S.C. § 504(c)*, which . . . could be as high as $150,000 . . . ." Id. at 2. The letter was addressed to the BBF in Cambridge, Massachusetts. Id.

Based on these facts, both the relatedness **[*12]** element and the purposeful availment element of the minimal contacts analysis are satisfied.

Relatedness is shown where there is a "sufficient causal nexus between [the defendant's contacts] with [the forum] and [plaintiff's] causes of action." *Jet Wine & Spirits, Inc. v. Bacardi & Co., Ltd., 298 F.3d 1, 7 (1st Cir. 2002)*. Importantly, a defendant "need not be physically present in the forum state to cause injury . . . in the forum state." *N. Laminate Sales, Inc. v. Davis, 403 F.3d 14, 25 (1st Cir. 2005)*. There is no real dispute that the July 3, 2018 letter is related to Larson's cause of action. Indeed, the sending of the letter directly gave rise to the two causes of action: Larson contends that the letter knowingly misrepresented the facts and law to BBF in a manner that was intended to interfere with Larson's agreement with BBF, Am. Compl. ¶¶ 78, 84-86, 93, 101 [#52], and Larson further contends that the act of sending the letter, given that it allegedly contained misrepresentations of fact and law, was unfair or deceptive trade or commerce under *Mass. Gen. Laws ch. 93A*. Id. ¶¶ 96, 104.

Similarly, the undisputed facts demonstrate that the Cohen Defendants purposefully availed themselves of this forum. Purposeful availment is shown where a defendant "deliberately targets a behavior toward the society or economy of a particular **[*13]** forum." *Carreras v. PMG Collins, LLC, 660 F.3d 549, 555 (1st Cir. 2011)*. At bottom, the analysis is meant to ensure that defendants' contacts with the forum "proximately result from actions by the defendant himself," *Phillips v. Prairie Eye Ctr., 530 F.3d 22, 28 (1st Cir. 2008)*, and not from "random, fortuitous, or attenuated contacts." *Carreras, 660 F.3d at 555*. Here, it is not disputed that the Cohen Defendants purposefully directed a letter to a Massachusetts business, BBF, for the purpose of affecting BBF's business decisions. By doing so, the Cohen defendants could or should have "reasonably anticipate[d] being haled into court []here." *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)*.[2]

This leaves the court to assess the reasonableness of its exercise of personal jurisdiction over the Cohen Defendants. "The hallmark of reasonableness in the context of personal jurisdiction is 'fair play and substantial justice.'" *Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138, 150 (1st Cir. 1995)* (citing *International Shoe Co. v. State of Washington, 326 U.S. 310, 320, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*). Per the First Circuit, the court is to generally consider:

> (1) the defendant's burden of appearing in the forum state, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of

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[2]The arguments presented by the Cohen Defendants to rebut their purposeful availment of this forum are unpersuasive. Defendants argue that in their communications with Plaintiff included the disclaimer that "the only appropriate jurisdiction applicable to the dispute between our clients as to your client's infringement of her copyright is California, with the appropriate venue being Los Angeles" and a warning to Larson "that if Larson files suit in Massachusetts, it will swiftly move to dismiss the suit for lack of Jurisdiction." Defs.' Mem. 13 [#12]. The court is aware of no basis in law for Cohen Defendants' argument that it can unilaterally disclaim a forum's jurisdiction while still engaging in activity in the forum and the Cohen Defendants do not provide one.

all sovereigns in promoting substantive social policies.

A Corp., 812 F.3d at 61 (internal citation [*14] omitted). However, the reasonableness analysis will "typically play a larger role in cases—unlike this one—where the minimum contacts question is very close." C.W. Downer & Co. v. Bioriginal Food & Sci. Corp., 771 F.3d 59, 69 (1st Cir. 2014).

Here, the court finds that the reasonableness factors do not, together, weigh either strongly for or against assessing personal jurisdiction over the Cohen Defendants. There is certainly a burden placed on these California Defendants for appearing in a Massachusetts court. The court must take this burden seriously. See Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994) ("The burden associated with forcing a California resident to appear in a Massachusetts court is onerous" and is "entitled to substantial weight in calibrating the jurisdictional scales"). However, the remaining four reasonableness factors all weigh towards the court's exercise of jurisdiction. First, "[t]he forum state has a demonstrable interest in exercising jurisdiction over one who causes tortious injury within its borders." Ticketmaster-New York, 26 F. 3d at 211. Second, there is as much of a burden to Plaintiff litigating this matter in California, if not more, as there is to Defendants litigating it here. Furthermore, all or most of the relevant witnesses and records are located in Massachusetts. Third, the court finds that the interests [*15] of the juridical system do not tip the scales one way or the other. Fourth, the court finds that Massachusetts has a policy interest in being able to provide Larson, a resident of the commonwealth, "a convenient forum for . . . to redress injuries inflicted by out-of-forum actors." Sawtelle v. Farrell, 70 F.3d 1381, 1395 (1st Cir. 1995).

Weighing the multiple considerations together, the court finds that Plaintiff has succeeded in showing that Defendants' purposeful contacts with Massachusetts gave rise to her cause of action here. While the court takes seriously the burden imposed on the Cohen Defendants for being haled into a Massachusetts court, the exercise of personal jurisdiction over these Defendants under these facts does not offend considerations of fair play and substantial justice, and accordingly the exercise of personal jurisdiction is appropriate. International Shoe, 326 U.S. at 320.[3]

2. Failure to State a Claim due to the "Litigation Privilege"

The Cohen Defendants further argue that Plaintiff has failed to state a claim for which relief can be granted because the Cohen Defendants are shielded by a "litigation privilege." Defs.' Mem. 15 [#12]. In Massachusetts, "an attorney's statements are absolutely privileged 'where such statements are made by [*16] an attorney engaged in his function as an attorney whether in the institution or conduct of litigation or in conferences and other communications preliminary to litigation.'" Blanchette v. Cataldo, 734 F.2d 869, 877 (1st Cir.1984) (quoting Sriberg v. Raymond, 370 Mass. 105, 109, 345 N.E.2d 882 (1976)). Where the communication is to a prospective defendant, the proceeding to which it relates must be

[3] In recent cases, the First Circuit has remarked that the Massachusetts long-arm statute "may impose limits on the exercise of personal jurisdiction more restrictive than those required by the Constitution." A Corp., 812 F.3d at 59 (reviewing cases) (internal citation omitted). Here the Massachusetts long-arm statute is satisfied where the complaint alleges that Plaintiff "caus[ed] tortious injury by an act or omission in this commonwealth" by mailing a demand letter into the Commonwealth where that demand letter is alleged to misrepresent the applicable law so as to cause tortious injury. Mass. Gen. Laws ch. 223A, § 3(c). Courts have held that out-of-state defendants who knowingly send false representations into Massachusetts with the intent that they be relied on to the detriment of a Massachusetts resident are subject to personal jurisdiction under § 3(c). See Murphy v. Erwin-Wasey, Inc., 460 F.2d 661, 664 (1st Cir. 1972) ("Where a defendant knowingly sends into a state a false statement, intending that it should be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within the state"); see also The Scuderi Group, LLC v. LGD Tech., LLC, 575 F.Supp. 2d 312, 320 (D. Mass. 2008); Burtner v. Burnham, 13 Mass. App. Ct. 158, 163-64, 430 N.E.2d 1233 (1982).

"contemplated in good faith and . . . under serious consideration." *Sriberg, 370 Mass. at 109*.

The litigation privilege does not give a lawyer the freedom to act with impunity. As Judge Stearns recently wrote: "The law draws a distinction between holding a speaker liable for the content of her speech, on the one hand, and using that speech as evidence of her misconduct, on the other. The litigation privilege applies in the former context, but not the latter." *58 Swansea Mall Drive, LLC v. Gator Swansea Prop., LLC, No. CV 15-13538-RGS, 2016 U.S. Dist. LEXIS 141384, 2016 WL 5946872, at *1 (D. Mass. Oct. 12, 2016)* (citing *Capital Allocation Partners v. Michaud, 81 Mass. App. Ct. 1139, 967 N.E.2d 1157, 2012 WL 1948596, at *2 (Mass. App. Ct. 2012))*. The contours of the demarcation between privileged conduct and unprotected conduct "is determined on a case-by-case basis, after a fact-specific analysis." *Fisher v. Lint, 69 Mass. App. Ct. 360, 365-66, 868 N.E.2d 161 (2007)*.

Here, Plaintiff does not attempt to hold the Cohen Defendants liable for the contents of the letter, but plausibly alleges that the Cohen Defendants used the letter as a means to effectuate unlawful ends, specifically to interfere with the **[*17]** BBF contract and extract unlawful concessions from both the BBF and Plaintiff. Thus, Plaintiff has stated a claim for which she can be granted relief. See *58 Swansea Mall Drive, No. CV 15-13538-RGS, 2016 U.S. Dist. LEXIS 141384, 2016 WL 5946872, at *2* ("Where a party uses legal mechanisms, such as letters from counsel, to terminate a contract in bad faith or to extract concessions from a plaintiff in arguable violation of *Chapter 93A*, the litigation privilege does not shield it from liability").

The Cohen Defendants argue that their communications with BBF fall within the bounds of this privilege because "the Firm's statements were made in furtherance of protecting its client's intellectual property rights" and "its communications were limited to the potential publisher and the author's attorneys." Defs.' Mem. 17 [#12]. This defense, and the further requirement that the letter relate to proceedings "contemplated in good faith" and "under serious consideration" are questions of fact that cannot be resolved at this stage.

Accordingly, the Cohen Defendants' motion to dismiss on the basis of the litigation privilege is denied.

B. Dorland's Motion to Dismiss

1. Failure to State a Claim of Defamation

Defendant Dorland moves for dismissal of the Defamation **[*18]** count on two grounds. First, Defendant Dorland argues that Larson's Complaint fails to provide sufficient notice of the basis of her Defamation claim. Second, Defendant Dorland argues that Larson is a limited-purpose public figure and because Larson fails to allege actual malice, the Complaint fails as a matter of law. Both arguments are without merit.

First, Larson's Complaint has provided Defendant Dorland sufficient details of the basis of her defamation allegation. Larson alleges that, in May and June 2018, Dorland told both the ASF and the BBF that Larson plagiarized Dorland's work. Am. Compl. ¶¶ 37-38 [#52]. Larson further alleges that Dorland made these same allegations to Larson's employer and to a writer's organization to which Larson had applied for a fellowship. Id. ¶¶ 40-41. These factual allegations are specific enough to provide Dorland "a meaningful opportunity to mount a defense." *Benyamin v. Commonwealth Med. UMass Med. Ctr., Inc., No. 11-40126-FDS, 2011 U.S. Dist. LEXIS 73083, 2011 WL 2681195, at *2 (D. Mass. July 6, 2011)* (quoting *Diaz-Rivera v. Rivera-Rodriguez, 377 F.3d 119, 123 (1st Cir.2004))*.[4]

[4] Defendant Dorland argues for a heightened pleading standard for defamation cases, requiring that Plaintiff provide "the specific words

Equally unavailing is Defendant's argument that the defamation claim should be dismissed because Plaintiff is a limited-purpose public figure and Plaintiff has failed to plead that Dorland made allegedly **[*19]** defamatory statements with actual malice. "To determine whether a defamation plaintiff is a limited-purpose public figure, the First Circuit employs a two-pronged test: the defendants must prove (1) that a public controversy existed prior to the alleged defamation, and (2) that 'the plaintiff has attempted to influence the resolution of that controversy.' *Alharbi v. Theblaze, Inc., 199 F. Supp. 3d 334, 355 (D. Mass. 2016)* (citing *Lluberes v. Uncommon Prods., LLC, 663 F.3d 6, 13-14 (1st Cir. 2011)*). Although the question of whether Larson was a limited-purpose public figure is ultimately a question of law, *Pendleton v. City of Haverhill, 156 F.3d 57, 68 (1st Cir. 1998)*, the inquiry is "inescapably fact-specific." *Mandel v. Bos. Phoenix, Inc., 456 F.3d 198, 204 (1st Cir. 2006)*. Indeed, it is so fact-specific that it "does not always lend itself to *summary judgment*." *Lluberes, 663 F.3d at 14* (emphasis added). Here, the pleadings do not require the court to conclude that Larson voluntarily injected herself into a public controversy. Accordingly, dismissal is not appropriate on the basis that the Complaint failed to plead actual malice.

2. Failure to State a Claim of Intentional Interference with Larson's ASF and BBF Contracts

Finally, Defendant Dorland moves for dismissal of Larson's Intentional Interference with Contract claims against her because the Complaint "wholly fails to allege that either ASF or the BBF broke a contract with Ms. Larson." Def.'s Mem. 19 [#26]. **[*20]**

In Massachusetts, to prove intentional interference with contractual relations, a Plaintiff must prove that: "(1) he had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions." *G.S. Enterprises, Inc. v. Falmouth Marine, Inc., 410 Mass. 262, 272, 571 N.E.2d 1363 (1991)*. Accordingly, to show entitlement to relief, the factual allegations in the pleadings must give rise to the legal conclusion that ASF and BBF breached their contract with Larson. See also *Pure Distributors, Inc. v. Baker, 285 F.3d 150, 155 (1st Cir. 2002)* ("In order for the plaintiff to have a cause of action for tortious interference of contract, it is axiomatic that there must be a *breach* of that contract") (citing *Fury Imports, Inc. v. Shakespeare Co., 625 F.2d 585, 588 (5th Cir.1980)*).[5]

Here, the complaint alleges in pertinent part: First, that as a result of Dorland's communications with ASF, ASF "decided to pull The Kindest from the ASF website, earlier than it had envisioned it would and in violation of its agreement with Larson." Am. Compl. ¶ 67 [#52]. Second, the Complaint alleges that, as a result of Defendant Dorland's communications with BBF, BBF decided to "pull The Kindest from its One City/One Story project in breach of its **[*21]** agreement with Larson." Id. ¶ 75. On a motion to dismiss, the court would generally only assess whether these allegations were plausible and whether they supported the legal conclusions underlying the claims. However, it is appropriate for courts to look outside the four corners of a complaint where the record includes "documents the authenticity of which are not

that were used." Def.'s Mem. 14 [#26]. In so doing, Defendant misapprehends a remark made by the First Circuit in *Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 728 (1st Cir. 1992)*. See *Bishop v. Costa, 495 F. Supp. 2d 139, 140 (D. Me. 2007)* (rejecting the argument that Phantom Touring creates a heightened pleading standard for defamation and collecting cases from the courts of appeal for the proposition that defamation need only satisfy the notice pleading standards of *Fed. R. Civ. P. 8*).

[5] In contrast, a claim for intentional interference with an advantageous business relationship does not require Plaintiff to prove a breach of contract, but only, inter alia, interference with a "business relationship or contemplated contract of economic benefit." *Am. Private Line Servs., Inc. v. E. Microwave, Inc., 980 F.2d 33, 36 (1st Cir. 1992)* (citing *United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 551 N.E.2d 20 (1990)*).

disputed by the parties" or documents "central to plaintiffs' claims" and "sufficiently referred to in the complaint." *Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993)*. Here, the ASF and BBF contracts were referenced throughout the Complaint and Larson introduced the documents into the record as exhibits to the Complaint. Accordingly, the court incorporates these records into the pleadings.

Here, the legal conclusions drawn in the Complaint (i.e., breach of contract on the part of ASF and BBF) do not comport with the actual terms of the agreement. With regard to ASF, the agreement, which contains an integration clause, provides a grant of rights to ASF to publish The Kindest, including publishing the story on its website. See Exhibit D, ASF Publishing Agreement 2 [#52-4]. However, the agreement contains no promise by ASF as to the duration of any such publication, or indeed **[*22]** any promise to publish The Kindest at all. Id. Similarly, the BBF contract, which also contains an integration clause, also only grants rights to BBF to publish and distribute the story, but it does not contain any promise by BBF to actually include The Kindest in its One City/One Story project or to otherwise publish the work. See Exhibit E, BBF Agreement 2 [#52-5]. Since breach of contract is an essential element of Larson's Intentional Interference with Contract claims and the only support found in the pleadings to undergird this accusation are conclusory statements that ASF and BBF breached their agreements, Defendant Dorland's motion to dismiss these two claims is allowed.

IV. Conclusion

For the aforementioned reasons, the Cohen Defendants' Motion to Dismiss [#11] is DENIED and Defendant Dorland's Motion to Dismiss [#25] is ALLOWED IN PART as to counts I and II, but otherwise DENIED. Defendant Dorland's Motion for Hearing [#28] is DENIED.

IT IS SO ORDERED.

Date: March 27, 2020

/s/ Indira Talwani

United States District Judge

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Board of Education v. Farmingdale Classroom Teachers Asso.

Court of Appeals of New York

November 19, 1975, Argued ; December 29, 1975, Decided

No Number in Original

Reporter
38 N.Y.2d 397 *; 343 N.E.2d 278 **; 380 N.Y.S.2d 635 ***; 1975 N.Y. LEXIS 2360 ****; 91 L.R.R.M. 3058; 80 Lab. Cas. (CCH) P54,018

Board of Education of Farmingdale Union Free School District, Respondent, v. Farmingdale Classroom Teachers Association, Inc., Local 1889, AFT AFL-CIO, et al., Appellants

Prior History: [**1]** *Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO, 46 AD2d 794*, modified.

Appeal, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of said court, entered November 18, 1974, which affirmed an order of the Supreme Court at Special Term (Steven B. Derounian, J.), entered in Nassau County, denying a motion by defendants to dismiss the complaint. The following question was certified by the Appellate Division: "Was the order of this court, dated November 18, 1974, properly made?"

Disposition: Order modified, with costs, in accordance with the opinion herein and, as so modified, affirmed. Question certified answered in the negative.

Core Terms

abuse of process, cause of action, teachers, maliciously, damages, school district, subpoenas, injure, prima facie tort, legal procedure, allegations, conspiracy, harass, legal process, infliction

Case Summary

Procedural Posture
Defendants, a teachers' association and its attorney, filed a motion to dismiss plaintiff school district's action for abuse of process. The Appellate Division of the Supreme Court (New York) affirmed the trial court's denial of the motion and certified the question of whether its order was properly made. The teacher's association and its attorney appealed.

Overview
The school district contended that the association and its attorney were liable for abusing legal process by subpoenaing, with the intent to harass and to injure, 87 teachers and refusing to stagger their appearances. The school district was compelled to hire substitutes in order to avert a total shutdown and sought damages for the amount expended to engage the substitute teachers and an amount representing the aggregate salary of the subpoenaed teachers. The court held that the complaint was sufficient to state a cause of action for abuse of process. On its face, the allegation that the teachers' association and its attorney subpoenaed 87 persons with full knowledge that they all could not testify and that this was done maliciously with the intent to injure, harass, and inflict economic harm on the school district spelled out an abuse of process. Actual or special damages were properly alleged by asserting damages in the amount expended to hire substitutes. There was no justification for the claim for damages representing the salaries paid to the subpoenaed teachers in view of the fact that these were approved absences within the meaning of the collective bargaining agreement.

Outcome
The court modified the lower court's order by striking from the complaint the element of damages representing the salaries paid to the subpoenaed teachers. The court affirmed the order as modified and answered the certified question in the negative.

LexisNexis® Headnotes

Torts > Intentional Torts > Abuse of Process > Elements

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN1[] **Abuse of Process, Elements**

There are three essential elements of the tort of abuse of process. First, there must be regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act. Next, the person activating the process must be moved by a purpose to do harm without that which has been traditionally described as economic or social excuse or justification. Lastly, defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process.

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN2[] **Intentional Torts, Malicious Prosecution**

Legal procedure must be utilized in a manner consonant with the purpose for which that procedure was designed. Where process is manipulated to achieve some collateral advantage, whether it be denominated extortion, blackmail or retribution, the tort of abuse of process will be available to the injured party.

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN3[] **Intentional Torts, Malicious Prosecution**

The deliberate premeditated infliction of economic injury without economic or social excuse or justification is an improper objective which will give rise to a cause of action for abuse of process.

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN4[] **Intentional Torts, Malicious Prosecution**

The tort of abuse of process will be available to nonrecipients of process provided they are the target and victim of the perversion of that process.

Torts > Intentional Torts > Prima Facie Tort > General Overview

HN5[] **Intentional Torts, Prima Facie Tort**

A modern system of procedure, one which permits alternative pleading, should not blindly prohibit that pleading in the area of prima facie tort. Double recoveries will not be allowed, and once a traditional tort has been established the allegation with respect to prima facie tort will be rendered academic. Nevertheless there may be instances where the traditional tort cause of action will fail and plaintiff should be permitted to assert this alternative claim.

Headnotes/Summary

Headnotes

Process -- abuse of process -- elements of tort of abuse of process are: there must be regularly issued process compelling performance or forebearance of prescribed act; person activating process must be moved by purpose to do harm; and defendant must be seeking collateral advantage or corresponding detriment to plaintiff outside legitimate ends of process -- in action by board of education against teachers' association in which [**2] it was alleged that attorney for association, in connection with hearing before Public Employment Relations Board, issued subpoenas to 87 teachers to compel their attendance on same day and that association refused to stagger their appearances, complaint states cause of action for abuse of process; subpoenas were regularly issued process, defendant was motivated by intent to harass, and refusal to comply with request to stagger appearances was sufficient to support inference that subpoenas were being perverted to inflict economic harm on plaintiff.**

1. The three essential elements of the tort of abuse of process are: there must be regularly issued process, civil or criminal, compelling the performance or forebearance of some prescribed act; the person activating the process must be moved by a purpose to do harm without that which has been traditionally described as economic or social excuse or justification; and defendant must be seeking some collateral advantage or corresponding detriment to plaintiff which is outside the legitimate ends of the process.

2. In an action by a board of education against a teachers' association in which it was alleged that the attorney for the association, **[****3]** in connection with a hearing before the Public Employment Relations Board (PERB) arising out of the absence of teachers from their classes on two successive days, issued subpoenas duces tecum to 87 teachers to compel their attendance on the same day, and that the association refused to stagger the appearances of those teachers, the complaint states a cause of action for abuse of process. The subpoenas were regularly issued process, defendant was

motivated by an intent to harass and injure, and the refusal to comply with a reasonable request to stagger the appearances was sufficient to support an inference that the subpoenas were being perverted to inflict economic harm on plaintiff.

3. While it is standard practice to subpoena all witnesses for the first day of any judicial proceeding, on its face an allegation that defendant subpoenaed 87 teachers with knowledge that all could not testify and that this was done maliciously with intent to injure spells out an abuse of process. Although plaintiff was not a party to the PERB proceeding, it was not a disinterested bystander, and the deliberate premeditated infliction of economic injury is an improper objective giving rise to the cause **[****4]** of action.

4. Abuse of process is available to plaintiff, a nonrecipient of the subpoenas, where it was the target and victim of the perversion of that process.

5. By asserting damages in the amount expended to hire substitute teachers on the day the regular teachers were to appear pursuant to the subpoenas, plaintiff satisfied the requirement for an allegation of special damages. However, the claim for damages representing the salaries paid to the subpoenaed teachers is rejected, since those were approved absences within the collective bargaining agreement.

6. There is no obstacle to the maintenance of the second cause of action for punitive damages, contingent on the establishment of malice.

7. The third cause of action for prima facie tort is sufficient insofar as it refers to the intentional infliction of economic harm by forcing plaintiff to hire a great many substitute teachers. However, once a traditional tort has been established, the allegation with respect to prima facie tort will be rendered academic.

Counsel: *Stanley A. Immerman* and *Irving Perlman* for appellants. I. Only allegations of fact are deemed admitted for purposes of a motion to dismiss. *(Spock [****5] v Pocket Books, Inc., 48 Misc 2d 812; Cordes v California Ins. Co., 6 AD2d 985; Baka v Board of Educ. of City of N. Y., 8 Misc 2d 1022; St. Regis Tribe of Mohawk Indians v State of New York, 4 Misc 2d 110.)* II. An action for abuse of process will not lie where the process is lawfully used for the purpose for which it was created. *(Williams v Williams, 23 NY2d 592; Embassy Sewing Stores v Leumi Financial Corp., 39 AD2d 940; Hauser v Bartow, 273 NY 370; Dean v Kochendorfer, 237 NY 384; Beardsley v Kilmer, 236 NY 80; Dishaw v Wadleigh, 15 App Div 205.)* III. An action for punitive damages will not lie where the basic cause of action fails. *(Kallman v Wolf Corp., 25 AD2d 506; Browdy v State-Wide Ins. Co., 56 Misc 2d 610.)* IV. Prima facie tort will lie as a remedy only where facts do not fit traditional tort patterns and where the sole purpose of an intentional wrong is to injure plaintiff. *(Nationwide Carpets v Lenett Pub., 31 AD2d 911; Ruza v Ruza, 286 App Div 767; Brandt v Winchell, 286 App Div 249; Reinforce, Inc. v Birney, 308 NY 164; Coleman & Morris v Pisciotta, 279 App Div 656; Faulk v Aware, Inc., 3 Misc 2d [****6] 833; Rochette & Parzini Corp. v Campo, 301 NY 228.)* V. No action will lie for abuse of process where plaintiff was not a party either to the prior proceeding or the process.

Kendrick C. Smith for respondent. I. The complaint herein is sufficient upon a motion to dismiss pursuant to *CPLR 3211* (subd [a], pars 2, 3 and 7) and *CPLR 3211* (subd [c]). *(Walkovszky v Carlton, 18 NY2d 414; De Maria v Josephs, 41 AD2d 655; Griefer v Newman, 22 AD2d 696; Hauser v Bartow, 273 NY 370; Dean v Kochendorfer, 237 NY 384.)* II. Plaintiff need not be a party to the prior proceeding or process to maintain an action for abuse of process. *(Dishaw v Wadleigh, 15 App Div 205.)*

Judges: Wachtler, J. Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Fuchsberg and Cooke concur.

Opinion by: WACHTLER

Opinion

[*399] [280] [***638]** This appeal, arising in the context of an apparently bitter dispute between a school district and a teachers' association, concerns the seldom considered tort of abuse of process. The school district contends that the association and its attorney are liable for abusing legal process by subpoenaing, with the intent to harass and to injure, **[****7]** 87 teachers and refusing to stagger their appearances. As a result the school district was compelled to hire substitutes in order to avert a total shutdown. The issue on appeal is whether the complaint states a cause of action.

The controversy began in March, 1972 when a number of teachers employed by the district were absent from their classes on two successive days. The school district considered this illegal and the teachers' association was charged with violating the so-called Taylor law (*Civil Service Law, § 210, subd 1*) by the Public Employees Relations Board (PERB). The association vehemently denied having engaged in or condoned a strike and the matter was scheduled for a hearing to be held on October 5, 6, 10 and 11.

[*639]** The complaint contains the following version of the ensuing events. Sometime between September 5, 1972 and October 5, 1972, the attorney for the association prepared and issued judicial subpoenas duces tecum to 87 teachers in order to compel their attendance as witnesses on October 5. The school district learned of these subpoenas on or about October 3, 1972 when the individual teachers requested approved absences from teaching duties in accordance **[****8]** with the collective bargaining agreement. The complaint further alleges that the district's prompt oral request that the majority of teachers be excused from attendance at the initial hearing date was **[*400]** refused by the defendant. Indeed, the defendant refused even to grant the request to stagger the appearances. Consequently all 87 teachers attended the hearing and 77 substitute teachers were hired to replace them. Based on these allegations, the school district asserts three causes of action.

The first alleges an abuse of process in that the defendants wrongfully and maliciously and with intent to injure and harass the plaintiff issued 87 subpoenas with knowledge that all the teachers could not have possibly testified on the initial hearing date. As damages for this cause of action plaintiff seeks the amount expended to engage substitute teachers and an amount representing the aggregate salary of the subpoenaed teachers. The second cause of action reiterates the allegations of the first and prays for punitive damages; while the third alleges defendants' conduct constituted a prima facie tort. Defendants moved to dismiss primarily for failure to state a cause of action **[****9]** (*CPLR 3211, subd [a]*, par 7). Special Term denied this motion and the Appellate Division affirmed with one Justice dissenting.

In its broadest sense, abuse of process may be defined as the misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process. It has been observed that this tort is an obscure one *(Italian Star Line v United States Shipping Bd. Emergency Fleet Corp., 53 F2d 359, 361)* one which is rarely brought to the attention of the courts *(Dishaw v Wadleigh, 15 App Div 205, 209)* and the vital elements of which are not clearly defined (see, generally, Prosser, Torts [4th ed], § 121; 1 Harper & James, Torts, § 4.9; Harper, Torts, § 272; *Restatement, Torts, § 682*; Cooley, Torts [4th ed], § 131).

Abuse of process, i.e., causing process to issue lawfully but to accomplish some unjustified purpose, is frequently confused **[**281]** with malicious prosecution, i.e., maliciously causing process to issue without justification. Although much of the confusion is dispelled on careful analysis, it must be noted that both torts possess the common element of improper purpose in the use of legal process and both were **[****10]** spawned from the action for trespass on the case in the nature of **[***640]** conspiracy. In order to fully understand the nature of abuse of process a consideration of its origin and evolution is necessary.

Like many causes of action, abuse of process is rooted in the interstices of various common-law concepts. It is important to keep in mind that when a part abuses process his tortious **[*401]** conduct injures not only the intended target but offends the spirit of the legal procedure itself. Insofar as it relates to the harm inflicted on the individual, abuse of process finds its origin in the writ of conspiracy. The earliest meaning ascribed to this writ is extremely vague but refers to improper meddling in a legal dispute (Winfield, History of Conspiracy and Abuse of Legal Procedure, ch I). Eventually this writ came to mean several parties allying to procure a false accusation. However, because of its narrow scope, the writ of conspiracy gradually fell into disuse.

It was superseded by a more malleable form of action; known as an action of case in the nature of conspiracy. This action had a checkered development, due in large measure to the competing policies of seeking **[****11]** to deter false accusers while trying to encourage just ones (compare *Jones v Gwynn*, 10 Mod 214 [12 Anne, BR] with *Hercot v Underhill & Rochley*, 2 Bulst 331 [12 Jac I]). Throughout this evolution glimpses of two additional concerns are discernible. The use of process to serve the purposes of oppression or injustice was deemed punishable as contempt (see 8 Halsbury's Laws of England [3d ed], pp 16-17 and cases there cited) and also as giving rise to an action for injury to reputation (see Winfield, History of Conspiracy and Abuse of Legal Procedure, ch V, pp 126-127 and cases there cited).

It was at this juncture that the tort of malicious prosecution emerged as a distinct concept and was fully recognized in the case of *Savile v Roberts* (1 Ld Raym 374 [10 Will III, BR]). There, Lord Holt, C.J., noted that while the existence of such an action was not a question of first impression, it was clear that contriving to injure someone by pretense and color of legal process demanded redress because it resulted in a loss of reputation, anxiety and the expenditure of funds in defense. With *Savile*, malicious prosecution was firmly ensconced in the common law (see, e.g., **[****12]** *Brown v Chapman*, 1 W Bl 427 [3 Geo III]; *Quartz Hill Cons. Gold Min. Co. v Eyre*, 11 QBD 674; Winfield, Present Law of Abuse of Legal Procedure, ch VI).

The tort of abuse of process makes its first independent appearance in *Grainger v Hill* (4 Bing NC 212). The plaintiff in that case was the owner and captain of a certain vessel who borrowed a sum of money from Hill and others. Although the loan was secured by a mortgage on the vessel, the defendants were desirous of possessing the ship's register. To accomplish

this end they sued Grainger in assumpsit and caused a writ of [*402] arrest to issue. Thereafter Grainger, [***641] who was wounded and bedridden, was threatened with incarceration unless he delivered the register to defendants. Rather than go to jail he succumbed and relinquished the register. Grainger then sued defendants for procuring the writ of arrest (p 212) "wrongfully, illegally, and maliciously contriving to injure, harass, and distress the plaintiff, and to compel [him] * * * to give up and relinquish to them * * * a certain register" and certificate of registry to his ship. The court affirmed a judgment in favor of plaintiff. One Judge [****13] noted that this was a case of first impression [**282] which involved a new species of injury and that a new action must be fashioned according to the particular circumstances. The court held that this action was not for maliciously putting process in force (malicious prosecution) but rather was an action for maliciously abusing the process of the court. It was further held that since process was used to effect an object not within the scope of the process, it was immaterial whether the original suit had been terminated or whether it was founded on probable cause. The employment of process to extort property was, of itself, a sufficient cause of action. These basic principles have been carried forward into modern times and are recognized in this country (Addison, Torts [6th ed, 1887], ch I, § 1, p 33).

In New York, actions based on abuse of process, that is, the tortiousness of using legal process to attain some collateral objective can be found in the earliest reported cases *(Holley v Mix, 3 Wend 350; Brown v Feeter, 7 Wend 301; Baldwin v Weed, 17 Wend 224; Rogers v Brewster, 5 Johns 125; Bebinger v Sweet, 6 Hun 478; Hazard v Harding, 63 How Prac [****14] 326)*. One early appellate case warrants discussion as a classic example of abuse of process. *Dishaw v Wadleigh (15 App Div 205, supra)* involved an attorney who assigned claims to an associate living in another part of the State for the purpose of having the associate institute proceedings. The idea behind it was to make it easier to pay the claim than to submit to the discomfort and expense of attending a distant court. Ruling in favor of plaintiff, the court rejected the argument that the procedure utilized was strictly legal. The court expressed the view that such trickery and cunning was "degrading to an honorable profession, and well calculated to bring the administration of justice into reproach and contempt" (p 209; see, also, *Foy v Barry, 87 App Div 291*).

Abuse of process was first considered by our court in *Dean v [*403] Kochendorfer (237 NY 384)*, apparently the only time, to date, in which we sustained such a cause of action. There in a suit against a Magistrate for willfully issuing an arrest warrant for disorderly conduct, the court held that it was enough to show that regularly issued process was perverted to the accomplishment of an [***642] [****15] improper purpose. On the basis of the complaint the court inferred that the Magistrate had issued the warrant to show his authority and to gratify his personal feelings of importance. Since this act was one which the court felt (p 390) "savors of oppression" it was concluded that it constituted an abuse of process.

The tort was next before our court in *Hauser v Bartow (273 NY 370)*, where we ruled that the complaint failed to state a cause of action. The complaint alleged abuse of process by virtue of defendant's having had plaintiff declared incompetent and having herself named as his committee in order to gain financial benefit. We concluded that proof of ulterior motive was not sufficient. In order for the conduct to be considered tortious there must be something "done outside the use of the process -- a perversion of the process" (p 374). Emphasizing that there had been a conclusive adjudication of the validity of the order appointing defendant as committee and that an accounting revealed no impropriety in the management of his property we went on to hold that there had been no perversion of process.

More recently, in *Williams v Williams (23 NY2d 592)*, we held that [****16] a complaint in another action which had been mailed to members of the trade was not process capable of being abused.

Despite the paucity of New York authority, *HN1*[↑] three essential elements of the [**283] tort of abuse of process can be distilled from the preceding history and case law. First, there must be regularly issued process, civil or criminal, compelling the performance or forebearance of some prescribed act. Next, the person activating the process must be moved by a purpose to do harm without that which has been traditionally described as economic or social excuse or justification (cf. *James v Board of Educ. of Cent. School Dist. No. 1 of Towns of Orangetown & Clarkstown, 37 NY2d 891*). Lastly, defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process.

Assuming the truth of the facts pleaded along with every favorable inference *(Williams v Williams, 23 NY2d, at p 596,* [*404] *supra; Cohn v Lionel Corp., 21 NY2d 559; Howard Stores Corp. v Pope, 1 NY2d 110)* and applying the above principles, we find that the complaint before us is sufficient to state a cause of action [****17] for abuse of process. The subpoenas here were regularly issued process, defendants were motivated by an intent to harass and to injure, and the refusal to comply with a reasonable request to stagger the appearances was sufficient to support an [***643] inference that the process was being perverted to inflict economic harm

on the school district.

While it is true that public policy mandates free access to the courts for redress of wrongs *(Burt v Smith, 181 NY 1; Miller v Stern, 262 App Div 5; Doane v Hescock, 173 App Div 966)* and our adversarial system cannot function without zealous advocacy, it is also true that *HN2*[↑] legal procedure must be utilized in a manner consonant with the purpose for which that procedure was designed. Where process is manipulated to achieve some collateral advantage, whether it be denominated extortion, blackmail or retribution, the tort of abuse of process will be available to the injured party.

The appellants raise several arguments against the sufficiency of this complaint. The most troublesome contention raised is that it is standard, appropriate and proper practice to subpoena all witnesses for the first day of any judicial proceeding. **[****18]** While we acknowledge this as appropriate procedure and in no way intend this decision to proscribe it, we are obligated to determine appeals in the context in which they are presented. Here we consider solely whether the complaint states a valid cause of action. If the proof at trial establishes that defendants attempted to reach a reasonable accommodation at a time when the accommodation would have been effectual, the cause of action will be defeated. However, on its face an allegation that defendants subpoenaed 87 persons with full knowledge that they all could not and would not testify and that this was done maliciously with the intent to injure and to harass plaintiff spells out an abuse of process. Another factor to be weighed at trial is whether the testimony of so many witnesses was material and necessary. As this complaint is framed, it may be inferred that defendants were effecting a not too subtle threat which should be actionable.

The dissent in the Appellate Division responds to this point by noting that the school district was not a party to the PERB proceeding, therefore defendants did not stand to gain collateral advantage, a requisite element of the alleged tort. **[****19]** While **[*405]** it is true that plaintiff was not a party to that proceeding, it is equally true that they were not disinterested bystanders. More important *HN3*[↑] the deliberate premeditated infliction of economic injury without economic or social excuse or justification is **[**284]** an improper objective which will give rise to a cause of action for abuse of process.

In the same vein, defendants contend that the school district cannot bring this action because the alleged abusive process was not issued against them. Although there is support for this proposition (see, generally, *Restatement, Torts, § 682)* we reject it. To hold that the party whom the defendants seek to injure and who has **[***644]** suffered economic injury lacks standing would be to defy reality. Accordingly, *HN4*[↑] the tort of abuse of process will be available to nonrecipients of process provided they are the target and victim of the perversion of that process.

As to the argument that no action exists against defendant attorney due to the lack of allegations implicating him, we need only cite *Dishaw v Wadleigh (15 App Div 205, supra)*, discussed previously.

Turning to the question of damages, we note that **[****20]** to sustain the first cause of action plaintiff must allege and prove actual or special damages in order to recover *(Bohm v Holzberg, 47 AD2d 764)*. Plaintiff has satisfied this requirement by asserting damages in the amount expended to hire substitutes. However, we reject the claim for damages representing the salaries paid to the subpoenaed teachers. There is no justification for that element of damages, particularly in view of the fact that these were approved absences within the meaning of the collective bargaining agreement. Accordingly, that element of damages should be stricken from the complaint. As to the second cause of action for punitive damages we see no obstacle to its maintenance, contingent on the establishment of malice.

Lastly, we conclude that the third cause of action for prima facie tort is sufficient insofar as it refers to the intentional infliction of economic harm by forcing plaintiff to hire a great many substitutes. It does not matter whether the action is denominated a so-called "prima facie tort" or is called something else *(Hauser v Bartow, 273 NY 370, 377, supra* [Crane, Ch. J., dissenting]; *Keller v Butler, 246 NY 249, 254; Morrison [****21] v National Broadcasting Co., 24 AD2d 284* [Breitel, J.], revd on other grounds *19 NY2d 453*). Although in *Opera on Tour v [*406] Weber (285 NY 348)*, the court referred to a prima facie tort (with less than an accurate reference to the theory which Mr. Justice Holmes had articulated in *Aikens v Wisconsin, 195 U.S. 194, 204)* that term is merely an inaccurate mislabel and the plaintiff's right to maintain an action does not hinge on the label used *(Knapp Engraving Co. v Keystone Photo Engraving Corp., 1 AD2d 170, 172)*. The operative fact here is that defendants have utilized legal procedure to harass and to oppress the plaintiff who has suffered a grievance which should be cognizable at law. Consequently whenever there is an intentional infliction of economic damage, without excuse or justification, we will eschew formalism and recognize the existence of a cause of action.

[*645]** The Appellate Division majority in this case concluded that a cause of action in prima facie tort cannot exist where all the damages sustained are attributable to a specific recognized tort (citing *Ruza v Ruza, 286 App Div 767,*

769; * *Metromedia, Inc. v Mandel, [**285] [****22] 21 AD2d 219*, affd *15 NY2d 616*). It is our view that *HN5*[+] a modern system of procedure, one which permits alternative pleading, should not blindly prohibit that pleading in the area of prima facie tort. Of course, double recoveries will not be allowed, and once a traditional tort has been established the allegation with respect to prima facie tort will be rendered academic. Nevertheless there may be instances where the traditional tort cause of action will fail and plaintiff should be permitted to assert this alternative claim.

Accordingly, the order of the Appellate Division should be modified in accordance with this opinion, and as modified, affirmed.

Order modified, with costs, [****23] in accordance with the opinion herein and, as so modified, affirmed. Question certified answered in the negative.

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*Although Chief Judge Breitel, writing then for the Appellate Division, seemed to accept the "prima facie tort" as a distinct cause of action, he later applied a more refined and acceptable approach when writing for the court in *Morrison v National Broadcasting Co. (supra)*. It is this later approach which is adopted today by this court.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Mass.R.A.P., I, Peter S. Farber, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including but not limited to:

Mass.R.A.P. 16(a)(13)(addendum);
Mass.R.A.P. 16(e)(references to the record);
Mass.R.A.P. 18 (appendix to briefs);
Mass.R.A.P. 20 Form and (appendix to briefs);
Mass.R.A.P. 20 (length of briefs, appendices and other documents); and
Mass.R.A.P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass.R.A.P. 20 because it was produced in monospaced font (Courier New) at 12 characters per inch. The brief does not exceed 50 pages in length (total non-excluded pages).

/s/ Peter S. Farber
Peter S. Farber (BBO #544182)

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify under the penalties of perjury that I this day made service of the Brief and Appendix upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by the Electronic Filing System, to wit:

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