

IN THE CIRCUIT COURT OF THE 15th JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION
CASE NO. 502009CA040800XXXXMBAG
Judge David F. Crow

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

v.

SCOTT ROTHSTEIN, individually and
BRADLEY J. EDWARDS, individually,

Defendants.

**PLAINTIFF/COUNTER-DEFENDANT JEFFREY EPSTEIN'S MEMORANDUM OF
LAW IN OPPOSITION TO DAMAGES PLED IN BRADLEY EDWARDS' SECOND
AMENDED COUNTERCLAIM**

Plaintiff/Counter-Defendant Jeffrey Epstein ("Epstein"), by and through his undersigned counsel, pursuant to this Court's Order on March 29, 2012, respectfully submits this Memorandum Of Law In Opposition To Damages Pled In Bradley Edwards' Second Amended Counterclaim, and states as follows:

In his Second Amended Counterclaim, Edwards seeks the following damages from Epstein for alleged abuse of process: injury to Edwards' reputation, "interference in his professional relationships, the loss of the value of his time required to be diverted from his professional responsibilities, and the cost of defending against Epstein's spurious and baseless claims." (Second Amended Counterclaim, ¶17). Edwards seeks precisely the same damages for alleged malicious prosecution. (*See* Second Amended Counterclaim, ¶33).

As more fully set forth below, the compensatory damages demanded by Edwards are not recoverable as a matter of law.

First, Edwards seeks "damages including but not limited to..." various elements of damages. (See Second Amended Counterclaim, ¶17 and 33). Just as this Court has precluded Epstein from seeking unspecified damages by pleading "damages including but not limited to ...", Edwards should be held to the same standard and likewise be barred from seeking any unspecified damages in support of his claims against Epstein. Damages for these torts are special damages that need to be pled.

Second, under Florida law, Edwards cannot recover compensatory damages for the alleged loss or use of his own time participating in the subject litigation, regardless of whether such participation resulted in time "diverted from his professional responsibilities" (¶17) or "interfere[d] in his professional relationships" (*id.*). The court stated in *Miami Nat'l Bank v. Nunez*, 541 So. 2d 1259, 1260 (Fla. 3d DCA 1989) that "[w]e find no precedent for awarding a litigant compensatory damages for her own...participation in the preparation for litigation." (Emphasis added). See also *Maulden v. Corbin*, 537 So. 2d 1085 (Fla. 1st DCA 1989) (ruling that an attorney was not entitled to compensation for his time participating in litigation when he engaged counsel to represent him in the matter). Since Edwards has engaged Mr. Scarola from the outset of this case to represent him, Edwards cannot claim as damages his time assisting counsel or involvement in the subject litigation that purportedly interfered with his professional relationships.

Third, Edwards' claim for damages to reputation is based solely on purportedly baseless *allegations* and *statements* contained in the pleadings, motions and other papers filed by Epstein in the prosecution of Epstein's claims against Edwards¹. Edwards' Second Amended

¹ By contrast, Epstein claims that Edwards committed various *acts* that were not undertaken in furtherance of the underlying litigation.

Counterclaim does not allege that there were allegations or statements by Epstein outside the confines of the subject litigation that injured his reputation. Nor does Edwards allege how "every motion, request for production, every subpoena issued ..." (Second Amended Counterclaim, ¶16) could possibly have caused injury to his reputation. Under settled Florida law, all allegations in a complaint, as well as statements made in the course of litigation, are subject to an absolute privilege, and thus, will not support a claim for injury to reputation. *See, e.g., Fridovich v. Fridovich*, 598 So. 2d 65 (Fla. 1992)(defamatory statements made in the course of judicial proceedings are absolutely privileged). Accordingly, absent any operative allegations in the Second Amended Counterclaim that Epstein made defamatory statements *outside the subject litigation*, Edwards has no lawful basis to recover damages for injury to reputation, and his claim for damages to his reputation should be stricken.

Fourth, Edwards is not entitled to recover damages for "the cost of defending against Epstein's spurious and baseless claims" (¶17) for abuse of process, or any other damages allegedly caused by the filing or service of a purportedly baseless lawsuit. Given the fact that the mere *filing or service* of a spurious claim is not itself actionable as abuse of process, *see, e.g., McMurray v. U-Haul Co.*, 425 So. 2d 1208, 1209 (Fla. 4th DCA 1983); *Blue v Weinstein*, 381 So. 2d 308, 310 (Fla. 3d DCA 1980), it necessarily follows that Edwards is barred from recovering attorney's fees incurred defending a purportedly baseless lawsuit and any other damages allegedly resulting from the filing of that lawsuit.

Fifth, abuse of process is based on process used for an immediate purpose other than that for which it was designed. *See, e.g., McMurray v. U-Haul Co.*, 425 So. 2d 1208 and n. 1 (Fla. 4th DCA 1983). Edwards, however, does not allege that any specific process was used by Epstein for any immediate purpose for which it was not designed (*see* ¶16, Second Amended

Counterclaim), claiming only that everything done by Epstein in prosecuting his claims against Edwards was generally improper.² Since Edwards has not identified acts taken for a purpose other than what has been intended and instead states they are all invalid because the lawsuit is invalid, these damages are not recoverable at all for abuse of process. The claim is nothing more than a thinly-veiled malicious prosecution claim, *see Blue*, 381 So. 2d at 311, which held that claims for damages for a baseless lawsuit are not recoverable because it is not an abuse of process claim but a "thinly-veiled malicious prosecution claim.

Finally, no damages for malicious prosecution are recoverable by Edwards because there was no prior lawsuit that ended with a "bona fide termination" in his favor. *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352 (Fla. 1994). In order to comply with the Court's order to address damages, Epstein needs to incorporate certain arguments previously made that bear on damages. Edwards has not alleged that the "*first suit*, on which the malicious prosecution suit is based, ended in a manner indicating the original defendant's innocence of the charges ...so that a court handling the malicious prosecution suit, can conclude with confidence that the termination of the *first suit* was not only favorable to the defendant in that suit, but also that it demonstrated the *first suit's* lack of merit." *Doss v. Bank of America*, 857 So. 2d 991 (Fla. 5th DCA 2003)(emphasis added). *See also Waite v. Ward*, 413 So. 2d 830, 831 (Fla. 1st DCA 1982)(malicious prosecution action "cannot be filed until the original *action* is concluded.")(emphasis added); *Blue*, 381 So. 2d 308 (same). Instead Edwards has attempted to argue that "abandoned counts" from the first complaint constitute a bona fide termination, but

² The Court's Order dismissing the amended counterclaim required that Edwards "set forth with more specificity the alleged improper or perverted use of process..." All Edwards did was attach the docket sheet instead of saying "every single act", which does not comply with this Court's Order.

such is not the law. The law as noted above is based on termination of the *lawsuit* in toto, not counts within the lawsuit. There has been no determination that a previous *lawsuit* lacked merit. Epstein respectfully asks the Court to recall that Epstein was directed to replead the amended complaint so the Court could address certain discovery issues. Respectfully, the fact that Epstein did not refile certain counts does not mean that Edwards obtained a favorable determination of innocence. Epstein intended to leave those counts pending until certain discovery he has, and is still seeking, was obtained. Thus, there is still a likelihood that Epstein will ask to reinstate those counts, and that such counts may be added, thus precluding a malicious prosecution claim based on those "abandoned counts". Moreover, Epstein's pending abuse of process claim essentially incorporates the operative factual allegations of the prior dropped claims, thus precluding any valid argument that there was a bona fide termination in favor of Edwards. Thus, unless and until Epstein's lawsuit against Edwards is concluded *in its entirety and all claims have been resolved*, there can be no determination as to how the lawsuit terminated for purposes of a malicious prosecution claim, and no basis to seek damages for malicious prosecution. Finally, assuming *arguendo* that the Court were to view the dismissal of Epstein's initial claims for RICO, fraud and conspiracy and §772.101, Fla. Stat., as proving a basis for a malicious prosecution claim by Edwards, Edwards' damages for malicious prosecution must be limited to any damages arising solely from the prosecution of *those counts* up until the time they were "abandoned" Edwards cannot recover malicious prosecution damages resulting from Epstein's ongoing prosecution of his abuse of process claim, because it has not terminated in Edward's favor.

WHEREFORE, Epstein respectfully requests that Edwards' damages claims be stricken.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been duly furnished via Email, Facsimile, U.S. Mail, Hand Delivery, Federal Express this ____ day of April, 2012 to:

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Respectfully submitted,

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