

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

JEFFREY EPSTEIN,  
Plaintiff,

Complex Litigation, Fla. R. Civ. Pro. 1201  
Case No. 50 2009 CA 040800XXXXMBAG

vs.

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

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**PLAINTIFF/COUNTER-DEFENDANT JEFFREY EPSTEIN'S MOTION TO DISMISS  
AMENDED COUNTERCLAIM AND SUPPORTING MEMORANDUM OF LAW**

Plaintiff/Counter-Defendant, JEFFREY EPSTEIN ("Epstein"), by and through his undersigned counsel, hereby moves to dismiss the Amended Counterclaim of the Defendant/Counter-Plaintiff, BRADLEY EDWARDS ("Edwards"), and in support thereof states as follows :

**I. SUMMARY OF ARGUMENT**

Edwards' Amended Counterclaim should be dismissed because it fails to state an actionable claim against Epstein for abuse of process or malicious prosecution. Count I fails to state a valid abuse of process claim because it alleges that Epstein filed insufficient claims against him and does not contain operative factual allegations of improper process by Epstein unrelated to the pending litigation. Count II fails to state a valid claim for malicious prosecution absent operative factual allegations that there was a bona fide termination of an original proceeding in favor of Edwards, and that such original proceeding was without merit. Count II also improperly commingles claims for abuse of process and malicious prosecution.

## II. BACKGROUND

In December, 2009, Epstein, through prior counsel, filed a Complaint against Edwards. Edwards filed an Answer and Counterclaim for abuse of process. The Court denied Epstein's motion to dismiss Edwards' Counterclaim. Edwards then filed a motion for summary judgment on Epstein's Complaint and a motion for leave to assert punitive damages. The Court denied Edwards' summary judgment motion as "premature" because Epstein "has not been able to obtain records which clearly are calculated to lead to admissible evidence in this case" and because of pending privilege issues. **JA – PLEASE EXPAND HERE/CORRECT AS NECESSARY** On April 15, 2011, Epstein filed an Amended Complaint, which consisted of a single count against Edwards for abuse of process, and a claim against Defendant Scott Rothstein for conspiracy. **E d w a r d s m o v e d t o d i s m i s s E p s t e i n ' s A m e n d e d C o m p l a i n t .**

At a July 13, 2011 hearing, this Court noted that Epstein's Amended Complaint did not clearly differentiate who did what, thereby making it "difficult to figure out the scope of discovery and that's why I directed Mr. Ackerman to file an amended complaint so we would be able to focus on what is discoverable, what isn't, what the cause of action is and that sort of things." (Hearing Tr. 7/13/2011 at 18). The Court granted Edwards' motion to dismiss the **A m e n d e d C o m p l a i n t w i t h l e a v e t o a m e n d .**

Epstein then filed a Second Amended Complaint which contained a single count against Edwards for abuse of process, and a single count against Rothstein. Edwards moved to dismiss the Second Amended Complaint. At the September 28, 2011 hearing on Edwards' motion to dismiss the Second Amended Complaint, the Court explained that abuse of process required

improper use of process after it issued, and expressed "serious concerns" as to whether Edwards' Counterclaim pled a viable claim for abuse of process. (Hearing Tr. 8/28/2011 at 25).

On October 4, 2011, Edwards filed an Amended Counterclaim which contained a claim against Epstein for abuse of process (Count I) and a claim for malicious prosecution (Count II). Count I alleges *inter alia* that Epstein invoked his Fifth Amendment right against self-incrimination (§6); notwithstanding Epstein's "intimidation" tactics, Edwards' clients have continued to prosecute their claims (§7); Edwards has not engaged in any unethical or improper conduct (§ 8); Epstein *filed* civil claims against Edwards and others to intimidate them (§9); Epstein knew and has known that his prior Complaint had no factual support and could not be prosecuted "to a successful conclusion" (§12; *see also* §§10-11); in filing and "continuing to prosecute each of the claims" against Edwards, Epstein acted maliciously and "to extort Edwards into abandoning the claims he was prosecuting against Edwards' (§14); and each pleading, motion, subpoena and request for production by Epstein was intended to "advance Epstein's efforts at extortion . . . and constituted a perversion of process after its initial service." (§16).

Edwards' malicious prosecution claim (Count II) incorporates all allegations of his abuse of process claim and further alleges as follows:

After unsuccessful efforts to defend and amend his maliciously filed and prosecuted claims over a period of almost two years, Epstein abandoned the claims except for an ongoing effort to salvage his abuse of process claim. That abandonment brings to successful conclusion Edwards' defense against each of the other abandoned claims. (§18)

Edwards seeks damages "including but not limited to" injury to reputation, interference in his professional relationships, the loss of the value of his time, and the cost of defending against Epstein's claims. (§18)

**ARGUMENT****A. COUNT I SHOULD BE DISMISSED FOR  
FAILURE TO STATE A VALID CLAIM FOR  
ABUSE OF PROCESS**

Edwards' amended abuse of process claim should be dismissed because it is legally insufficient. Abuse of process under Florida law requires pleading and proof of the following three elements: 1) an illegal, improper or perverted use of process; 2) an ulterior motive or purpose in exercising the illegal, improper or perverted process; and 3) resulting damages.. *See, e.g., S&I Invs. v. Payless Flea Mkt.*, 36 So. 3d 909, 917 (Fla. 4<sup>th</sup> DCA. 2010); *Valdes v. GAB Robins North America, Inc.*, 924 So. 2d 862, 867 n. 2 (Fla. 3d DCA 2006); *Della-Donna v. Nova Univ., Inc.*, 512 So. 2d 1051, 1055 (Fla. 4<sup>th</sup> DCA 1987).

With regard to the first element of the tort of abuse of process, it is axiomatic that "the mere filing of a complaint and having process served is not enough to show abuse of process." [Citation omitted] The plaintiff must prove improper use of process *after it issues.*" *S&I Invs.*, 36 So. 3d at 917 (quotation omitted). *See also Valdes*, 924 So. 2d at 867 ("Valdes' failure to allege any improper willful acts by the appellees during the course of the prior action requires dismissal of the abuse of process claim..."); *Yoder v. Adriatico*, 459 So. 2d 449, 450 (Fla. 5<sup>th</sup> DCA 1984)("the tort of abuse of process is concerned with the improper use of process *after it issues*")(emphasis added); *Cazares v. Church of Scientology*, 444 So. 2d 442, 444 (Fla. 5<sup>th</sup> DCA 1983)(holding that a cause of action for abuse of process would not lie where the Church alleged no act other than the *wrongful filing* of a lawsuit); *Peckins v. Kaye*, 443 So. 2d 1025, 1026 (Fla. 2d DCA 1986)(counterclaim allegedly causing undue expenditure of time and money did not constitute abuse of process); *McMurray v. U-Haul Co.*, 425 So. 2d 1208, 1209 (Fla. 4<sup>th</sup> DCA 1983)(same); *Blue v. Weinstein*, 381 So. 2d 308, 311 (Fla. 3d DCA 1980)("[N]o abuse of the

process apart from the complaint is pled and the effort to do so amounts to nothing more than a thinly disguised malicious prosecution claim.").

Edwards' amended abuse of process claim alleges that Epstein *filed* baseless claims against him (*see* ¶¶ 9-15) in an attempt to intimidate and "extort" Edwards into abandoning the claims he was prosecuting against Epstein. (¶¶ 14-15). Because Edwards' abuse of process claim is based on the *filing* of allegedly insufficient claims, it fails to state a valid claim for relief. *See, e.g., Della-Donna*, 512 So. 2d at 1055; *McMurray*, 425 So. 2d 1208 (counterclaim for abuse of process was properly dismissed with prejudice when based on filing of complaint "for a multitude of improper purposes").

Edwards' abuse of process claim is not actionable because it contains conclusory allegations that the "perversion of process" consists of "every" pleading filed by Epstein and "every motion, every request for production, every subpoena issued and every deposition taken." (¶16). Edwards fails to allege how or why such acts constitute a "perversion of process" and also fails to allege that such acts are *not* related to or in furtherance of the pending litigation. Edwards' new allegations do not mask the fact that Count I is nothing more than a malicious prosecution claim in disguise, as squarely demonstrated by the fact that *all* of Edwards' abuse of process allegations are incorporated into his malicious prosecution claim. Accordingly, Edwards' abuse of process claim should be dismissed. At a minimum, Edwards should be required to allege the acts constituting his abuse of process claim with the same specificity that this Court has required of Epstein.

Finally, Edwards' damages claim -- "including but not limited to" various elements of damages (¶17) -- should be stricken because the open-ended phrase "including but not limited

to" does not put Epstein on notice as to the *specific* damages that Edwards is claiming. (See Hearing Tr. July 13, 2011 at 19-20). To paraphrase the Court's comment at the July 13, 2001 hearing, Edwards has "thrown in the kitchen sink in that, which is included [but] not limited . . ." (*id.* at 20). .

**B. COUNT II SHOULD BE DISMISSED FOR  
FAILURE TO STATE A VALID CLAIM FOR  
MALICIOUS PROSECUTION**

Malicious prosecution requires pleading and proof of the following elements: "(1) an original criminal or civil judicial proceeding against the present plaintiff was commenced or continued; (2) the present defendant was the legal cause of the original proceeding against the present plaintiff as the defendant in the original proceeding; (3) the termination of the original proceeding constituted a *bona fide termination* of that proceeding in favor of the present plaintiff; (4) there was an absence of probable cause for the original proceeding; (5) there was malice on the part of the present defendant; and (6) the plaintiff suffered damage as a result of the original proceeding." *Alamo Rent-A-Car v. Mancusi*, 632 So. 2d 1352, 1355 (Fla. 1994).. A claim for malicious prosecution is defeated if a plaintiff fails to allege or establish any one of these six elements. *Alamo Rent-A-Car*, 632 So. 2d at 1355.

A "bona fide termination" of the proceedings has been described as:

a fancy phrase which means that the first suit, on which the malicious prosecution suit is based, *ended* in a manner indicating the original defendant's (and current plaintiff's) innocence of the charges or allegations contained in the first suit, 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 Am., N.A.*, 857 So. 2d 991, 994 (Fla. 5th DCA 2003)(emphasis added).

Based upon the foregoing authorities, Edwards' malicious prosecution claim is insufficient and baseless because he has not pled – and cannot plead – that Epstein's *pending* suit against him *terminated*-in Edwards' favor. Under settled Florida law, "malicious prosecution may *not* be brought as a counterclaim when directed against the filing of some or all of the counts in the pending main action." *Blue v. Weinstein*, 381 So. 2d 308, 311 (Fla. 3d DCA 1980)(emphasis added). As explained in *Cazares*, 444 So. 2d at 447, "Florida courts clearly hold that an action for malicious prosecution cannot be filed until the original action is concluded, thus precluding any counterclaims from being filed in the underlying action itself." *See also Bielely v. Du Pont, Glore, Forgan, Inc.*, 316 So. 2d 66, 67 (Fla. 3d DCA 1975)("A counterclaim for malicious prosecution or abuse or process cannot be maintained in a pending action since the abuse claimed is the pending suit which cannot be said to have terminated in favor of the counter-claimant."); *American Salvage & Jobbing Co. v. Salomon*, 295 So. 2d 710, 712 (Fla. 3d DCA 1974)(a malicious prosecution counterclaim was properly dismissed where the complaint was still pending: "It is readily apparent that an action which is pending cannot be said to be terminated in favor of the counterclaimant.").

Thus, Edwards' claim for malicious prosecution is fatally flawed absent allegations that an original action terminated in Edwards' favor. Unless and until Epstein's action against Edwards terminates in Edwards' favor, any malicious prosecution claim by Edwards is premature. Allegations in ¶18 of Count II that Epstein "abandoned the claims except for an ongoing effort to salvage his abuse of process claim" and that "abandonment brings to successful conclusion Edwards' defense against each of the other abandoned claims" do not satisfy the

requirement that Edwards plead that the *action* brought by Epstein *terminated* in Edwards' favor. The mere dropping or amendment of claims in the course of ongoing litigation does not, by definition, constitute the termination of an action, as required to state a claim for malicious prosecution. The law of malicious prosecution would be turned on its head if by simply dropping or amending a claim, a party would be exposed to malicious prosecution. If that were the case, Epstein could presently sue Edwards for malicious prosecution based upon the mere fact that Edwards filed an *amended* abuse of process Counterclaim against Epstein. Thus, the fallacy in Edwards' position is readily apparent.

Edwards' claim for malicious prosecution should be dismissed for the additional reason that it does not allege that "there was an absence of probable cause for the original proceeding" *Alamo Rent-A-Car*, 632 So. 2d at 1355, as required to plead a claim for malicious prosecution..

Finally, Count II improperly incorporates all allegations supporting the abuse of process claim, thereby impermissibly commingling the claims for abuse of process and malicious prosecution.

### CONCLUSION

Based upon the foregoing arguments and authorities, Plaintiff/Counter-Defendant, Jeffrey Epstein, respectfully requests that the Court dismiss Defendant/Counter-Plaintiff Bradley Edwards' Amended Counterclaim.

Respectfully submitted,

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via e-mail  
and U.S. Mail this \_\_\_\_ day of October, 2011 to:

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