

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.

**PLAINTIFF/COUNTER-DEFENDANT JEFFREY EPSTEIN'S RESPONSE IN
OPPOSITION TO DEFENDANT/COUNTER-PLAINTIFF BRADLEY EDWARDS'
MOTION TO DISMISS THE AMENDED COMPLAINT**

Plaintiff/Counter-Defendant, JEFFREY EPSTEIN ("EPSTEIN"), by and through his undersigned counsel, hereby offers the following response in opposition to Defendant/Counter-Plaintiff EDWARDS' ("EDWARDS") motion to dismiss the Amended Complaint and states:

1. EDWARDS' one-page motion to dismiss is perfunctory and conclusory, cites no supporting authorities, and contains no valid arguments supporting dismissal. The Amended Complaint satisfies all of the elements of a cause of action for abuse of process, and EDWARDS has not demonstrated otherwise.

2. It is axiomatic that a motion to dismiss for failure to state a cause of action admits all well-pleaded facts as true and that the allegations and reasonable inferences therefrom must be construed in the light most favorable to the plaintiff. *See, e.g., Morris v. Fla. Power & Light Co.*, 753 So. 2d 153, 154 (Fla. 4th DCA 2000) ("[A] complaint should not be dismissed for failure to state a cause of action 'unless the movant can establish beyond any doubt that the claimant could prove no set of facts whatever in support of his claim."); *Salit v. Ruden*,

McClosky, Smith, Schuster & Russell, P.A., 742 So. 2d 381,383 (Fla. 4th DCA 1999). EDWARDS has not met his substantial burden.

3. EDWARDS' initial argument that the "Introduction" to the Amended Complaint is "surplusage apparently intended to defame Mr. Edwards . . ." does not on its face state a basis for dismissal of the Amended Complaint on any ground. His critique of the Introduction does not indicate any deficiencies in the abuse of process claim and should be stricken or disregarded.

4 There is no merit to EDWARDS's contention that the Amended Complaint does not identify the "process" that was allegedly abusive, or when, or on whom, it was served. EDWARDS misapprehends the nature of an abuse of process claim. Under Florida law the tort of abuse of process requires proof that the judicial system was misused for an ulterior purpose *after* an action was filed and process served. *See, e.g., Della-Donna v. Nova University, Inc.*, 512 So. 2d 1051, 1055 (Fla. 4th DCA 1987); *McMurray v. U-Haul Co, Inc.*, 425 So. 2d 1208, 1209-10 (Fla. 4th DCA 1983). The filing of an action itself is not abuse of process. *Della-Donna*, 512 So. 2d at 1056. The Amended Complaint details numerous instances of actionable abuse of process by EDWARDS. (*See* Amended Complaint ¶¶ 29-32).

5. EDWARDS' next "argument" that the Amended Complaint does not "articulate a cognizable theory of damages" caused by his wrongdoing flatly ignores the allegations of the Amended Complaint at ¶ 34, that set forth the damages caused by his abuse of process. Moreover, nominal damages and attorneys' fee costs are sufficient to support a claim for abuse of process. *See, e.g., Stoler v. Levinson*, 394 So. 2d 462 (Fla. 3d DCA 1981).

6. Equally flawed is Defendant's penultimate "argument" that the Amended Complaint does not "identify any conduct outside the protection of the litigation privilege. " EDWARDS does not advance any argument as to how the litigation privilege applies to the facts

asserted, and does not cite a single supporting authority. In addition, litigation privilege is an affirmative defense and EDWARDS has not shown that such a defense appears on the face of the pleading. See *Ingalesbe v. Stewart Agency, Inc.*, 869 So. 2d 30, 34-5 (Fla. 4th DCA 2004)(dismissal of claim for interference with fee contract on basis of litigation immunity reversed where affirmative defense did not appear on face of complaint). EDWARDS has not, and cannot, point to allegations that the misconduct was done pursuant to court orders so as to be given absolute immunity. See *American Nat'l Title & Escrow of Florida, Inc.*, 810 So. 2d 996, 997 (Fla. 4th DCA 2002). Cf. *SCI Funeral Services of Florida, Inc. v. Henry*, 839 So. 2d 702, 710 n.4 (Fla. 3d DCA 2002)(noting that a cause of action for malicious prosecution is not barred by the litigation privilege)." The reasoning in *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 312 (3d Cir. 2003) is persuasive on this point:

GRC mainly argues that the judicial privilege cannot possibly apply to these circumstances because "[i]t is illogical on the one hand to say that discovery abuses and filing frivolous motions can support an abuse of process claim because those actions are incident to the litigation process, and on the other hand to say that those actions are absolutely privileged because they are communications issued in the litigation process." GRC's argument has a good deal of logical appeal. The mere existence of the abuse of process tort is evidence that judicial privilege applies to a much narrower range of activity than the attorney appellees urge. Where judicial process is being perverted, immunity would impede, not further, the interests protected by the judicial privilege.

7. Finally, EDWARDS' reliance on arguments he raised in his previously-filed motion for summary judgment is unavailing. Obviously, the standards are not the same for a motion to dismiss for failure to state a claim and a motion for summary judgment. It is well-established that on a motion to dismiss, the court is limited to review of only the "four corners"

of the complaint. References to another pleading or exhibits is inappropriate. Second, his motion for summary judgment was directed to a *prior* complaint, and significantly, the motion was *denied* by this Court. EDWARDS has not shown, and cannot possibly show, how a summary judgment motion directed to the allegations of the *prior* complaint, which motion was *denied* on the ground that it was "premature," supports dismissal of an amended complaint with *new* allegations. Moreover, EDWARDS argued in support of summary judgment on the *prior* abuse of process claim that Epstein alleged only that he "was unhappy with some motion or argument made by Edwards"; that the facts established that "every action Edwards took was entirely proper"; and that there was no evidence that EDWARDS had an ulterior motive. (Ex. A, Motion for Summary Judgment at 13-15). What the *evidence* may or may not ultimately prove with respect to the propriety of EDWARDS' conduct, and whether he had an ulterior motive, is entirely irrelevant to the issue of whether the allegations in the Amended Complaint, taken as true and with all reasonable inferences therefrom drawn in favor of the Plaintiff, state a valid claim for abuse of process.

WHEREFORE, Plaintiff JEFFREY EPSTEIN respectfully submits that Defendant/Counter-Plaintiff BRADLEY EDWARDS' motion to dismiss the Amended Complaint be denied.

Respectfully submitted,

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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 10th day of May, 2011 to:

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