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

JEFFREY EPSTEIN,

Plaintiff,

vs.

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

Defendants.

_____/

CIVIL DIVISION AG

Case No. 502009CA040800XXXXMBAG

PLAINTIFF/COUNTER-DEFENDANT JEFFREY EPSTEIN'S MOTION TO DISMISS AMENDED COUNTERCLAIM AND INCORPORATED 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 Edwards does not -- and cannot -- allege (1) that Epstein made any illegal, improper, or perverted use of process; (2) that Epstein had any ulterior motive or purpose at any time; and (3) that Edwards suffered any legally cognizable damage as a result of Epstein's actions in the pending litigation. Count II fails to state a valid claim for malicious prosecution because Edwards does not -- and cannot -- allege that there was a bona fide termination of an original proceeding in his favor, much less that any 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 naming Edwards as a defendant. 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.

On April 15, 2011, Epstein filed an Amended Complaint at the Court's direction, which consisted of a single count against Edwards for abuse of process, and a claim against Defendant Scott Rothstein for conspiracy. Edwards moved to dismiss Epstein's Amended Complaint.

At a July 13, 2011 hearing, the Court granted Edwards' motion to dismiss the Amended Complaint with leave to amend. Epstein had previously advised the Court at other hearings that further amendments may be needed as discovery proceeds.

Epstein then filed a Second Amended Complaint which contained a single count against Edwards for abuse of process, and a single count against Rothstein for conspiracy to commit abuse of process. Edwards moved to dismiss the Second Amended Complaint, and the Court denied Edwards' motion after a hearing on September 28, 2011. During that hearing, the Court explained that abuse of process requires improper use of process after it has issued and expressed "serious concerns" as to whether Edwards' Counterclaim pleaded a viable claim for abuse of process against Epstein. (Hr'g Tr. 9/28/2011 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 for abuse of process and malicious prosecution "including but not limited to" injury to reputation, interference in his professional relationships, the loss of the value of his time "required to be directed from his professional responsibilities," and the cost of defending against Epstein's claims. (¶17).

ARGUMENT

A. COUNT I OF THE AMENDED COUNTERCLAIM SHOULD BE DISMISSED FOR FAILURE TO STATE A VALID CLAIM FOR ABUSE OF PROCESS

1. Legal Standards

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. 4th DCA 2010)*; Valdes v. GAB Robins North America, Inc.*, 924 So. 2d 862, 867 n.2 (Fla. 3d DCA 2006). In addition, it "is a fundamental principle of pleading that the complaint, to be sufficient, must allege ultimate facts as distinguished from legal conclusions which, if proved, would establish a cause of action . . ." *Maiden v. Carter*, 234 So. 2d 168, 170 (Fla. 1st DCA 1970); *see also Brown v. Gardens by the Sea South Condominium Ass'n*, 424 So. 2d 181, 183 (Fla. 4th DCA 1983) ("Florida uses what is commonly considered as a notice pleading concept and it is a fundamental rule that the claims and ultimate facts supporting same must be alleged. The reason for the rule is to appraise [sic] the other party of the nature of the contentions that he will be called upon to meet, and to enable the court to decide whether same are sufficient."). The amended counterclaim does not meet even this basic requirement.

2. Failure To Allege Illegal, Improper or Perverted Use of Process

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)(emphasis added). *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. 5th 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. 5th 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. 4th 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 at 1209 (counterclaim for abuse of process was properly dismissed with prejudice when based on filing of complaint "for a multitude of improper purposes"). "The maliciousness or lack of foundation of the asserted cause of action itself is actually irrelevant to the tort of abuse of process." *Cazares*, 444 So. 2d at 444.

Although Edwards attempts to bolster his amended abuse of process claim with conclusory allegations that the alleged "perversion of process" consists of "every" pleading

Epstein has filed and "every motion, every request for production, every subpoena issued and every deposition taken" (¶16), that attempt fails for two reasons. First, Edwards never alleges how or why such acts -- which on their face do not constitute abuse of process -- demonstrate a "perversion of process," or are illegal or improper. Indeed, far from constituting perversion of process, filing motions and conducting discovery are common and often necessary actions in every litigation. *See* Fla. R. Civ. P. 1.280 [(explanatory parenthetical)]. And Edwards has not even attempted to allege that the commonplace actions that Epstein has taken are *not* related to or in furtherance of this litigation. Standing alone, Edwards' bald assertion that Epstein's motions and discovery efforts amount to perversion of process is insufficient. Instead, Edwards "must allege and prove that the process was used for an immediate purpose other than that for which it was designed." *Biondo v. Powers*, 805 So. 2d 67, 69 (Fla. 4th DCA 2002). This is particularly true in this case, given that the Court has already decreed that the parties must plead with enough specificity to enable it to address critical discovery issues. (*See* Tr. 7/13/2011 at 18). In the absence of specific factual allegations as to what was illegal, improper or perverted about the process issued by Epstein after filing the Complaint in this action, Edwards has failed to plead the first element of abuse of process. And for the same reason, Edwards' amended abuse of process claim does not provide a "short and plain statement of the ultimate facts showing that the pleader is entitled to relief," as it must. Fla. R. Civ. P. 1.110(b). *See also Brown*, 424 So. 2d at 183. In failing to plead the first required element, Edwards has failed to plead an abuse of process claim, and therefore, Count I should be dismissed.

Second, the crux of Edwards' claim is that the lawsuit itself is without merit and thus everything within it constitutes an abuse of process and should be dismissed. Count I is nothing more than an invalid malicious prosecution claim in disguise because it is simply targeted at

Epstein's entire case against Edwards, and does not allege how the lawsuit compels Edwards to do "some collateral action not properly involved in the proceeding." *Miami Herald Publ'g Co. v. Ferre*, 636 F. Supp. 970, 975 (S.D. Fla. 1985).

3. Failure To Allege An Ulterior Motive or Purpose

Even if Edwards had alleged perverted use of process -- which he has not -- he has offered nothing more than vague and unfounded allegations to support the second required element in an abuse of process claim -- ulterior motive or malicious intent -- in ¶4 that Epstein "effectively" conceded illicit sexual activity, in ¶5 that many civil suits against Epstein remain pending, and in ¶¶6 &7 that his "victims and their legal counsel" have been "intimidate[d] . . . into abandoning legitimate claims." The allegations do not identify which suits remain pending, which victims and their legal counsel have been intimidated, or how settlements without admissions of liability "effectively concede illicit sexual activity." (¶4) Moreover, Edwards' claims of intimidation are undermined by his contrary allegations that his clients were *not* intimidated. (*See* ¶4). Without specificity regarding who, what, where and when, Epstein cannot effectively formulate a response and the door will be open to discovery into matters not likely to lead to relevant evidence. *Brown*, 424 So. 2d at 183. Again, Edwards' new allegations do not mask the fact that Count I is nothing more than an attempt 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.

Moreover, all of the allegations in paragraphs 4-7 of the Amended Counterclaim refer to events that occured *before* filing of the Complaint. It is well established, however, that events that occur *before* the filing of a complaint and service of process, are *not sufficient* to satisfy the element of ulterior motive or malice. *See Marty v. Gresh,* 501 So. 2d 87 (Fla. 1st DCA 1987); *S*

& I Investments, 36 So. 3d at 917. Accordingly, Edwards' abuse of process claim should be dismissed for the additional and independently sufficient reason that he has not properly alleged the second element required to state an abuse of process claim.

4. Failure to Plead Damages

Finally, Edwards' damages claim -- "including but not limited to" various elements of damages (¶17) -- should be stricken. First, the open-ended phrase "including but not limited to" does not put Epstein on notice as to the *specific* damages that Edwards is claiming and must, therefore, be struck. (*See* Hearing Tr., July 13, 2011 at 19-20 (this Court striking similar language from Epstein's Amended Complaint); *Brown*, 424 So. 2d at 183**).**

Second, Edwards' demand for damages to reputation is a thinly-veiled and impermissible attempt to inject defamation into the litigation. Similarly, Edwards' demand for damages for "interference in his professional relationships" is a thinly-veiled and impermissible attempt to inject tortious interference into the litigation. Such kitchen-sink pleading denies Epstein due process and due notice. These are separate claims with separate defenses commingled in a single count, in violation of Fla. R. Civ. P. 1.110(f), which requires separate statements of claim.

Third, there is no legal authority which permits Edwards to recover damages for abuse of process for the "loss of the value of his time required to be diverted from his professional responsibilities." A litigant cannot recover damages for the time spent defending a claim. *See, e.g., Miami National Bank v. Nunez*, 541 So. 2d 1259, 1260 (Fla. 3d DCA 1989) ("We find no precedent for awarding a litigant compensatory damages for her own participation in the preparation for litigation."); *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, Edwards cannot claim his time assisting counsel or participating in this case as damages.

Finally, Edwards seeks damages for the "cost of defending against [sic] Epstein's spurious and baseless claims." While a party who recovers a judgment is entitled to taxable costs pursuant to §57.104, Fla. Stat., a party is not entitled to an award of attorney's fees unless there is a statutory or contractual entitlement pleaded and established. To the extent Edwards seek attorneys' fees, the claim should be denied because of his failure to plead entitlement by statute or contract. *Florida Hurricane Protection and Awning, Inc. v. Pastina,* 43 So. 3d 893 (Fla. 4th DCA 2010). In short, Edwards has failed to plead that he has suffered any legally cognizable damages. Thus, he has failed to plead the third element of his abuse of process claim, and as a result, Edwards' Count I should be dismissed.

B. COUNT II OF THE AMENDED COUNTERCLAIM 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) (emphasis added). A claim for malicious prosecution is defeated if a plaintiff fails to allege or establish any one of these six elements. *Id.*

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

> It is axiomatic that a plaintiff in a malicious prosecution case must, as an essential elements of that cause of action, establish that the prior litigation giving rise to the malicious prosecution suit ended with a "bona fide termination" in that party's favor. That is 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).

Given the requirement that an original or prior proceeding terminate in favor of a malicious prosecution claimant, 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). That is precisely what Edwards has done. 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 Bieley 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.").

Based upon the foregoing authorities, Edwards' malicious prosecution counterclaim fails to state a valid claim for relief because there has been no termination of the "original proceeding" -- by definition, a proceeding different from and prior to the present action -- as absolutely required to state a claim for malicious prosecution. Edwards has not pleaded – and cannot plead – that "*the first suit*, on which the malicious prosecution suit is based, *ended." Doss,* 857 So. 2d at 994. (Emphasis added). Edwards has not pleaded – and certainly cannot plead – that Epstein's *pending* suit against him has *terminated* in Edwards' favor. Indeed, Edwards' Amended Counterclaim squarely violates the rule that "malicious prosecution may not be brought as a counterclaim when directed against the filing of some or all of the counts in the pending action." *Blue*, 381 So. 2d at 311 ("[O]ur decisions holding that 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 are sound and are herein affirmed."). Thus, unless and until Epstein's pending action against Edwards terminates in Edwards' favor, any malicious prosecution claim by Edwards is invalid as a matter of law.

Moreover, Edwards cannot save this malicious prosecution claims with his allegations in ¶18 of Count II that Epstein "abandoned" certain other claims and that "abandonment brings to successful conclusion Edwards' defense against each of the other abandoned claims." These allegations do not satisfy the requirement that Edwards plead that a prior *action* brought by Epstein *terminated* in Edwards' favor. The mere dropping or amendment of claims in the course of pending litigation -- a very common occurrence -- does not, by definition, constitute the *termination* of a proceeding. *See, e.g., American Salvage, & Jobbing Co., Inc.*, 295 So. 2d at 712

("It is readily apparent that an action which is pending cannot be said to be terminated in favor of the counterclaimant."). Moreover, the mere dropping or amending of a claim in ongoing litigation pursuant to an interlocutory order cannot constitute a *favorable* determination of the *action or proceeding*, as unquestionably required to state a claim for malicious prosecution. Absent allegations by Edwards that a *prior proceeding terminated in his favor*, his malicious prosecution claim is not actionable.

Finally, because Edwards adopts in Count II his damage claims alleged in Count I, Epstein incorporates by reference herein his damages arguments as stated above.

In sum, Edwards' claim for malicious prosecution is defective and should be dismissed with prejudice.

C. COUNT II SHOULD BE DISMISSED BECAUSE IT CONTAINS COMMINGLED CLAIMS

Count II should be dismissed for the additional and independently sufficient reason that it improperly incorporates all allegations supporting the abuse of process claim, thereby impermissibly commingling the two claims. Florida courts recognize that commingling multiple legal claims in a single count severely hampers a defendant's ability to prepare a responsive pleading and require that such claims be repled. *See Gerantine v. Coastal Sec. Sys.,* 529 So. 2d 1191, 1194 (Fla. 5th DCA 1988) ("[B]y the time a defendant reached the sixth count of the complaint, he would find himself faced with 72 previous paragraphs, many with numerous subdivisions, replete with evidentiary facts and together forming a total morass which would make it difficult, if not impossible, to respond to."); *Frugoli v. Winn-Dixie Stores*, 464 So. 2d 1292 (Fla. 1st DCA 1985) (requiring claims to be alleged in separate counts and not intermingled). Such shotgun pleadings are rejected for good reason: "Experience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the

trial court's docket becomes unmanageable, the litigants suffer and society loses confidence in the court's ability to administer justice." *Anderson v. Dist. Bd. of Trs, of Cent. Fla. Cmty Coll.,* 77 F. 3d 364, 366-67 (11th Cir. 1996).

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,

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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 ____ day of October, 2011 to:

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