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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III Lowe Justice

PART 56m

Larry Stryker

- v -

Alex Stelmak et al

INDEX NO. 117524/06

MOTION DATE 9/20/07

MOTION SEQ. NO. 008

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/19/07

HON. RICHARD B. LOWE, III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

LARRY STRYKER,

Plaintiff, Index No. 117524/06

-against-

ALEX STELMAK, an individual,
STAN MASHOV, an individual,
SIMONE V PALAZZOLO, ESQ., an individual;
ADVANCED TECHNOLOGIES GROUP, LTD. a
Nevada corporation with New York as their County of
Principle Office;

Defendants.

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Hon. Richard B. Lowe, III:

Plaintiff Larry Stryker ("Stryker") moves this court pursuant to CPLR § 306-b for an extension of time to serve his summons and complaint on Defendants Alex Stelmak ("Stelmak") and Stan Mashov ("Mashov").

Background

This action arises out of a purported agreement between Stryker, Stelmak and Mashov involving the ownership of stock in a business. In Plaintiff's complaint, which has since been dismissed for lack of personal jurisdiction due to improper service, it is alleged, among other things, that Defendants defrauded Plaintiff of his ownership interest in corporate Defendant Advanced Technologies Group, LTD ("ATG").

In September of 1997, Plaintiff and Defendants Stelmak and Mashov (and non-party, Rubenstein), all successful businessmen, formed a corporation called Oxford Global Network ("OGN"). Defendant Palazzolo served as counsel for OGN. Plaintiff never received stock

certificates but was listed as a 25% beneficial owner on the company's Private Placement Memorandum, and was told that his stock would be held in escrow with Palazzolo.

The complaint alleges that in or about "late-1998" Stelmak and Mashov told Plaintiff that OGN did not receive proper funding, that stock certificates had never been issued to anyone, and that OGN would be deactivated as an ongoing concern. Plaintiff asserts he found out much later that these statements were false. In fact, as the complaint alleges, OGN did not deactivate. Rather in January 2001, it changed its name to FX3000, Inc. without Plaintiff's knowledge and allegedly without calling a meeting. Later in January 2001, FX3000, Inc., again without calling a meeting or notifying Plaintiff, merged with Defendant ATG, causing Stelmak and Mashov to become officers and directors of ATG.

In June 2002, Plaintiff learned that OGN had changed its name to FX3000, Inc. and merged with ATG. Allegedly, before November 6, 2002, Stelmak, Mashov and Palazzolo ignored Plaintiff's inquiries concerning the status of his shares and ownership interest in the company. On November 6, 2002, Palazzolo, on behalf of Stelmak, Mashov, and ATG, advised Plaintiff that he was not considered a founder or shareholder of OGN and was not entitled to any interest whatsoever in OGN, FX3000, Inc., or ATG or any of their affiliates.

In December 2003, Stelmak filed an action against Plaintiff alleging defamation and intentional infliction of emotional distress. Plaintiff, acting *pro se* filed an answer to Stelmak's complaint in which he explained that he was entitled to 25% of OGN's stock and that Stelmak and Mashov lied to Plaintiff and stole his shares in the company, and that Plaintiff would have filed suit against them but did not have the money. The defamation suit was eventually dismissed because Stelmak refused to cooperate with court ordered discovery. It is Plaintiff's contention that the statute of limitations for the instant claims stopped running when Plaintiff

answered Stelmak's complaint in the defamation suit. Plaintiff asserts that the court could have found valid counterclaims in his answer and should have read it more liberally because he was acting *pro se*.

On February 21, 2006, Plaintiff filed an action in the Southern District of New York alleging essentially the same causes of action as in the instant action with two additional federal claims under the Securities Act of 1933. The District Court (Chin, J.) dismissed the federal claims on statute of limitations grounds, finding that the action was untimely in view of the facts alleged in the complaint and the two year statute of limitations from the date of discovery of the violation, or five year statute of limitations from the date of the actual violation (*Stryker v. Stelmak*, No. 06 Civ. 1322(DC)[SDNY 2006].) The District Court declined to exercise supplemental jurisdiction over the remaining state claims, and the action was dismissed on November 14, 2006 (*Id).*

The instant action was filed November 22, 2006 with causes of action sounding in: malicious prosecution; abuse of process; breach of fiduciary duty; aiding and abetting breach of fiduciary duty; constructive trust; breach of contract; breach of the implied covenant of good faith and fair dealing; quantum meruit; common law fraud; common law negligent misrepresentation or intentional deceit; and injunctive relief.

On November 28, 2006 plaintiff hired a reputable process serving firm to serve the summons and complaint on defendants Stelmak, Mashov and ATG. Service was effected and copies of the signed affidavits of service were filed with the County Clerk's office. Thereafter, Plaintiff granted Defendants four extensions of time in which to appear. Defendants appeared on Feb 27, 2007, moving to dismiss Plaintiff's complaint a total of ninety-seven days after the

summons and complaint were filed. Plaintiff alleges that he did not receive a complete copy of Defendants motion to dismiss until March 1, 2007.

On February 29, 2007 Defendant allegedly served on Plaintiff an affidavit of Defendant Alex Stelmak in which Stelmak swore that service was defective because the process server said nothing to him at the time of attempted service, including failing to inquire whether he had served in the military. Plaintiff contends that he did not become aware of Defendant's opposition to Plaintiff's service of process until about the time Defendant filed its motion to dismiss. Plaintiff subsequently sought a two-week extension to respond to Defendant's motion to dismiss, adjourning the motion from March 30, 2007 to April 13, 2007. It should be noted that the statutory 120-day limit for service was up March 22, 2007. Oral argument was heard on May 16, 2007 and this Court ordered a traverse hearing to determine if service was proper. The traverse hearing was scheduled for June 20, 2007 but because Stelmak was stranded in Toronto, the hearing was postponed to September 4, 2007. Service was ultimately found to be defective, and the complaint was dismissed for lack of personal jurisdiction over the individual defendants. Plaintiff contends that if not for the protracted delay in defendants' appearance and the postponement of the traverse, the defect in service would have been timely flushed out and cured. Defendant maintains that Plaintiff had ample notice that his service was defective and failed to take reasonable steps to correct it.

This court now must decide if Plaintiff's time to serve his summons and complaint should be extended; if his causes of action are bound by res judicata or collateral estoppel from the dismissed federal action; and even if Plaintiff's time should be extended in the interest of justice, and his causes of action are not bound by res judicata, whether the statute of limitations has run on his claims, thus making the extension futile.

Discussion

Plaintiff moves this Court for an extension of time to serve his summons and complaint. Under New York law, if service is not made upon a defendant within 120 days, the court, upon motion may extend the time for service upon good cause shown or in the interest of justice. CPLR § 306-b. An extension of time for service is a matter within the court's discretion. (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001].)

Plaintiff's argument is based primarily on the "interest of justice" standard for extension. "The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties." (*Leader*, 97 NY2d at 105.) "The court may consider diligence, or lack thereof, along with any other relevant factor in making its determination including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant." (*Id.* at 105-106.) The extension is applicable where service is timely made within the 120-day period but is subsequently found to have been defective. (*Earle v Valente*, 302 AD2d 353, 354 [2nd Dept. 2003].) Courts have denied extensions based on the interest of justice where there is a showing of "extreme lack of diligence" and a "long delay before defendant received any notice of the action." (*Slate v. Schiavone Construction Company*, 4 NY3d 816 [2005].)

The issue is whether upon applying the factors set forth in *Leader*, tempered by the considerations in *Slate*, the court should grant the Plaintiff an extension of time to serve its summons and complaint in the interest of justice. Specifically, the Court must decide if Plaintiff's diligence or lack thereof, rises to the level of the "extreme lack of diligence" shown in *Slate*, and whether Plaintiff has a meritorious cause of action.

Plaintiff retained a reputable company to serve process on each defendant. He made the reasonable assumption that service was properly effected and was only notified that it was not, upon Defendant's filing of a motion to dismiss and an affidavit from Stelmak (allegedly coming within two days of each other, both almost one-hundred days after the complaint was filed). Despite this, it is the Defendants' contention that Plaintiff had ample time to simply re-serve the defendants, but chose not to.

It is true that Plaintiff *could have* re-served defendants, however the fact that he did not, does not end the inquiry. A showing of reasonable diligence is not a prerequisite to the court granting an extension in the interest of justice. (*see Leader*, 97 NY2d at 105.) Here, Plaintiff had served the Defendants, and only knew that service was disputed, not that it would ultimately be found defective. Oral argument took place May 16, 2007, almost two months after the expiration of the 120-day period. The postponed traverse hearing took place September 4, 2007 and ultimately found service defective due to the process server's failures. It was after this decision that Plaintiff promptly (September 7, 2006), made this motion to extend time to serve his summons and complaint.

Plaintiff's actions here do not rise to the level of an "extreme lack of diligence" as considered in *Slate*. As the dissent in that case (agreed with in a memorandum decision by the Court of Appeals) pointed out, the lack of diligence exhibited by the plaintiff was inexcusable because defendants did not receive notice of the action until after a default judgment was entered, more than a year after the expiration of the 120-day service period. (*see Slate v. Schiavone Construction Company*, 10 AD3d 1, 9 [1st Dept. 2004], rev'd 4 NY3d 816 [2005].) This was not the case here as it is undisputed that the service on Stelmak and Mashov albeit ineffective, gave them actual notice of the action.

Courts are also concerned with prejudice to the defendant in the granting of a plaintiff's motion to extend time for service. Courts have held that lack of notice until long after accrual of a cause of action leads to an inference of substantial prejudice. (*see Leader*, 97 NY2d 95 at 107; *see also Kyoko Yamamoto v. Hidehiko Yamamoto*, 43 AD3d 372 [1st Dept. 2007].)

In the instant case, as previously stated, Defendants indisputably had notice of Plaintiff's claims since the time of the defective service of process. Furthermore, prejudice involves impairment of a defendant's ability to defend on the merits and not the loss of a procedural or technical advantage. The expiration of the statutory period does not, in and of itself, constitute prejudice to defendant. (*see Slate*, 10 AD3d 1 at 6 [1st Dept. 2004], citing *Busler v. Corbett*, 259 AD2d 13, 16 [4th Dept. 1999].) Therefore, Defendants have failed to establish prejudice.

Other factors set forth in *Leader*: expiration of the statute of limitations; length of delay in service; and promptness of plaintiff's request for an extension of time (*Leader*, 97 NY2d at 105-106), weigh in favor of Plaintiff to varying degrees. The "length of delay in service" factor weighs in Plaintiff's favor because his service, though defective, was made six days after filing of the summons and complaint. The "promptness of Plaintiffs request for an extension" factor weighs in Plaintiff's favor because he made the application to extend time just three days after the determination of defective service at the traverse hearing. The "expiration of the statute of limitations" factor in this context generally involves cases where the action was timely filed but service was either defective or was never effected, and the statute of limitations expired before proper service was rendered. (*see Estate of Jervis v. Teachers Insurance and Annuity Association*, 279 AD2d 367 [1st Dept. 2001]; *see also Busler*, 259 AD2d at 14.) In the case at bar, the situation is different. Here, as Defendant asserts, and as will be discussed *infra*, if the

statute of limitations expired before the initial complaint was filed, it would act as a total bar to Plaintiff's claims and render a potential extension granted by this court a nullity.

The "meritorious nature of the cause of action" factor is what ultimately leads this court to deny Plaintiff's requested relief. Defendant asserts two arguments bearing on this issue which would render an extension of time futile. Defendants argue that (1) res judicata and/or collateral estoppel bar the relitigation of the claims or issues asserted in this action, and (2) the statute of limitations has run on all of Plaintiff's causes of action before plaintiff filed the instant action.

Res Judicata and Collateral Estoppel

Defendants' argument that Plaintiff's claims are barred by res judicata is unconvincing. Plaintiff's action in federal court, which alleged federal securities claims as well as various state claims (the claims asserted in the instant action), was dismissed. (*Stryker v. Stelmak*, No. 06 Civ. 1322(DC) [SDNY 2006].) Defendants assert that because all claims were dismissed, Plaintiff is barred by res judicata from relitigating these claims.

The rule for res judicata is that a judgment of a competent court, on the merits, is a bar to any future suit between the same parties, upon the same cause of action. (*see Mintzer v. Loeb, Rhoades & Co.*, 10 AD2d 27, 29 [1st Dept. 1960].) "While res judicata effect is given to judgments on the merits rendered by Federal courts, res judicata will not bar a State action where it is clear that the pretrial dismissal of the Federal cause of action did not include adjudication of a pendant state claim on its merits." (*Browning Ave. Realty Corp. v. Rubin*, 207 AD2d 263, 265 [1st Dept. 1994].) While the Federal Judge dismissed the federal claims on statute of limitations grounds, he stated "I decline to exercise supplemental jurisdiction over plaintiff's state law claims, as there is no basis for federal jurisdiction, and the federal claims were dismissed before

trial." (*Id.*) Therefore, it is clear the Federal Court did not dismiss the state law claims on their merits, which would bar their relitigation.

Defendants also argue that Plaintiff is collaterally estopped from relitigating certain "findings of fact" made by the Federal Court in that case. This argument is in relation to Defendants' assertions that the statute of limitations has run on all of Plaintiff's claims. Defendants point to the dates noted by the Federal Court which were relevant in determining that the statute of limitations had run on the federal claims, specifically that "plaintiff had actual knowledge of the alleged fraud no later than November 6, 2002," and "the date of the actual violation occurred around 1998, which is when defendants informed him that Oxford Global was being deactivated, and allegedly lied to him about the stock shares not being distributed" (*Id.*)

The doctrine of collateral estoppel precludes a party from relitigating "an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point." (*Gilberg v. Barbieri*, 53 NY2d 285, 291 [1981].) Moreover, collateral estoppel effect will only be given to matters "actually litigated and determined" in a prior action, which are "essential to the judgment." (*see* Restatement [Second] of Judgments § 27, quoted in *Koch v. Consolidated Edison Co.*, 62 NY2d 548, 554 [1984].)

The issue is whether the relevant dates noted by the Federal Court were "actually litigated and determined." On deciding the motion to dismiss, the Federal Court assumed to be true all of the facts alleged in the complaint. The federal securities claims were dismissed on statute of limitations grounds, finding "the facts as alleged in the complaint show that plaintiff had actual knowledge of the alleged fraud no later then November 6, 2002," (*Stryker v. Stelmak*, No. 06 Civ. 1322(DC) [SDNY 2006],) and that based on the allegations in the complaint, "[t]he

date of the actual violation occurred around 1998, which is when defendants informed him that Oxford Global was being deactivated." (*Id.*)

Defendant correctly argues that these dates should be given preclusive effect because Plaintiff had the opportunity to, and actually did litigate the dates of the alleged contract and the alleged fraud. "For a question to have been actually litigated... it must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the proper proceeding." (*Hyalkar v. Board of Regents of State of N.Y.*, 72 NY2d 261, 268 [1998].) First, it was Plaintiff who averred the facts leading to the District Court's determination that the statute of limitations had run. There was little to no interpretation necessary on the part of the Federal Court. Plaintiff provided the dates in his allegations, and the Federal Court simply applied the dates to the applicable statute of limitations. While the statute of limitations for the federal claims were different from the statutes of limitations for the state claims, all of the claims were based on the same set of transactions or occurrences and therefore the identicality of issues requirement is satisfied[1] (*see Id.*). Second, as demonstrated by Plaintiff's Memorandum of Points and Authorities Opposition to Defendants' Motion to Dismiss the Federal court action, Plaintiff litigated issues surrounding the relevant dates (Bacharach Affirmation in Opposition, Exhibit 2.) While he did not dispute the dates themselves (presumably because he was the one who proffered them), he asserted, as he does again in this case, that the statute of limitations "stopped running in June 2004, when Stryker pleaded the facts constituting the Defendants' fraud in his *Pro Se* answer to Stelmak's defamation complaint." (*Id.*)

Further, it goes without saying that the Federal Court's determination of the relevant dates was "essential to the judgment," as considered in Section 27 of the Restatement [Second]

[1] Plaintiff's federal claims under the Securities Act of 1933 had a statute of limitations of the earlier of two years from the discovery of the facts constituting the violation or five years from the actual violation.

of Judgments. The Federal Court based the decision dismissing the action on the ground that the statute of limitations had run on the federal claims on these dates proffered by the Plaintiff.

Plaintiff has alleged the same set of facts in this case. He has alleged the same dates leading to the inference of his knowledge of the alleged wrongdoing on November 6, 2002, and the actual wrongdoing occurring in "late 1998." The court finds that collateral estoppel bars the relitigation of these dates, and notes that even if collateral estoppel did not apply, the outcome would be the same, as this court would have interpreted the relevant dates as the Federal Court did.

Therefore, collateral estoppel does apply with respect to those certain findings of fact.

Statute Of Limitations

The ultimate issue faced by this court is whether granting Plaintiff's extension of time to serve his summons and complaint would be futile, and simply prolong the inevitable dismissal of Plaintiff's claims on statute of limitations grounds.

Because the dates determined by the Federal Court are to be given preclusive effect, these are the dates to be used in determining whether the statute of limitations had run on Plaintiff's claims before the filing of the action. Defendant relies on these dates and asserts that all of Plaintiffs claims are barred by either CPLR § 213 or CPLR § 214, which provide for a six year and a three year statute of limitations, respectively. Plaintiff makes no reference to the statute of limitations in his motion to extend time except to say that "there exist several statute of limitations issues that might take Plaintiff outside the statute of limitations if his motion is not granted." As discussed *supra*, Plaintiff argued in the federal case that the statute of limitations "stopped running in June 2004, when Stryker pleaded the facts constituting the Defendants' fraud in his *Pro Se* answer to Stelmak's defamation complaint." (Bacharach Affirmation in

Opposition, Exhibit 2.) Plaintiff made the same argument in this case in his opposition to Defendant's motion to dismiss the complaint. As will be discussed, most of Plaintiff's causes of action are barred by the applicable statute of limitations.

Plaintiff's fraud claim is barred by the statute of limitations set forth in CPLR § 213[8] which states "the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff... discovered the fraud, or could with reasonable diligence have discovered it." (McKinney's CPLR § 213[8].) Here, as noted above, "[t]he date of the actual violation occurred around 1998, which is when defendants informed [Plaintiff] that Oxford Global was being deactivated, and allegedly lied to him about the stock shares not being distributed" and that "plaintiff had actual knowledge of the alleged fraud no later than November 6, 2002." (*Stryker v. Stelmak*, No. 06 Civ. 1322 [SDNY 2006].) Six years from the date of the actual alleged fraud would be, "late 2004." Two years from the discovery of the alleged fraud would be November 6, 2004. Plaintiff commenced this action November 22, 2006, long after the expiration of the statute of limitations.

Plaintiff's breach of contract claim is barred by the six year statute of limitations set forth in CPLR § 213[2]. Unlike fraud, "knowledge of the occurrence of the wrong on the part of the plaintiff is not necessary to start the statute of limitations running in a contract action." (*Ely-Cruikshank Co., Inc., v. Bank of Montreal*, 81 NY2d 399 [1993].) The statute of limitations expired six years after the date of the actual breach. Therefore, it expired in late 2004.

For the same reasons set forth above, Plaintiff's breach of fiduciary duty claim is barred by the six year statute of limitations in CPLR 213[1] where the relief sought is equitable in nature and the three year statute of limitations in CPLR 214[4] where the only relief sought is monetary damages. (*see Weisenthal v. Weisenthal*, 40 AD3d 1078 [2nd Dept. 2007].)

Plaintiff's remaining claims of aiding and abetting breach of fiduciary duty, constructive trust, breach of the implied covenant of good faith and fair dealing, quantum meruit, common law negligent misrepresentation, and injunctive relief are all barred for the same reasons set forth above, by the six year statutes of limitations from CPLR 213[1] and CPLR 213[2] (*see Niagra Mohawk Power Corp. v. Freed*, 288 AD2d 818 [4th Dept. 2001]; *see also Boronow v. Boronow*, 71 NY2d 284, 288 [1998]; *see also Eisen v. Feder*, 307 A.D.2d 817, 818 [1st Dept 2003]; *see also 1050 Tenants Corp. v. Lapidus*, 289 AD2d 145 [1st Dept. 2001].)

Plaintiff provides no support, nor can ths court find any legal authority for his contention that his causes of action were preserved because the statues of limitations "stopped running in June 2004, when Stryker pleaded the facts constituting the Defendants' fraud in his *Pro Se* answer to Stelmak's defamation complaint." While it is true that "where facts are pleaded in an answer that are sufficient to state a claim, those facts may be construed as stating a counterclaim, even though (1) the facts are not labeled as a counterclaim and (2) there is no specific prayer for relief" (Kaufman, 23 NYS2d 637, 643 [Sup Ct NY County 1940], aff'd 263 A.D.703 [1st Dept. 1941],) it does not follow that the statute of limitations stopped running.

In view of the expiration of the statutes of limitation, Plaintiff cannot satisfy the "meritorious nature of the cause of action" factor for an extension of time. Granting Plaintiff's motion to extend time to serve his summons and complaint would be futile, and would simply prolong the inevitable dismissal on statute of limitations grounds at the expense of all parties and the resources of this court.

Intentional Tort Claims

Plaintiff's intentional tort claims of malicious prosecution and abuse of process may still be viable claims. Intentional torts are subject to the one-year statute of limitations in CPLR §

215. Under CPLR § 205(a), "[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff... may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon the defendant is effected within such six-month period." The defamation case against Plaintiff was dismissed on May 19, 2005. Plaintiff filed an action in federal court on February 21, 2006 alleging the same intentional torts alleged here, and the federal court declined to exercise supplemental jurisdiction, dismissing the state claims on November 14, 2006. Plaintiff then filed the instant action on November 22, 2006, and made the defective service on November 28, 2006. If Plaintiff has alleged meritorious causes of action for malicious prosecution and abuse of process, the court may grant Plaintiff an extension of time to serve his summons and complaint for those causes of action alone.

The elements of malicious prosecution consist of the initiation of a legal action by the defendant against the plaintiff, begun with malice and without probable cause to believe it can succeed, and ending in the accused's favor. (*Purdue Frederick Co. v. Steadfast Insurance Co.*, 40 AD3d 285, 286 [1st Dept. 2007].) Such a cause of action may be based upon a civil action instituted against plaintiff provided there is a showing of some interference with plaintiff's person or property (*O'Brien v. Alexander*, 101 F.3d 1479, 1484 [2d Cir. 1996]; *Williams v. Williams*, 23 N.Y.2d 592, 596 n. 2 [1969],) constituting a "special injury." (*Engel v. CBS, Inc.* 93 NY2d 195, 201 [1999].) A special injury requires a "concrete harm that is considerably more cumbersome than the physical psychological or financial demands of defending a lawsuit." (*Id.*)

Plaintiff has adequately pled a cause of action for malicious prosecution. The complaint alleges that Defendant initiated the defamation action maliciously and without probable cause to believe it could succeed (Complaint ¶ 58). It further alleges that the action ended in Plaintiff's favor, and while not on the merits, the outcome of that case shows Defendant's apparent bad faith. In a strongly worded opinion, the Judge dismissed the case for Defendant's failure to comply with numerous discovery obligations, stating "the court in its discretion finds that this is the *unusual case where a party's conduct has been so dilatory and inconsiderate to the opposing party* as to warrant the sanction of dismissal" (Complaint, Exhibit D). The court also noted that the Plaintiff in this action had complied with all of his discovery obligations in the Federal action and found the Defendant's failures to abide to his obligations "especially pronounced" in light of the fact plaintiff was representing himself pro se (Id.)

For Plaintiff's damages on the malicious prosecution claim, the complaint alleges that he: sustained serious damages including past and future financial loss; past and future wage loss; damage to his reputation; past and future damage to his business; emotional distress, humiliation, embarrassment and mental anguish (Complaint ¶ 59). Therefore, Plaintiff has pled a meritorious action for Malicious Prosecution.

Plaintiff's claim for abuse of process is meritorious for the same reasons. To sustain a cause of action for abuse of process, a plaintiff must demonstrate "the deliberate premeditated infliction of economic injury without economic or social excuse or justification" (*Walentas v. Johnes*, 257 AD2d 352, 354 [1st Dept. 1999] quoting *Board of Educ. v Farmingdale Classroom Teachers Assn.*, 38 NY2d 397, 405 [1975],) and that the process employed must entail some "unlawful interference with one's person or property," (*Walentas v. Johnes*, 257 Ad2d 352, 354 [1st Dept. 1999] quoting *Williams v. Williams*, 23 NY2d 592, 596 [1969],) and finally,

"defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process." (*Board of Educ. v. Farmingdale Classroom Teachers Assn.*, 38 NY2d 397, 403 [1975].) The complaint alleges that Defendant instituted the lawsuit for improper, ulterior purposes, including harassment of Plaintiff such that he would abandon the pursuit of his interest in defendant ATG and its business. It further alleges that after the litigation was commenced, Defendant informed Plaintiff's friends and business associates about the lawsuit in order to carry out defendant's improper ulterior motives, and alleges the same damages as noted above. Assuming the truth of the facts pled along with every favorable inference and applying the above principles, the complaint is sufficient to state a meritorious cause of action for abuse of process.

Therefore, Plaintiff has pled a meritorious cause of action as to abuse of process.

Conclusion

Therefore, based on the forgoing, Plaintiff's motion to extend time to serve his summons and complaint should be denied as to all causes of action except malicious prosecution and abuse of process against Defendant Stelmak and it is further

ORDERED that Plaintiff serve a copy of his summons and complaint within 20 days of this order with notice of entry and it is further

ORDERED that defendants shall answer the complaint within twenty days from the date

of said service.

This shall constitute the Decision and Order of the Court.

Dated: November 19, 2007

ENTER:

JUSTICE RICHARD B. LOWE, III
J.S.C.