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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 56

Index Number : 602291/2007

SALTA, REMO

VS.

SALTA, ROMEO

SEQUENCE NUMBER : # 001

DISQUALITY COUNSEL

INDEX NO. 602291-07

MOTION DATE ~~12/27/07~~ 1/2/08

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

e 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

FILED

FEB 07 2008

NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1/25/08

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

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REMO SALTA, individually, and derivatively as a Member and in the right of 378 Third Avenue Associates, LLC,

Plaintiff,

Index No. 602291/07

-against-

ROMEO SALTA, JAMES H. GOMEZ, DAVID S. KRISS, DANIEL WISE, ILGAR PEKER and 378 THIRD ASSOCIATES LLC,

Defendants,

and

378 THIRD AVENUE ASSOCIATES LLC,

Nominal Defendant.

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Hon. Richard B. Lowe, III:

Defendants move to disqualify Larry Hutcher, Esq. ("Hutcher") and Davidoff, Malito & Hutcher LLP ("Davidoff Malito") as Plaintiff's counsel. Plaintiff Remo Salta ("Remo") cross moves to dismiss defendants' counterclaim for abuse of process brought by defendants Romeo Salta ("Romeo"), James H. Gomez ("Gomez") and Daniel Wise (collectively, the "Romeo Defendants") and also requests sanctions.

Background

The complaint alleges that plaintiff, a writer, was solicited by his brother, defendant Romeo, an attorney and real estate investor, to become 50/50 partners in the purchase of a commercial building located at 378 Third Avenue, New York, New York (the "premises").

It is alleged the only reason plaintiff was asked to participate in the transaction was

because the Romeo Defendants could not obtain a mortgage without the benefit of plaintiff's credit. However, after plaintiff and his wife guaranteed the mortgage, Romeo fraudulently induced plaintiff to "sign over" in blank his shares in the LLC which owned the premises. As a result, plaintiff was allegedly deprived of his share of the profits resulting from the subsequent sale of the premises. Furthermore, defendants allegedly conspired to defraud the mortgagee bank by failing to disclose that the property had been sold leaving plaintiff and his wife fully liable under the mortgage even though plaintiff no longer owned the premises. The complaint seeks a declaratory judgment that the transfer be rescinded, the shares restored, and plaintiff awarded 49% of the consideration paid by the purchaser in connection with the sale of the property.

The basis for the motion to disqualify plaintiffs' counsel surrounds an inadvertent telephone call made by plaintiffs' counsel to defendant Romeo. On July 11, 2007, Romeo received a telephone call from Davidoff Malito, Hutcher's firm, and was told by a secretary to hold because Hutcher wanted to patch him into a conference call. While Romeo waited, he heard a conversation between Hutcher and another attorney who represents plaintiff, John La Greco, Esq.

The two attorneys were overheard laughing and discussing this instant matter. Hutcher was allegedly heard saying that the purpose of the lawsuit was to "scare the shit out of Romeo"and obtain some "quick cash". It was later learned the receptionist at Davidoff Malito called Romeo mistakenly believing she was contacting his brother, plaintiff Remo.

The defendants assert this action was brought to bring unnecessary economic harm upon Romeo. According to the Romeo Defendants, the LLC, which was owned 51% by Romeo and

49% by Remo, purchased the premises from Gomez in March 2003 for $5,950,000 but only paid $4,300,000 with the remaining balance of $1,650,000 payable to Gomez "under repayment terms to be negotiated by the parties" (*Ripin Aff., Exhibit B,* ¶¶ 84-85). On or about March 31, 2005, the LLC and Gomez executed a promissory note in the amount of $1,883,750 reflecting the balance of the purchase price plus the accrued interest (*Id*). Thereafter, in an agreement between the LLC and Gomez dated March 1, 2006, Remo and Romeo agreed to transfer their LLC shares to Gomez and defendant David Kriss who agreed to forgive the LLC's obligation under the note in exchange for their promise to waive any claims to future proceeds from the sale of the premises(*Id* at ¶ 98).[1] The plaintiff has allegedly breached the note and agreement by commencing this lawsuit which seeks additional monies in connection with the sale and thereby subjecting plaintiff and Romeo to a claim for damages by Gomez.

Based on these allegations, Romeo defendants have filed a counterclaim for abuse of process. To support this counterclaim, defendants intend to subpoena and call both Hutcher and LaGreco as necessary witnesses to the defense and counterclaim. Therefore, the defendants move to disqualify plaintiff's counsel.

The plaintiff moves to dismiss the counterclaim for abuse of process for failure to state a cause of action.

Discussion

Motion to dismiss Abuse of Process Counterclaim

Pursuant to CPLR 3211(a)(7), "[a] party may move for judgment dismissing one or more

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[1]Notably, neither the promissory note nor the March 1, 2006 agreement have been attached to the defendants' papers.

causes of action asserted against him on the ground that . . .the pleading fails to state a cause of action." The court must accept the material allegations as true and give plaintiff the benefit of every reasonable inference when analyzing the complaint to determine whether it sets forth sufficient facts to state a cognizable claim (*Sims v First Consumers Nat. Bank*, 303 AD2d 288, 290 [1st Dept 2003])(*Kralic v Helmsley*, 294 AD2d 234, 235 [1st Dept 2002]("accepting the material allegations as true and giving plaintiff the benefit of every reasonable inference" in analysis of motion to dismiss)).

Abuse of process has three elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification; and (3) use of the process in a perverted manner to obtain a collateral objective. (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). "[T]he institution of a civil action by summons and complaint is not legally considered process capable of being abused" (*Id at* 116). As to the first element, the process used must involve "an unlawful interference with one's person and property" (*Id).* " As a matter of law, service of a summons and complaint, even if made with malicious intent, is insufficient to state a cause of action for abuse of process" (*Stroock Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1st Dept 1990]). Service of a summons and complaint does not constitute unlawful interference with one's person or property because "the institution of a civil action by summons and complaint is not legally considered process capable of being abused" (*Curiano v Suozzi*, 63 NY2d at 116). Furthermore, even if a suit was instituted in an attempt to force a settlement, this would not be enough to claim abuse of process (*Stroock Stroock & Lavan*, 157 AD2d at 591). Abuse of process requires "'the deliberate premeditated infliction of economic injury without economic or social excuse or justification' and therefore, the expense arising from the defense of a lawsuit is

an insufficient injury to sustain the cause of action" (*Id*).

In the matter at bar, the abuse of process counterclaim alleges that plaintiff received "due consideration" for his LLC membership, reached an "accord and satisfaction" with defendant Romeo and plaintiff waived any rights to future proceeds from the sale of the building (*Ripin Aff., Exh.* B¶ 112). Thereafter, this litigation was brought and Romeo was "witness" to a phone conversation between plaintiff's counsels Hutcher and LaGreco in which Hutcher allegedly stated that the purpose of filing the lawsuit was to scare Romeo and obtain quick cash (*Id* ¶ 110). According to the counterclaim, plaintiff is wrongfully attempting to obtain greater proceeds from the sale of the premises than he is entitled to and is seeking a windfall (*Id* ¶ 111).

The counterclaim is founded entirely upon the commencement of this action by service and complaint. It is alleged to have been instituted with malicious intent to injure the defendants. However , even if there is malicious intent, abuse of process cannot be found if there has only been the filing of a summons and complaint.

The defendants argue this case does not only concern the filing of a summons and complaint by the plaintiff, but there have also been discovery requests made by the plaintiff. Defendant contends that plaintiff has improperly used the discovery process in this matter. However, to the extent that defendant finds the requests improper, he may object pursuant to CPLR 3122(a).

Defendants argue this case is likened to *Dishaw v Wadleigh*, 15 AD 205 [3rd Dept 1897] where an attorney had assigned claims to another associate living in another part of the state for the purpose of having the associate institute proceedings in an area which made it more feasible for the defendant to pay the claims rather than incur the expense of attending a distant court. The

Court of Appeals relied on *Dishaw* when it found a "classic example of abuse of process" in another matter which was before it (*See Board of Education of Farmingdale Union Free School District v Farmingdale Classroom Teachers Association Inc.*, 38 NY2d 397 [1975]).

The defendants argue this case is similar to *Dishaw* because the plaintiff knows this matter could expose defendants to a possible claim by Gomez which resurrects the note entered into between him, the plaintiff, and Gomez. Therefore, the plaintiff is looking to raise quick cash knowing that to litigate this matter could expose defendants to damages claimed by Gomez. However, defendants do not dispute that in order to sustain a cause of action for abuse of process, one must also allege and prove actual or special damages to recover (*Bohm v Holzberg*, 47 AD2d 764 [2nd Dept 1975]). The defendants only allege that there may be costs from this litigation as well as from *possible* litigation brought by Gomez. "[T]he expense arising from the defense of a lawsuit is insufficient injury to sustain [a] cause of action [for abuse of process]" (*Stroock & Stroock & Lavan*, 157 AD2d at 591). Because the defendants only allege potential damages arising from the instant litigation as well as future litigations, they have not alleged the actual or special damages which would support the counterclaim. Therefore, it must be dismissed.

Motion to disqualify counsel

The advocate-witness rule requires an attorney to withdraw from a case "if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client" (22 NYCRR § 1200.21[a]). "Such disqualification is required only where the testimony by the attorney is considered necessary" (*Broadwhite Assoc. v Truong*, 237 AD2d 162, 162-163 [st Dept 1997). When an attorney will be called as a witness on a significant issue

by an adversary, disqualification is required only when prejudice to the client can be shown (*Martinez v Suozzi*, 186 AD2d 378, 379 [1st Dept 1992])("plaintiff was required to identify the projected testimony of the witness and show that it would be so adverse to the factual assertions or account of events offered on behalf of the client as to warrant disqualification").

The basis for the motion to disqualify plaintiff's counsel is because his testimony is allegedly needed to explore the motives behind bringing this instant suit. However, this court has already found that even if there had been malicious intent when filing the summons and complaint, this is not enough to state a cause of action for abuse of process. Furthermore, the allegation that plaintiff's counsel was attempting to make "quick money" is not enough to support the counterclaim. Therefore, plaintiff's counsels' testimony is neither material nor necessary and the motion is denied.

Plaintiff's request for sanctions

Plaintiff requests sanctions be imposed against defendants for making the abuse of process counterclaim. At this stage, this court does not find defendant to have engaged in "frivolous conduct" as contemplated by 22 NYCRR 130-1.1(c)(1-3). Therefore, the request is denied.

Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED that the counterclaim for abuse of process is dismissed and it is further

ORDERED that the motion to disqualify plaintiff's counsel is denied.

This shall constitute the order and decision of the court.

Dated: January 25, 2008

ENTER:

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