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

PRESENT: _____ Justice

PART _____

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

- v -

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

FILED

MAY 26 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: _____

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

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

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: IAS PART 56

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TADCO CONSTRUCTION CORP.,

Plaintiff,

-against-

Index No. 603259/06

GOTTESMAN, WOLGEL, MALAMY, FLYNN, & WEINBERG P.C., STEVEN WEINBERG, ESQ., STEWART LEE, ESQ., and CENTENNIAL INSURANCE COMPANY,

Defendants.

----------X

RICHARD B. LOWE, III, J:

Motion sequence numbers 006 and 007 are consolidated for disposition.

In this action, plaintiff Tadco Construction Corp. (Tadco) seeks $300,000 in damages allegedly caused when counsel for defendant Centennial Insurance Company (Centennial) served a second restraining notice upon non-party Dormitory Authority of the State of New York (DASNY). The three-count complaint asserts causes of action for abuse of process, negligent issuance and service of process, malicious issuance and service of process, and malicious refusal to release an improper restraint. Tadco also seeks punitive damages and attorneys' fees.

Centennial moves (in motion sequence number 006) for summary judgment dismissing the complaint. Alternatively, Centennial requests that Tadco be limited in its proof to what Tadco disclosed in pre-trial proceedings, and that Tadco be precluded from introducing new or different documentary or testamentary proof, and, in any event, dismissing Tadco's request for punitive damages. Defendants Gottesman, Wolgel, Malamy, Flynn, & Weinberg, P.C. (Gottesman Firm), Steven Weinberg, Esq. (Weinberg) and Stewart Lee, Esq. (Lee) move (in

motion sequence number 007) for the same relief requested by Centennial.

Tadco cross-moves for summary judgment on its causes of action for negligent issuance and service of process, and violation of CPLR 5222 (c). Tadco also cross-moves for leave to amend the complaint to add a cause of action for breach of contract.

Background

In January 2002, the New York State Office of General Services awarded Tadco a $1.6 million contract to construct a pavement marking crew facility for the New York Department of Transportation. Tadco procured the requisite performance and payment bond for the project from Centennial, whereby Centennial guaranteed payment for labor and materials provided in connection with the project. The bond was executed by Centennial as surety and by Tadco as principal. Under a General Agreement of Indemnity, Tadco agreed to indemnify and hold Centennial harmless from any claims against the bond. This indemnity agreement was executed by Tadco and non-party D&D Mason Contractors, Inc. (D&D Mason).

During the Department of Transportation project, Tadco entered into a subcontract with non-party Racanelli Construction Company, Inc. (Racanelli) for the purchase of a pre-engineered metal building. Racanelli, in turn, contracted with non-party Ceco Building Systems (Ceco) to fabricate the materials for the building. Racanelli allegedly delivered non-conforming materials for the building, which Tadco was forced to correct at its own expense. When Tadco failed to pay Racanelli for the building, Racanelli and Ceco commenced actions against Tadco and Centennial to recover the purchase price.

Centennial demanded that Tadco post collateral for the lawsuit, and to indemnify Centennial for expenses. When Tadco failed to do so, Centennial, through the Gottesman Firm,

commenced an action, under index No. 603713/04, against Tadco, D&D Mason, and Frank and Thomas DeMartino, the respective presidents of Tadco and D&D Mason, demanding payment of $200,000 as collateral for Racanelli and Ceco's claims against the bond (Centennial Collateral Action). Tadco failed to oppose Centennial's motion for summary judgment in the Centennial Collateral Action, and on August 30, 2005, judgment was entered against the defendants for $219,303.03. Centennial was represented in the Centennial Collateral Action by Weinberg of the Gottesman Firm.[1]

After the entry of judgment in the Centennial Collateral Action, the Gottesman Firm issued and served restraining notices against the bank accounts of Frank and Thomas DeMartino, and Tadco's operating account at Bank of America. The Gottesman Firm also served a restraining notice against DASNY, which at the time was allegedly Tadco's "largest and most important client" (Complaint, ¶ 33). Tadco claims that it was working on three major construction projects for DASNY when the DASNY restraining notice was served.

Tadco claims that the restraining notices had a devastating impact on its ability to continue operating its business. On January 30, 2006, the parties to the Centennial Collateral Action entered into a stipulation (Stipulation) "to resolve certain issues relating to the security of [Centennial's] judgment and the ability of [Tadco] to continue to operate normally on an ongoing basis" (Ha Aff., Ex. C). Under the Stipulation, Centennial agreed to refrain from enforcing its judgment in exchange for the defendants' agreement to collateralize the judgment.

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[1] In July 2005, Centennial commenced a separate action against Tadco in the City Civil Court of New York County, under index No. 33215/05, for unpaid surety bond premiums, totaling $17,032 (Centennial Bond Premium Action). Tadco asserted a counterclaim in this action. Centennial was represented by non-party Soffer & Rech LLP in this action.

Specifically, Tadco agreed to give Centennial a Deed in Lieu of Foreclosure for a certain piece of real property, $35,000 in cash or other certified funds, and cash or an irrevocable letter of credit in the amount of $194,000 (*id.*).

Tadco tendered the Deed in Lieu of Foreclosure and a certified check in the amount of $35,000. In February 2006, the Gottesman Firm released DASNY from obligations under the restraining notice and released the restraint on Tadco's operating account. Tadco claims that, notwithstanding the release of the restraint on its operating account, Bank of America froze the funds in the account as a result of the restraint. The Gottesman Firm also allegedly delayed in releasing the restraints on Frank DeMartino's personal bank accounts. Tadco maintains that, as a result, it was unable to obtain a letter of credit and unable to make the first of three installment payments of $64,666.76 on the $194,000, pursuant to the Stipulation.

On March 30, 2006, Centennial caused a new restraining notice to be served upon DASNY (3/30/06 Restraining Notice). Centennial admits that it served this new restraining notice without seeking a court order, as is required by CPLR 5222; this failure by Centennial is at the heart of Tadco's claims. The 3/30/06 Restraining Notice was signed by Lee, an associate of the Gottesman Firm. Tadco claims that DASNY enforced the 3/30/06 Restraining Notice and withheld a payment of approximately $197,000 that was due to be made to Tadco on April 3, 2006. Tadco maintains that it needed this money to pay its vendors and creditors, and to otherwise meet its day-to-day obligations.

According to Tadco, the Gottesman Firm knew that the 3/30/06 Restraining Notice gave it leverage over Tadco, and enabled the Gottesman Firm to exploit Tadco. Tadco avers that, as a condition to releasing the restraint, the Gottesman Firm demanded that Tadco withdraw its

counterclaim in the Centennial Bond Premium Action and pay the $17,032 demanded by Centennial in that action. The Gottesman Firm also allegedly required Frank DeMartino and his father (Joseph DeMartino) to execute additional documents for Centennial's benefit in connection with the previously tendered Deed in Lieu of Foreclosure.

Tadco claims that it gave in to all of these demands, but that the 3/30/06 Restraining Notice was not released until April 14, 2006, exacerbating Tadco's problems with its vendors and creditors and further obstructing the operation of Tadco's business. Indeed, by letter dated April 10, 2006, Centennial withdrew and released the 3/30/06 Restraining Notice. Defendants submit a DASNY memorandum, dated April 12, 2006, acknowledging Centennial's withdrawal of the 3/30/06 Restraining Notice. According to defendants, DASNY sent two checks to Tadco on April 13, 2006: one for $61,272.15; and another for $261,239.90, which included the previously withheld $197,639.90. Tadco received these checks on April 14, 2006, ten days later than the earliest Tadco could have received the payment.

The court notes that additional background facts concerning this case, and separate actions involving several of the same parties, have been stated in detail in this court's decisions of November 15, 2006, June 29, 2007 and August 22, 2007 in *Centennial Ins. Co. v Tadco Constr. Corp. et al.* (Sup Ct, NY County, Lowe, J., index No. 603713/04), in *Tadco Constr. Corp. et al. v Centennial Ins. Co.* (Sup Ct, NY County, Oct. 7, 2008, Lowe, J., index No. 602749/07), and in the various decisions and orders on the record in these actions. Therefore, the court presumes familiarity with the additional facts and refers herein to those decisions.

DISCUSSION

Abuse of Process

Defendants argue that Tadco's claims should be dismissed for lack of standing, because CPLR 5222 exists for the benefit of DASNY, and not for Tadco. Defendants also argue that Tadco's abuse of process claim should be dismissed, because they did not serve the 3/30/06 Restraining Notice with an ulterior purpose to do harm without excuse or justification, the restraint was not served to seek a collateral objective, and Tadco did not suffer actual or special damage. Tadco counters that the court already fully considered and rejected defendants' standing argument, and that Centennial's service of the 3/30/06 Restraining Notice violated CPLR 5222 and the terms of the Stipulation.

As a preliminary matter, the court's denial of the Gottesman Firm's motion to dismiss on December 13, 2006 took no position on the issue of standing, but rather, the court denied the motion to dismiss based upon the existence of factual issues. Indeed, for the reasons discussed below, factual issues still exist in this action, which preclude summary judgment dismissal of the abuse of process cause of action.

CPLR 5222 (c) provides for service of "[s]ubsequent notice[s]," stating that "[l]eave of court is required to serve more than one restraining notice upon the same person with respect to the same judgment or order." The "LEGISLATIVE STUDIES AND REPORTS" for the statute states:

> Subd. (c) is designed to require that the judgment creditor show his need for a new restraint, whether or not he seeks an examination. He may show such matters as that he was unaware of certain property despite diligent attempts to ascertain its existence and location during the earlier restraining period or that he was unable to apply property discovered to the satisfaction of the judgment during that period.

> *To prevent undue harassment of third parties*, subd. (c) requires leave of court whether or not the judgment has been assigned to a new judgment creditor.
>
> Because a restraining notice served upon a judgment debtor is effective under subd. (b) for the life of the judgment, *subd. (c) is only applicable to notices served upon persons other than the judgment debtor*. See notes to subd. (b)

(id. [emphasis added]).

Thus, CPLR 5222 was intended to protect the third party served, here, DASNY, not Tadco as the judgment debtor. Therefore, Tadco has no direct claim for a violation of CPLR 5222 (c), and to the extent that defendants seek summary judgment dismissal of any such direct claims, the motion is granted.

However, Tadco's first cause of action does not assert a direct claim under CPLR 5222 as a judgment debtor. Rather, this claim asserts a common law tort claim for abuse of process, which flows from defendants' violation of the Stipulation and misuse of the 3/30/06 Restraining Notice for a collateral objective. Therefore, defendants' standing argument is unpersuasive with respect to Tadco's first cause of action.

"Abuse of process has three essential 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]).

Here, the parties do not dispute that the 3/30/06 Restraining Notice was regularly issued process, and defendants admit that they failed to obtain leave of court prior to serving the 3/30/06 Restraining Notice upon DASNY. With respect to the element of intent, the Stipulation stated that the defendants in the Centennial Collateral Action "will collateralize [Centennial's]

judgment and [Centennial] will refrain from executing thereon" (Ha Aff., Ex. C, at 2). The Stipulation also stated that, in the event of a default and failure to cure under the Stipulation by Tadco, "[Centennial] shall be immediately entitled to file the Deed in Lieu of Foreclosure and may pursue any and all of its remedies in connection therewith" (*id.* at 3). The parties also agreed that, in the event of a default under the Stipulation, Tadco, D&D Mason or the DeMartinos, "individually and/or in their corporate capacities and/or their father, Joseph DeMartino will fully cooperate in executing any additional documents needed attendant to [Centennial's] recording of the Deed in Lieu" (*id.* at 3-4).

As this court already stated in its August 22, 2007 decision denying Centennial's motion to reargue in the Centennial Collateral Action:

> When read as a whole, it is clear that the parties[']intent was that the Deed would serve to collateralize the judgment. The parties agreed that in exchange for [Centennial] foregoing executing on the judgment, DeMartino would make certain installment payments. In the event the payments were not made, then [Centennial] became entitled to file the deed in satisfaction of the judgment.
>
> ...
>
> There is no dispute that the single purpose of the stipulation was to enable Tadco to be free from restraints on its funds and to continue to do business. Therefore, it turned over the Deed as collateral which represents property agreed to be worth twice as much as the judgment which is to be turned over in the event Defendant does not make the stipulated payments. [Centennial] received this Deed and agreed to forgo its right to execute the judgment. This understanding is made evident through the terms of the stipulation

(*id.*, Ex. F, at 5, 6). This ruling is consistent with this court's decisions dated June 29, 2007 (*id.*, Ex. G, at 8) and October 7, 2008 (*id.*, Ex. BB, at 2). Therefore, having already determined that, under the Stipulation, Centennial received the deed and agreed to forgo its right to execute the

judgment, a question of fact exists as to Centennial's intent in serving the 3/30/06 Restraining Notice.

Furthermore, restraining notices "allow [a judgment creditor] to collect on a properly obtained judgment by preventing [the judgment debtor] from improperly disposing of property before the judgment is satisfied" (*Mitchell v Kurtz*, 10 Misc 3d 1063(A), 205 NY Slip Op 52107(U), 2005 WL 3501560, *3 [Sup Ct, NY County 2005]). There is at least some evidence in the record of Centennial's purported collateral objective. Specifically, the affidavit of Frank DeMartino states that Centennial used the 3/30/06 Restraining Notice to force Tadco to pay the $17,032 demanded in the Centennial Bond Premium Action, to withdraw its counterclaim in that action, and to execute certain additional tax transfer documents relating to the deed referenced in the Stipulation. According to Frank DeMartino, defendants agreed to release the restraint only after they had succeeded in obtaining the above-referenced concessions from Tadco. Indeed, the "STIPULATION OF DISCONTINUANCE WITH PREJUDICE" in the Centennial Bond Premium Action, which discontinued that action and Tadco's counterclaim, and whereby Centennial acknowledged payment of $17,032, was dated April 10, 2006 (Centennial Ex. 31), the same day that the Gottesman Firm withdrew and released the 3/30/06 Restraining Notice (*id.*, Ex. 45).

Thus, if Centennial served the 3/30/06 Restraining Notice in order to extort or blackmail Tadco into submission in the Centennial Bond Premium Action, especially where Centennial already received the deed and agreed to forgo its right to execute the judgment, Centennial serving the 3/30/06 Restraining Notice could constitute a collateral objective (*see Board of Ed. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Inc.*, 38

NY2d 397, 404 [1975] ["[w]here process is manipulated to achieve some collateral advantage, whether it be denominated extortion, blackmail or retribution, the tort of abuse of process will be available to the injured party"]). Therefore, an issue of fact exists as to whether Centennial used the 3/30/06 Restraining Notice in a perverted manner to obtain a collateral objective.

While defendants argue that Tadco did not suffer any actual or special damages, none of the cases cited by defendants state that actual or special damages are required to sustain an abuse of process cause of action. In any event, Tadco submits as evidence bank "NOTICE[S] OF INSUFFICIENT FUNDS" from April 6 - 28, 2006, showing bank charges of $2,040 for returned checks due to insufficient funds (Ha Aff., Ex. O), which were allegedly caused because the 3/30/06 Restraining Notice prevented Tadco from receiving funds from DASNY. These purported damages are sufficient to sustain Tadco's claim (*see Wolf St. Supermarkets, Inc. v McPartland*, 108 AD2d 25, 32 [4th Dept 1985] ["(s)pecial damages, as the term is used by New York courts, are defined as the loss of something having economic or pecuniary value such as loss of profits"]; *see also Walter v Doe*, 93 Misc 2d 286, 289 [Civ Ct, NY County 1978] ["issuance of the restraining notice ... subjects [defendant] to liability for any damages caused by the improper restraint"; plaintiffs' sustaining "some extra finance charges because of the dishonor of the checks issued" deemed sufficient]).

Tadco claims that it also incurred legal costs and expenses totaling over $25,000 in defending, addressing and resolving actions taken by defendants (*see Parkin v Cornell Univ., Inc.*, 78 NY2d 523, 530 [1991] ["actual or special damages" stated in abuse of process claim where "both plaintiffs testified that they had incurred legal expenses in connection with their defense of the criminal charges brought against them"]). In addition, Tadco claims that it

suffered injury to its reputation as a result of defendants' actions (*see Wolf St. Supermarkets, Inc.*, 108 AD2d at 32 ["(a) corporation cannot suffer personal humiliation or mental anguish but it can be actually damaged through injury to its reputation in the community regardless of whether it can also demonstrate special damages"]). Tadco also claims that it is entitled to recover the value of the counterclaim that it withdrew in the Centennial Bond Premium Action and for exposure resulting from entry of a judgment in that action, and also non-legal costs and expenses associated with having to defend against defendants' actions. For the foregoing reasons, defendants' motions for summary judgment dismissal of Tadco's abuse of process cause of action are denied.

Negligent Issuance and Service of Process

The Gottesman Firm, Weinberg and Lee argue that Tadco's second cause of action for negligent issuance and service of process should be dismissed for lack of a duty owed to Tadco. Tadco counters that the court has already considered and rejected this argument, that a duty exists, and that it is entitled to summary judgment on this claim.

As a preliminary matter, at the hearing held on December 13, 2006, the court denied the Gottesman Firm's motion to dismiss this action, holding that Tadco's assertions that Centennial "used an underlying judgment to force payment in another action gives at least a cognizable cause of action that can be recognized" (Ha Aff., Ex. U). However, the cognizable cause of action acknowledged by the court's December 13, 2006 ruling was Tadco's abuse of process claim which, as discussed above, is sustained. The court made no specific ruling concerning the existence of a duty in connection with Tadco's negligence cause of action.

"It is recognized that '[t]he public interest ... demands that attorneys, in the exercise of

their proper functions as such, shall not be civilly liable for their acts when performed in good faith and for the honest purpose of protecting the interests of their clients" (*Hahn v Wylie*, 54 AD2d 629 [1st Dept 1976]). An attorney is not "immune from responsibility for his wrongful acts," but rather, he "may be personally liable to a third party who sustains an injury in consequence of his wrongful act or improper exercise of authority, where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act" (*id.*). Moreover, "[w]ithout allegations of malicious intentions, this conduct does not give rise to liability" (*Gifford v Harley*, 62 AD2d 5, 7 [3d Dept 1978]).

Here, Tadco fails to provide legal support for the creation of a new claim of negligent issuance of a restraining notice, without malice or intent. In any event, to the extent that the second cause of action purports to allege intent, the claim is duplicative of the third cause of action for malicious issuance and service of process.

Tadco relies upon *Walter* (93 Misc 2d 286, *supra*) in support of its negligence claim. *Walter* involved a negligence claim against an attorney based upon his improper issuance of a restraining notice against the judgment debtor's brother-in-law in violation of CPLR 5222 (b). The attorney moved to dismiss the claim, because the plaintiffs were not his clients. The court rejected this argument, found that a duty existed, and granted summary judgment to the plaintiffs, reasoning that "the issuance of a restraining notice is an act which is intended to interfere with property rights and its effect is not fortuitous or incidental but is direct and immediate" (*Walter*, 93 Misc 2d at 289). The court also stated that the defendant "did not proceed within the authorization of [CPLR 5222 (b)]" (*id.*), and that "[t]he purpose of the statute is to prevent a judgment creditor from serving restraining notices at whim. It was not intended to

permit, or encourage lack of care on the part of those seeking to collect the judgment" (*id.* at 290).

As a preliminary matter, *Walter* is a court of concurrent jurisdiction, and, therefore, it is not binding upon this court. In any event, *Walter* was an action brought by the judgment debtor's brother-in-law after his bank account was improperly restrained, whereas the instant action is brought by Tadco, purporting to assert the improper service of a restraint on a third party. As discussed above, CPLR 5222 (c) was intended to protect the third party served, here, DASNY, not Tadco as the judgment debtor. To the extent that a duty was owed under the statute, it was owed to DASNY, not Tadco.

Moreover, in *Walter*, the restraint was clearly improper under CPLR 5222 (b), which authorizes the service of a restraining notice upon one other than the judgment debtor, but only if the attorney proceeds within the authorization of the statute, which the attorney failed to do in *Walter*. The court inferred intentional misconduct based upon the fact that the attorney's "office failed to take account of facts giving notice that Account No. 12457921 was owned by Leonard and Ann," the judgment debtor's brother-in-law and his wife (*id.* at 289). The court held that "[t]he issuance of the restraining notice despite notice of those facts subjects [the attorney] to liability for any damages caused by the improper restraint" (*id.*). Accordingly, *Walter* is distinguishable on its facts, because of the clearly indisputably improper service of the restraining notice upon the third party's bank. To extend liability to an attorney for simple negligence in the performance of his legal representation of clients would be contrary to settled law (*Hahn*, 54 AD2d 629, *supra*; *Gifford*, 62 AD2d 5, *supra*; *Racoosin v Le Schack & Grodensky, P.C.*, 103 Misc 2d 629 [Sup Ct, NY County 1980]). For the foregoing reasons,

Tadco's second cause of action for negligent issuance and service of process is dismissed.

Malicious Issuance and Service of Process

Defendants seek summary judgment dismissal of Tadco's third cause of action for malicious issuance and service of process and malicious refusal to release an improper restraint, arguing that this claim is not recognized under New York law. Alternatively, defendants argue that, if this cause of action is deemed a claim for prima facie tort, it must be dismissed for failure to establish special damages and because defendants' actions were without social or economic excuse or justification. Tadco counters that the third cause of action is properly construed as a claim for prima facie tort.

A cause of action for prima facie tort consists of four elements: "(1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful" (*Curiano*, 63 NY2d at 117).

As discussed in connection with Tadco's abuse of process claim, Tadco has stated special damages. Also discussed above, the element of intentional infliction of harm without excuse or justification raises a question of fact in connection with defendants' service of, and failure to release, the 3/30/06 Restraining Notice. Accordingly, defendants' motions for summary judgment dismissal of Tadco's third cause of action are denied.

Punitive Damages

Defendants argue that Tadco is not entitled to punitive damages in connection with its surviving causes of action. Tadco counters that defendants acted with malice and in wanton, deliberate and reckless disregard of its rights.

"To sustain a claim for punitive damages in tort, one of the following must be shown:

intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another" (*Gamiel v Curtis & Riess-Curtis, P.C.*, 16 AD3d 140, 141 [1st Dept 2005]).

Here, defendants admit that they served the 3/30/06 Restraining Notice in violation of CPLR 5222 (c). The 3/30/06 Restraining Notice also appears to have been served in violation of the Stipulation. As discussed above, questions of fact exist as to defendants' intent and whether Centennial used the 3/30/06 Restraining Notice in a perverted manner to obtain a collateral objective. At a minimum, these facts present issues of fact that preclude summary judgment dismissal (*see Farmingdale Union Free School Dist.*, 38 NY2d at 405 [sustaining punitive damages claim "contingent on the establishment of malice"]). Accordingly, defendants' motion for summary judgment dismissal of Tadco's claim for punitive damages is denied.

Limitation of Proof

Defendants next argue that Tadco should be limited in its proof as to what was disclosed in pre-trial proceedings, and should be precluded from introducing new or different documentary or testamentary proof. However, as Tadco argues, the court has already issued a preclusive order concerning Tadco's evidence of damages. Specifically, on February 7, 2008, the parties entered into a stipulation that was so ordered by the court, as follows:

> 2. Plaintiff is hereby precluded from offering into evidence any documents as to damages not produced by plaintiff as of 3:20 p.m. on February 7, 2008 with the exception of: (a) the previously referred to loan agreement, which shall be provided 3 weeks prior to the note of issue date; and (b) supplementing attorney fees and expenses previously claimed.
>
> 3. Documents produced as to damages by any of the defendants or third parties not in plaintiff's possession, custody or control as of the date of this stipulation shall not be subject to the above

preclusion

(Manno Aff., Ex. 27). By order dated February 13, 2008 (filed February 20, 2008), the court denied defendants' motion to compel as moot, determining that Tadco had produced the requested discovery, and Tadco was sanctioned for its dilatory conduct (*id.*, Ex. 26). Therefore, having already addressed the issues of discovery and preclusion, defendants' request is denied as moot.

Cross-motion to Amend the Complaint

Tadco cross-moves for leave to amend the complaint to add an allegation that "Defendants owed a duty to TADCO" in connection with Tadco's second cause of action for negligence (Complaint, ¶ 84), and to add a cause of action for breach of the Stipulation (*id.*, ¶¶ 97-105). Tadco argues that leave to amend should be granted because, in a decision in the separate action, *Tadco Constr. Corp., et al. v Centennial Ins. Co.* (Sup Ct, NY County, Oct. 7, 2008, Lowe, J., index No. 602749/07) (10/7/08 Decision), this court dismissed the claim for breach of the Stipulation on the ground that it is more properly brought in the instant action.[2]

The Gottesman Firm, Weinberg and Lee counter that the claim for breach of contract lacks merit, because they were not parties to the Stipulation. Centennial counters that the amended complaint is barred because of Tadco's delay in asserting the claim, and by *res judicata*, because the new breach of contract claim could have been raised in the Centennial Collateral Action, in which a judgment was entered on October 16, 2008, in favor of Centennial

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[2] Tadco, D&D Mason, and Frank and Thomas DeMartino commenced the action under index No. 602749/07 against Centennial, seeking declaratory, injunctive and monetary relief based upon Centennial's alleged bad faith settlement of the surety bond claim with Racanelli, refusal to release collateral so that Tadco could pay Racanelli, and breaches of the indemnity agreement and Stipulation.

and against Tadco (10/16/08 Judgment), pursuant to this court's October 8, 2008 decision and order (10/8/08 Decision).

Under CPLR 3025 (b), leave to amend a pleading will be freely granted "in the absence of prejudice or unfair surprise" (*Aetna Cas. and Sur. Co. v LFO Constr. Corp.*, 207 AD2d 274, 277 [1st Dept 1994]). However, "leave to amend a complaint is not granted upon mere request without a proper showing. Rather, in determining whether to grant leave to amend, a court must examine the underlying merit of the causes of action asserted therein, since, to do otherwise would be wasteful of judiciary resources" (*Wieder v Skala*, 168 AD2d 355, 355 [1st Dept 1990]; *Morton v Brookhaven Memorial Hosp.*, 32 AD3d 381, 381 [2d Dept 2006] ["(w)here ... proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave to amend should be denied"]). "In exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom" (*Mohammed by Ahmad v City of New York*, 242 AD2d 321, 321 [2d Dept 1997]).

For the reasons discussed in this decision, Tadco's request for leave to amend to add the allegation that "Defendants owed a duty to TADCO," in connection with Tadco's negligence claim (Complaint, ¶ 84), lacks merit and is denied.

The parties to the Stipulation were Centennial, Tadco, D&D Mason, and Frank and Thomas DeMartino. While counsel for the parties signed the Stipulation on the parties' behalf, the Gottesman Firm, Weinberg and Lee are not parties to the Stipulation. Therefore, Tadco's proposed claim for breach of the Stipulation, as against the Gottesman Firm, Weinberg and Lee, is without merit, and leave to amend is denied with respect to these defendants.

With respect to Centennial, the proposed amendment is not plainly without merit. On Centennial's motion to dismiss (which resulted in the 10/7/08 Decision), Centennial sought dismissal, *without prejudice*, of the cause of action for breach of the Stipulation, arguing that this claim was duplicative of the claims brought in the instant action. Centennial affirmatively argued that "there is nothing in the Eighth through Tenth Causes of Action in this lawsuit [index No. 602749/07] that is not already before the Court, *or that could not be easily brought before the Court*, in the prior-pending Abuse of Process Action" (Centennial 12/6/07 Mem. of Law, at 23 [emphasis added]). In the 10/7/08 Decision, the court agreed, dismissing the claims concerning breach of the Stipulation as duplicative of the instant action, finding that Tadco could seek to obtain the same relief in the instant action that it sought in the separate action against Centennial under index No. 602749/07. As stated in the 10/7/08 Decision, "[t]he factual assertions concerning both actions are virtually the same. The stipulation itself does not require the parties to engage in discovery. After having obtained discovery in the Abuse of Process Action, Tadco must determine only whether the facts discovered constitute a breach of the stipulation" (10/7/08 Decision, at 8). Therefore, the proposed amendment of the complaint in the instant action would not result in prejudice to Centennial.

Centennial's argument that the proposed amendment is barred by the 10/16/08 Judgment, under principles of *res judicata*, is without merit. As discussed above, when Tadco failed to oppose Centennial's motion for summary judgment in the Centennial Collateral Action, judgment was entered against Tadco, D&D Mason, and Frank and Thomas DeMartino. However, the court did not determine the matter of legal expenses owed by these parties, and referred the issue of the extent of Centennial's recovery of attorneys' fees to a Special Referee to

hear and determine. Based upon the Special Referee's report, decision, order and recommendations, in the 10/8/08 Decision, this court directed the Clerk of the Court to enter judgment in favor of Centennial, resulting in the 10/16/08 Judgment. Neither the 10/8/08 Decision nor the 10/16/08 Judgment had anything to do with Tadco's claim for breach of the Stipulation.

Moreover, while the Stipulation resulted from the underlying default judgment in the Centennial Collateral Action, the purported breach of the Stipulation resulting from service of the 3/30/06 Restraining Notice was not the subject of that litigation. Thus, the claim for breach of the Stipulation is not barred by *res judicata*, because that claim was not "brought to a final conclusion," and it did not "aris[e] out of the same transaction or series of transactions" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]), but rather, it involves the alleged breach of a stipulation entered into *after* a judgment was entered in that action. Significantly, "claim preclusion is tempered by recognition that two or more different and distinct claims or causes of action may often arise out of a course of dealing between the same parties" (*Reilly v Reid*, 45 NY2d 24, 28 [1978]). "A party's choice to litigate two such claims or causes of action separately does not bar his assertion of the second claim or cause of action" (*id.* at 28-29).

Centennial argues that Tadco's delay in bringing this claim warrants denial of leave to amend. However, it appears that Tadco has been attempting to litigate this claim since August 2007 in the action under index No. 602749/07. As discussed above, Centennial has known about this claim since at least that time, if not earlier, and Centennial conceded in that action that the claim "could ... be easily brought before the Court, in the prior-pending Abuse of Process Action," that is, the instant action (Centennial 12/6/07 Mem. of Law, at 23). Tadco's amended

complaint is dated December 1, 2008, less than two months after this court's 10/7/08 Decision dismissed the claim for breach of the Stipulation as duplicative of the instant action. Accordingly, Centennial's argument concerning Tadco's purported delay is unpersuasive.

Tadco's proposed fourth cause of action also asserts a claim for punitive damages (in paragraph 105). However, "[p]unitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights" (*Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 613 [1994]). Here, the purported breach of contract does not "involve[] a fraud evincing a high degree of moral turpitude," nor does it demonstrate "such wanton dishonesty as to imply a criminal indifference to civil obligations," and "the conduct was [not] aimed at the public generally" (*id.* [citation and internal quotation marks omitted]). Accordingly, Tadco's request for leave to amend to add a claim for punitive damages in connection with the proposed breach of contract cause of action is denied.

The court notes defendants' argument that Tadco's failure to comply with Rule 19-a of the Commercial Division rules renders Tadco's cross motion defective. While Tadco's failure to comply with Rule 19-a will not be tolerated in the future, this failure does not render Tadco's papers defective as to obviate otherwise meritorious defenses to defendants' motions.

Transfer to Civil Court

As this court stated at oral argument of this motion, there are grounds to transfer this case to the Civil Court. Accordingly, an order transferring this matter will be issued.

Conclusion

Accordingly, it is hereby

ORDERED that the defendants' motions (motion sequence numbers 006 and 007) for

summary judgment are granted to the extent that plaintiff's second cause of action, and any direct claims for violations of CPLR 5222 (c), are dismissed, and the motions are otherwise denied; and it is further

ORDERED that the plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the plaintiff's cross motion for leave to amend the complaint is granted, in part, to the extent that leave shall be granted to amend the complaint to add the fourth cause of action for breach of contract as against defendant Centennial Insurance Company; and it is further

ORDERED that leave to amend the complaint is denied with respect to the proposed paragraphs 84 and 105 (concerning Gottesman, Wolgel, Malamy, Flynn, & Weinberg P.C., the individual defendants, and the claim for punitive damages), and the proposed fourth cause of action in its entirety as against defendants Gottesman, Wolgel, Malamy, Flynn, & Weinberg P.C., Steven Weinberg, Esq., and Stewart Lee, Esq.; and it is further

ORDERED that the plaintiff shall serve an amended complaint, revised in accordance with the directives of this decision, upon defendants within 5 days from the date of service of a copy of this order with notice of entry, and defendants shall answer the amended complaint within 10 days of service.

Dated: May 22, 2009

ENTER:

J.S.C.