SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

KYUSUNG CHO and YOUNG SOOK CHO, a/k/a YOUNG SOOK YOO,

Plaintiffs,

INDEX NO.: 009057/2009
MOTION DATE: 10/06/2009
MOTION SEQUENCE: 004, 005 and 006

-against-

YOUN TAE YOO, DANIEL LEE, ROOSEVELT AVENUE CORPORATION, GOLDSTONE MANAGEMENT CORPORATION, RICHARD SUN JIN, DO YOUNG KIM, VILLAGE GROUP 30, INC., NEW YORK GROUP, INC., MILLION NEW YORK, INC., MOUNTAIN U.S.A. CORPORATION, MOONSTONE MANAGEMENT CORPORATION, "JOHN DOE" and "JANE DOE", said names being fictitious and presently unknown,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed 1
Memorandum of Law in Support of Plaintiffs' Motion to Dismiss the Counterclaims 2
Notice of Motion, Affirmation & Exhibits Annexed 3
Memorandum of Law in Support of Plaintiffs' Motion to Dismiss the Counterclaims 4
Amended Notice of Cross Motion, Affirmation & Exhibits Annexed 5
Affidavit of Defendant Youn Tae Yoo in Opposition to Plaintiffs' Motion to Dismiss Defendant Yoo's Counterclaim and to Impose Sanctions & Exhibit Annexed 6
Memorandum of Law in Opposition to Plaintiffs' Motion to Dismiss Defendant Yoo's Counterclaim and to Impose Sanctions 7

Motion pursuant to CPLR 3211[a][7], 3013 by the plaintiffs Kyusung Cho and Young Sook Cho, a/k/a Young Sook Yoo, for an order dismissing the counterclaims interposed by codefendants Daniel Lee, Roosevelt Avenue Corporation, Village Group 30, Inc., Million New York, Inc., Mountain U.S.A. Corporation, Moonstone Management Corporation.

Cross motion pursuant to CPLR 3211[a][7], 3013 by the plaintiffs Kyusung Cho and Young Sook Cho, a/k/a Young Sook Yoo, for an order (1) dismissing the counterclaim interposed by codefendant Do Young Kim; and (2) imposing sanctions pursuant to 22 NYCRR § 130-1.

Motion pursuant to 3025[b] by the defendants Daniel Lee, Roosevelt Avenue Corporation, Village Group 30, Inc., Million New York, Inc., Mountain U.S.A. Corporation, Moonstone Management Corporation, for an order granting them leave to amend their counterclaims.

During the one-year period between July of 2007 and January of 2008, the plaintiffs Kyusung Cho and Young Sook Cho made loans totaling some $6.15 million to codefendant Richard Lee and/or certain corporate entities which Lee either allegedly controlled or in which he had an interest, *i.e.*, the so-called "Lee defendants" (A. Cmplt., ¶¶ 21, 25-26, 36, 46). (The "Lee defendants" as collectively referenced herein include Daniel Lee, Roosevelt Avenue Corporation, Village Group 30, Inc., Million New York, Inc., Mountain U.S.A. Corporation, Moonstone Management Corporation, Speed Group, Inc., Redstone U.S.A. Cooperation, Pine Village Group Cooperation, Grand Pacific Finance Corp., Chinatrust Bank, U.S.A. and Goldstone Management Corporation.)

The plaintiffs now contend that they were fraudulently induced to enter into the foregoing loan agreements – which are now allegedly in default – upon the advice and recommendation of

their then-attorney, codefendant Young Tae Yoo (A. Cmplt., ¶¶ 58–61; 70-72). The plaintiffs further contend that while Yoo was ostensibly advising them in connection with the loans, he was secretly and at the same time, furthering the interests of – and conspiring with – codefendant Richard Lee, to perpetrate what the plaintiffs claim was an "elaborate 'ponzi' scheme" aimed at converting the loan proceeds (A. Cmplt., ¶¶ 1-2, 21, 75; 114-118; 132-137).

According to the plaintiffs, the Lee defendants never intended to repay the borrowed funds, but rather, and from the inception of the transaction, supposedly harbored an undisclosed and preconceived intent to convert the funds which they received (A. Cmplt., ¶¶ 21, 75-76; 83).

To facilitate the alleged scheme, the Lee defendants – and Yoo in particular supposedly – manipulated and persuaded the plaintiffs to collateralize the loans in an unconventional and atypical fashion, *i.e.*, through the filing UCC statements, instead of the allegedly preferable and standard practice of acquiring and taking back mortgages as security for the loans (A. Cmplt., ¶¶ 27-30) The plaintiffs contend that after the loans were made, the defendants then conspired to subordinate and defeat the plaintiffs' security interests by, *inter alia*, failing to timely record them and/or by allegedly causing certain Lee-dominated, "sham" corporations to file fraudulent mortgages, which were allegedly senior to the plaintiffs' belatedly filed liens (A. Cmplt., ¶¶ 29, 32-33).

The scheme was allegedly complete when the defendants later defaulted, allegedly without ever having made a single payment on either of the two loan agreements principally at issue here. (A. Cmplt., ¶¶ 22, 33, 39). The plaintiffs further advise the real property against which the UCC statements were filed – certain property owned by "Lee defendant" Roosevelt Avenue Corporation ["Roosevelt"] – is now in foreclosure, and that by virtue of the defendants' improper and manipulative conduct with respect to their security, the plaintiffs currently stand fifth in line as creditors (A. Cmplt., ¶¶ 29-30).

In response, the Lee defendants and Yoo have denied the plaintiffs' allegations asserting, *inter alia*, that contrary to the impression created by the plaintiffs' papers, the plaintiffs are actually experienced, sophisticated business persons who "run a multi-million dollar business empire" and who were well acquainted with Lee before they voluntarily agreed to make the disputed loans – and to secure them in the specific manner reflected by the governing contract

documents (*see,* Order of Warshawsky, J., dated September 8, 2009 at 4-5 "[Order at__"]; *see also,* Yoo Aff., in Opp.,¶¶ 7, 8-16).

In March of 2009, and based upon the foregoing fraud and conspiracy claims, the plaintiffs commenced the within action, in which they set forth some thirteen causes of action, sounding in, *inter alia*, fraud, breach of contract (as against attorney Yoo), negligent misrepresentation, promissary estoppel, unjust enrichment, breach of fiduciary duty, and conversion.

The defendants have since answered and interposed various affirmative defenses and counterclaims, including a counterclaim sounding in defamation asserted by Yoo; and two counterclaims advanced by the Lee, the first of which sounding in abuse of process and a second claim for sanctions under 22 NYCRR § 130-1, which has been denominated and pleaded as a distinct and separate cause of action (Yoo Ans., ¶¶ 158-160; Lee Defs' Ans., ¶¶ 28-29).

At approximately the same time, the plaintiffs commenced a second, related action in the Supreme Court, Queens County against, *inter alia*, Lee and "Lee" defendants Roosevelt Avenue Corporation and Goldstone Management Corporation – the principal debtors on the second $3 million loan agreement/promissory note (Pltff's Mot., Exh., "C"). The Queens County complaint seeks stated declaratory relief and alleges breach of a stock pledge agreement, by which Goldstone's capital stock had been pledged as security for the above, $3 million loan (Pltffs' [Yoo] Mot., Exh., "E").

By order to show cause in this action dated May 2009, the plaintiffs previously sought injunctive relief prohibiting and enjoining the Lee defendants from, *inter alia*, transferring assets or removing them from any and all banking institutions and/or requiring the Lee defendants to reveal the location of their assets (Order at 11)

By order dated September 8, 2009, this Court denied the application, concluding among other things, that the plaintiffs' supporting papers failed to establish the threat of irreparable harm or a favorable balancing of the equities. The Court further noted that the relief sought by the plaintiffs was monetary only, and that the theory that their security was fraudulently "gerrymandered" and/or subordinated was unsubstantiated upon the papers then submitted (Order at 11-13).

A similar application for injunctive relief was made by the plaintiffs in the Queens County action, which application was also denied (Order of Grays, J., dated June 1, 2009).

The plaintiffs now move pursuant to CPLR 3211[a][7] to dismiss the Lee defendants' abuse of process and sanctions claims, as well as Yoo's defamation counterclaim.

The Lee defendants oppose the plaintiffs' application and cross move pursuant to CPLR 3025[b] for leave to amend their two counterclaims in the event this Court determines that they are defective in some fashion. The plaintiffs' motions should be granted to the extent indicated below. The Lee defendants' motion is denied.

It is settled that "[t]he elements of a cause of action [to recover damages] for defamation are a 'false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se'" (*Salvatore v. Kumar*, 45 AD3d 560, 563, *quoting from, Dillon v. City of New York*, 261 AD2d 34, 38 *see also*, *Epifani v. Johnson*, 65 AD3d 224, 233-234).

Moreover, "[t]he complaint must set forth the particular words allegedly constituting defamation (*see*, CPLR 3016[a]), and it must also allege the time when, place where, and manner in which the false statement was made, and specify to whom it was made" (*Epifani v. Johnson*, *supra see, Horbul v. Mercury Ins. Group,* 64 AD3d 682, 683; *Dillon v. City of New York*, *supra*, 261 AD2d at 38).

The foregoing pleading requirement is "strictly enforced" and paraphrased recitations or summaries will not suffice (*Horbul v. Mercury Ins. Group,* supra, at 683; *Manas v. VMS Associates, LLC,* 53 AD3d 451, 454-455; *Abe's Rooms, Inc. v. Space Hunters, Inc.*, 38 AD3d 690, 693). Allegedly defamatory statements made in the context of a judicial proceeding are generally privileged (*Cangro v. Marangos*, 61 AD3d 430; *Mintz & Gold, LLP v. Zimmerman,* 56 AD3d 358, 359; *Sexter & Warmflash, PC v. Margrabe*, 38 AD3d 163, 171-173 *see, Solomon v. Larivey*, 49 AD3d 1274, 1275; *Sinrod v. Stone*, 20 AD3d 560,).

With these principles in mind, and even when viewed in a most favorable light (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; *Daub v. Future Tech Enterprise, Inc.*, 65 AD3d 1004), the Yoo defamation counterclaim is deficient as a matter of law (*Epifani v. Johnson*, *supra*, 65 AD3d 224; CPLR 3016[b]).

A review of the amended complaint establishes that the Yoo counterclaim never particularizes or recounts the specific words or phases constituting the allegedly defamatory statements made by the plaintiffs. Nor does it include contextual averments which in any way illuminate "the time when, place where, and manner in which" the false statements were alleged uttered (*Epifani v. Johnson*, *supra*; *Fusco v. Fusco*, 36 AD3d 589, 591; *Acosta v. Fidelity New York*, 227 AD2d 424), *i.e.*, the claim does not identify any temporal or locational situs for the purportedly defamatory statements at all – apart from their presence in the plaintiffs' complaint; rather, Yoo's factual claims merely state that the plaintiffs defamed Yoo because they have "alleged" in their complaint that he committed fraud and/or colluded with Lee – statements which have made in a pleading, to which a privilege would therefore attach (*Cangro v. Marangos*, *supra*, 61 AD3d 430; *Kaye v. Trump,* 58 AD3d 579, 580)(Yoo Ans., ¶¶ 155-160).

Moreover, and contrary to Yoo's assertions, the counterclaim as pleaded, does not mention that the allegedly defamatory statements are actually based upon comments made by the plaintiffs themselves on Korean radio broadcast or in conversations with other businessmen in the Korean community (Zabrowsky Aff., at 1-3; Yoo Aff., ¶¶ 20-24). Further, many of the statements now included for the first time in Yoo's opposing papers, are second-hand quotations derived from previously aired radio broadcasts which either summarize the plaintiffs' accusations, or paraphrase the claims made in this lawsuit, *i.e.*, the quotations are generally not the actual words supposedly uttered by the plaintiffs themselves (*Manas v. VMS Associates, LLC*, *supra*, 53 AD3d 451).

Similarly, and with respect to the Lee counterclaims, the plaintiffs have established their entitlement to dismissal of both the abuse of process and "sanctions" causes of action.

To succeed on a claim sounding in abuse of process a plaintiff demonstrate the existence of: "(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]; *Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO*, 38 NY2d 397, 403 [1975];. *Island Federal Credit Union v. Smith*, 60 AD3d 730, 733; *Watson v. City of Jamestown*, 56 AD3d 1289, 1291 *see also, Hornstein v. Wolf*, 67 NY2d 721, 723 [1986]).

Here, while the sparsely pleaded abuse of process claim relies exclusively upon the theory

that the plaintiffs have maliciously interposed a "multiplicity" of redundant actions as against the Lee defendants (Lee Ans., ¶¶ 23-26), it at no point amplifies this allegation by identifying the multiple actions which have been redundantly and improperly commenced (Lee Ans., ¶¶ 23-25)(*cf., Caplan v. Tofel*, 65 AD3d 1180). In fact, the record establishes that the plaintiffs have commenced only one other action and then only against some of the Lee defendants – the Queens County action, in which the primary relief sought is recovery upon the Goldstone stock pledge agreement, as opposed to the distinct, "fraudulent scheme" theory principally at issue here (September 8 Order, at 13).

In any event, it has been repeatedly held that "[a] claim to recover damages for abuse of process cannot be based on the mere commencement of an action by summons and complaint, without unlawful interference with person or property" (*Island Fed. Credit Union v. Smith*, 60 AD3d 730 *see, Curiano v. Suozzi, supra*, at 116-117; *Sipsas v. Vaz*, 50 AD3d 878, 879; *Mago, LLC v. Singh*, 47 AD3d 772, 773; *Roberts v. 112 Duane Associates LLC*, 32 AD3d 366, 368; *Syllman v Nissan*, 18 AD3d 221, 222; *Leon v. Couri*, 285 AD2d 493, 494).

The nebulously framed averments set forth in the Lee counterclaim fall short of demonstrating "any actual misuse of the process to obtain an end outside its proper scope " (*Hornstein v. Wolf, supra,* at 723; *Mago, LLC v. Singh, supra*; *Syllman v Nissan, supra; Leon v. Couri, supra see, Caplan v. Tofel, supra*, 65 AD3d 1180). Accordingly, the plaintiffs' motion to dismiss the abuse of process counterclaim should be granted.

That branch of the plaintiffs' motion which is to dismiss the Lee defendants' rule-based "sanctions" counterclaim (22 NYCRR § 130-1) – here denominated as a separately standing "counterclaim" – should also be granted.

It has been repeatedly held that a claim for sanction under 22 NYCRR 130-1.1[b],[c]) may not be "pleaded as a distinct cause of action" (*see, Liberty Mut. Ins. Co. v. Mirage Limousine Services, Inc.* ___Misc3d___, 2008 WL 412610 [Supreme Court, Queens County 2008]; *Aurora Loan Services, LLC v. Cambridge Home Capital, LLC*, 12 Misc.3d 1152(A), 2006 WL 1320741 at 2 [Supreme Court, Nassau County 2006] *see also, Couch v. Schmidt*, 204 AD2d 951, 952-953; *Tribco, LLC v. Arsenous*, 14 Misc.3d 128(A), 2006 WL 3858387 [Supreme Court, Appellate Term 2nd Dept. 2006]; *Murphy v. Smith*, 4 Misc.3d 1029(A), 2004 WL 2239543 [Supreme Court, New

York County 2004];*Yankee Trails, Inc. v. Jardine Ins. Brokers, Inc.*, 145 Misc.2d 282, 283 [Supreme Court, Rensselaer County, 1989]). It bears noting that the Lee sanctions counterclaim merely provides, in an obscurely framed paragraph, that the entire lawsuit is frivolous (Ans.,¶ 28) – without detailing the specific manner in which the various claims made by the plaintiffs are, *inter alia*, "completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law" (*Joan 2000, Ltd. v. Deco Const. Corp.*, 66 AD3d 841; 22 NYCRR 130-1.1[b],[c]).

Relatedly, and with respect to the Lee defendants' cross motion to amend, while leave to amend is to be freely given (CPLR 3025[b] *see*, *Edendale Contr. Co. v. City of New York*, 60 NY2d 957, 959 [1983]; *Schuyler v. Perry* ,___ AD3d___, 886 NYS2d 228), a court should nevertheless deny the motion when, *inter alia*,"the insufficiency and lack of merit of the plaintiff's proposed amendment are clear and free from doubt (*see e.g., Hense v. Hense,* 60 AD3d 814, 815; *Tornheim v. Blue & White Food Products Corp.*, 56 AD3d 761, 762; *Scofield v. Degraded,* 54 AD3d 1017, 1018; *Lucido v. Mancuso*, 49 AD3d 220, 226-227; *Norman v. Ferrari,* 107 AD2d 739, 740).

The decision whether to grant leave to amend a pleading rests within the court's discretion (*Schuyler v. Perry, supra*; *Ingrami v. Rovner*, 45 AD3d 806, 808).

The Lee defendants have not annexed a proposed, amended pleading to their application by which the Court can assess the potential merit of the any changes which the plaintiffs intend to make – an omission which alone supports denial of a motion to amend (*see generally*, *Lupski v. County of Nassau*, 32 AD3d 997, 999; *Fernandez v. HICO Corp.*, 24 AD3d 110, 111; *Black Car and Livery Ins., Inc. v. H & W Brokerage, Inc.*, 28 AD3d 595; *Colleran v. Rockman*, 232 AD2d 322, 323; *Abbott v. Herzfeld & Rubin, P.C.,* 202 AD2d 351, 352 *see, Chang v. First American Title Ins. Co. of New York,* 20 AD3d 502; *Ferdinand v. Crecca & Blair*, 5 AD3d 538). Moreover, their request for relief has been conditionally framed and seeks leave only in the event that this Court dismisses their counterclaims or portions thereof (*see, Barrett v. Huff, supra*, 6 AD3d 1164, 1168).

In any event, and apart from the above, since the movants have not shown that further alteration to their claims would otherwise enhance their merit (*e.g.,, Zeleznik v. MSI Const., Inc.*, 50 AD3d 1024, 1025; *Citarelli v. American Ins. Co.,* 282 AD2d 494) – the Court declines to

exercise its discretion in favor of the application to amend (*Hense v. Hense*, *supra,* at 815; *Tornheim v. Blue & White Food Products Corp.*, *supra*, at 762; *Lupski v. County of Nassau*, *supra*, 32 AD3d at 999).

That branch of the plaintiffs' motion which is for an unspecified award of contract-based expenses and counsel fees under: (1) the Lee personal guarantee; and (2) the February 1, 2008 (second) loan agreement, as executed by Lee defendants Roosevelt Avenue and Goldstone Management, should be denied.

Although second Loan Agreement and the underlying (January 22, 2008) promissory note authorize, respectively, the recovery of costs and counsel fees upon occurrence of an "event of default" (Note at 2-3), and state that costs attributable to court proceedings shall be included in any "judgment" thereafter obtained (Agreement, "Default," §§ 10.1, 10.2 *cf.,* § 11.11), the Court has yet to render any substantive findings or determinative rulings with respect to whether a technical "event of default" has occurred (*cf., Siamos v. 36-02 35th Ave. Development, LLC*, 54 AD3d 842, 843). Nor have the plaintiffs previously moved for or obtained a judgment with respect to these issues – or with respect to the defendants' ultimate liability under the loans (Promissory Note at 2). Indeed, the plaintiffs have not even interposed a breach of contract claim based on the loan documents in the subject matter. Nor have they asserted a direct contractual claim as against Lee seeking recovery under the terms of his personal guarantee (*cf.*, Guarantee, § 4).

In any event, in order to make any fee or cost award, "'the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered' " (*SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 AD3d 986, 998, *quoting from, Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 AD2d 376, 378 *see, Olim Realty v. Lanaj Home Furnishings,* 65 AD3d 1318; *NYCTL 1998-1 Trust v. Oneg Shabbos, Inc.*, 37 AD3d 789, 791).

Further, "'[a]n award of attorneys' fees pursuant to such a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered'" (*Yonkers Rib House, Inc. v. 1789 Cent. Park Corp.,* 63 AD3d 726, 727; *Kamco Supply Corp. v Annex Contr.*, 261 AD2d 363, 365) and "[t]he movant bears the burden of proof 'to establish the necessity for and the reasonable value of the legal services rendered'" (*Centre Great*

Neck Co. v. Penn Encore, Inc., 255 AD2d 543 *see, Centre Great Neck Co. v. Penn Encore, Inc.*, 277 AD2d 415; *Chase Manhattan Bank v. Bekerus*, 276 AD2d 461; *Sand v. Lammers*, 150 AD2d 355, 356).

Here, the plaintiffs' submissions do not include any evidentiary materials which quantify or document whatever expenses they claim to have expended; nor do they address – much less establish – the reasonableness of those sums (*Chase Manhattan Bank v. Bekerus*, *supra*, 276 AD2d 461 *see also, SO/Bluestar, LLC v. Canarsie Hotel Corp.*, *supra*, at 988; *Centre Great Neck Co. v. Penn Encore, Inc.*, *supra*, 277 AD2d 415).

Lastly, after reviewing the record, and upon the exercise of its discretion, the Court concludes that the imposition of sanctions upon the Lee defendants is not warranted.

The Court has considered the parties' remaining contentions and concludes that none establishes their entitlement to relief in excess of that granted above.

Accordingly, it is,

ORDERED the motions by the plaintiffs Kyusung Cho and Young Sook Cho, a/k/a Young Sook Yoo for an order dismissing stated counterclaims interposed by defendants: (1) Young Sook Yoo; and (2) and Lee defendants, are granted; and it is further,

ORDERED that the branch of the plaintiffs' motion which is for an order imposing sanctions upon the Lee defendants pursuant to 22 NYCRR § 130-1.2, is denied, and it is further,

ORDERED the motion by the Lee defendants for an order granting them leave to amend their counterclaims pursuant to 3025[b], is denied.

The foregoing constitutes the decision and order of the Court.

Dated: November 30, 2009

J.S.C.