STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

SAM FARELLA, DAVID G. POHLE, and
ASSHA SANGAVI,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 09-843
RJI NO. 19-09-4275

WELDON HOUSE INC., and
DIAMONDBACK MOTORCROSS, INC.,

Defendants.

WELDON HOUSE INC.,

Third-Party Plaintiff,

-against-

GERALD A. BUNTING,

Third-Party Defendant.

Supreme Court Greene County All Purpose Term, May 21, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Bunting, Goner & Associates
Gerald Bunting, Esq.
Attorneys for Plaintiffs/Third-Party Defendant
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New York, New York 10018

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Attorney for Defendants/Third-Party Defendant
424 Warren Street
Hudson, New York 12534

TERESI, J.:

Plaintiffs and Defendant Weldon House, Inc. (hereinafter "Weldon") own adjacent parcels of property in Green County, New York. Weldon seeks to use its property for motocross

racing, and Plaintiffs commenced this action to permanently enjoin such use. Plaintiffs' complaint also seeks damages arising from Defendants' alleged nuisance and a declaratory judgment finding that "racing of any kind was not a 'current use' as defined by the Town of Durham Site Plan Review Law." Issue was joined by Weldon, whose answer set forth eight affirmative defenses and three counterclaims. Weldon now moves to amend its answer,[1] modifying its previously pled "abuse of civil process" counterclaim, deleting its third counterclaim sounding in "economic harm" and seeking to add three new counterclaims.[2] Weldon describes the three new counterclaims as sounding in "injurious falsehood," "tortious interference with contract" and "civil conspiracy." Plaintiffs oppose the motion.[3]

Additionally, Weldon has now commenced a third-party action against Plaintiff's attorney (hereinafter "Bunting"). Similar to Weldon's proposed amendments, its third-party complaint also alleges causes of action sounding in "injurious falsehood," "tortious interference with contract" and "abuse of process and/or abuse of legal remedies." Prior to answering the third-party complaint, Bunting moves to dismiss it pursuant to CPLR §§3211(g) and (a)(7). Weldon opposes the motion.

Because Weldon failed to demonstrate its entitlement to amend its answer, its motion is

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[1] Weldon's initial answer skipped a fourth affirmative defense. Its proposed amended answer renumbers its affirmative defenses, consecutively numbering each from one to eight. Despite the renumbering, Weldon made no substantive changes to its affirmative defenses.

[2] Weldon seeks no substantive change to its answer's second counterclaim of trespass.

[3] As Plaintiff's service was complete upon mailing (CPLR §2103[b][2]) Weldon failed to rebut Plaintiff's affidavit of service's prima facie showing of proper service. (US Bank National Association v. Vanvliet, 24 AD3d 906, 908 [3d Dept. 2005]). As such, Plaintiffs' opposition papers are being considered herein.

denied. Similarly, because Bunting failed to demonstrate his entitlement to dismissal of the third-party complaint, his motion is also denied.

Weldon's Motion to Amend

It is well established that "[l]eave to amend pleadings is freely granted (see CPLR §3025[b]) so long as there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit." (Paolucci v. Mauro, __AD3d__, 2010 WL 2302503 [3d Dept. 2010] quoting Shelton v. New York State Liq. Auth., 61 AD3d 1145 [3d Dept. 2009][internal quotes omitted]; Gersten-Hillman Agency, Inc. v. Heyman, 68 AD3d 1284 [3d Dept. 2009]). "In determining the merit of the proposed amendment, [the court] must accept as true the facts alleged and draw all reasonable inferences in favor of [the movant]." (Shelton, supra at 1150).

On this record, it is uncontested that Weldon's proposed amendments would not prejudice Plaintiff. However, Weldon's proposed amendments plainly lack merit.

Weldon's proposed abuse of process counterclaim requires "regularly issued process, either civil or criminal, an intent to do harm without excuse or justification, and use of the process in a perverted manner to obtain a collateral objective." (Minasian v. Lubow, 49 AD3d 1033, 1035-36 [3d Dept. 2008], quoting Plataniotis v. TWE Advance/Newhouse Partnership, 270 AD2d 627 [3d Dept. 2000]). However, the "institution of a civil action by summons and complaint is not legally considered process capable of being abused." (Curiano v. Suozzi, 63 NY2d 113 [1984]). "A cause of action for abuse of process must be based upon more than the institution of an action and may survive only if actual or special damages are alleged." (Kahn v. Friedlander, 90 AD2d 868, 869 [3d Dept. 1982]; Board of Educ. of Farmingdale Union Free

School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO, 38 NY2d 397 [1975]).

Here, the "process" allegedly abused are: "frivolous and unfounded civil litigation" commenced by Plaintiffs against Weldon, "civil process against the Town of Durham" and "an action against the Greene County Industrial Development Agency." Because such process amounts only to the "institution of civil proceedings," which cannot form the basis for an abuse of process claim, the proposed amendment plainly lacks merit. (Curiano, supra, Sipsas v. Vaz, 50 AD3d 878 [2d Dept. 2008], Brown v. Bethlehem Terrace Associates, 136 AD2d 222 [3d Dept.1988]). Moreover, to the extent that Weldon bases this proposed counterclaim on allegations contained in affidavits Plaintiff has submitted to this Court, it lacks merit. Such affidavits do not constitute "process" for an abuse of process claim because they do not contain a "direction or demand that one perform or refrain from doing some prescribed act." (Varela v. Investors Ins. Holding Corp., 185 AD2d 309 [2d Dept. 1992]). Nor has Weldon "plead special damages with sufficient particularity," as required for an abuse of process claim. (Jaroslawicz v. Cohen, 12 AD3d 160 [1st Dept. 2004]). Accordingly, this portion of Weldon's motion to amend plainly lacks merit and is denied.

Weldon's proposed "injurious falsehood" counterclaim also plainly lacks merit. An injurious falsehood's pleading must contain allegations that the Plaintiffs "conveyed false statements with an intent to harm [Weldon], and [Weldon] was harmed due to those statements." (Roche v. Claverack Co-op. Ins. Co., 59 AD3d 914, 917 [3d Dept. 2009]; see also Carrara v. Kelly, __AD3d__, 2010 WL 2200931 [2d Dept. 2010]; Waste Distillation Tech. v Blasland & Bouck Engrs., 136 AD2d 633 [2d Dept. 1988]; L.W.C. Agency v. St. Paul Fire & Mar. Ins. Co.,

125 AD2d 371 [2d Dept. 1986]). "[S]pecial damages, [is] a necessary element of an action for injurious falsehood that must be pleaded with particularity." (BCRE 230 Riverside LLC v. Fuchs, 59 AD3d 282 [1st Dept. 2009]; see also Drug Research Corp. v Curtis Pub. Co., 7 NY2d 435 [1960], Waste Distillation Tech., supra, L.W.C. Agency, supra).

Here, because Weldon's proposed counterclaim fails to plead special damages with particularity, it plainly lacks merit. In setting forth the damages it has suffered on its "injurious falsehood" claim, Weldon alleges only that it "is entitled to damages resulting from the injurious falsehoods set forth above." Such conclusory, circular and nonspecific allegation fails to plead special damages with particularity, as required, and Weldon's motion to add its "injurious falsehood" counterclaim is denied for lack of merit.

Similarly, Weldon's "tortious interference with contract" counterclaim lacks merit. "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (Lama Holding Co. v Smith Barney, 88 NY2d 413 [1996]). No claim for tortious interference with a contract is stated unless, as set forth above, an actual breach of contract is pled. (Bradbury v. Woller Cope-Schwarz, 20 AD3d 657 [3d Dept. 2005], Kronos, Inc. v. AVX Corp., 81 NY2d 90 [1993]). Here, accepting as true the amended counterclaim's facts and drawing all reasonable inferences therefrom in favor of Weldon, it fails to allege an actual breach of contract. While Weldon alleges Plaintiffs' knowledge of certain contracts and their "interference," at no point does Weldon allege that a breach of contract occurred. As such, Weldon's proposed counterclaim "plainly lacks merit" because it fails to

allege a necessary element of a tortious interference with a contract claim.

Lastly, Weldon's proposed amendment setting forth a civil conspiracy charge must be denied for lack of merit. Because "New York does not recognize an independent cause of action for civil conspiracy to commit a tort" this portion of Weldon's amended answer lacks merit and is denied. (Roche v. Claverack Co-op. Ins. Co., 59 AD3d 914 [3d Dept. 2009]).

Bunting's Motion to Dismiss

This motion to dismiss is premised upon CPLR §§3211(g), which statutorily modifies the applicable motion to dismiss standards in cases involving a Strategic Lawsuit Against Public Participation, i.e. a "SLAPP" suit. Such legislation was passed to ensure the "utmost protection for the free exercise of speech, petition and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern." (L 1992, ch 767, §1). Although CPLR §§3211(g) "ma[de] it easier for defendants in SLAPP suits to win motions to dismiss" (Yeshiva Chofetz Chaim Radin, Inc. v Village of New Hempstead, 98 F.Supp.2d 347, 359 [SDNY 2000]), on this record Bunting failed to demonstrate his entitlement to dismissal.

CPLR §3211(g) states, in pertinent part, that "[a] motion to dismiss... in which the moving party has demonstrated that the action... subject to the motion is an action involving public petition and participation as defined [by Civil Rights Law §76-a(1)(a)], shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law..." This burden shifting analysis requires first, the movant's demonstration that the action constitutes a SLAPP suit, i.e. "an action... for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on,

comment on, rule on, challenge or oppose such application or permission." (Civil Rights Law § 76-a[1][a]). Upon such showing the motion must be granted, unless the responding party demonstrates a "substantial basis in law" for its action. CPLR §3211(g) imposes upon the non-movant a "high burden of proof to avoid dismissal" (Harris v. Town of Fort Ann, 35 AD3d 928, 929 [3d Dept. 2006]) but the SLAPP suit law itself must be "strictly construed." (Hariri v. Amper, 51 AD3d 146 [1st Dept. 2008]).

On this record, Bunting failed to demonstrate that this third party action is a SLAPP suit. (Civil Rights Law § 76-a[1][a]). Bunting's allegation that "'cease and desist' orders from the NYDEC and the EPA" have prevented Weldon's further construction of a motocross race track does not demonstrate that Weldon is a Civil Rights Law § 76-a(1)(b) "public applicant or permittee." Rather, the allegation only shows that the "NYDEC and the EPA" have taken action against Weldon's project, but not that such action was taken upon an application or permit sought by Weldon. Such distinction is determinative because, strictly construing Civil Rights Law §76-a(1)(b), its language focuses on an applicant's "apply[ing] for or obtain[ing] a permit" not on the actions of an administrative agency. Because Bunting submits no factual allegations stating that the cease and desist orders were made in response to Weldon's application or permit, Bunting failed to demonstrate that Weldon is a Civil Rights Law §76-a(1)(b) "public applicant or permittee." (Hariri, supra [holding that an individual who makes no "application" cannot be a "public applicant or permittee"]). Nor does Bunting's motion set forth any other factual allegations of Weldon applying for or obtaining a permit.

Similarly unavailing is the undated memorandum of law submitted with Bunting's motion. As a memorandum of law is not a designated motion paper under CPLR §2214(b), this

submission is procedurally defective. Also, because the memorandum was neither sworn nor affirmed, its statement that Weldon is "attempting to obtain... SPEDES coverage from the NYDEC" is inadmissible and of no probative value. (Slavenburg Corp. v. Opus Apparel, Inc., 53 NY2d 799 [1981]; Morrison v. Hindley, 221 AD2d 691 [3 Dept. 1995]). Likewise, Weldon's unsigned and unsworn memorandum of law, submitted in opposition, is also procedurally defective, inadmissible and of no probative value.[4]

Lastly, Bunting's failure to submit a full and complete copy of the third-party complaint, requires that this motion "be denied for that reason alone." (Washington Temple Church of God In Christ, Inc. v. Global, 15 Misc.3d 1142(A), 10 [Sup. Court, Kings County 2007]). The third-party complaint submitted in support of this motion is missing allegation paragraphs 20 - 27, and its Schedules "A" and "B" appear to be mis-copied. Without a full and complete copy of the third-party complaint, Bunting failed to sufficiently demonstrate that this action involves "public petition and participation," requiring denial of this motion.

Accordingly, both Weldon and Bunting's motions are denied in their entirety.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute

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[4] To the extent that Weldon's memorandum of law admits that it is "in the process of obtaining coverage from DEC under its general permits," such admission is of no probative value. Moreover, even if considered, Bunting made no showing that this third-party action is "materially related to any efforts of [Bunting] to... challenge or oppose such application."

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: June 24, 2010
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated March 18, 2010, Affidavit of Robert Gagen, dated March 17, 2010, with attached Exhibits 1-3.
2. Affirmation of Gerald Bunting, dated April 16, 2010
3. Affidavit of Robert Gagen, dated April 23, 2010, with attached Exhibits 1-2.
4. Notice of Motion, dated April 23, 2010, Affirmation of Gerald Bunting, dated April 23, 2010, Affirmation of Robert Goner, dated April 23, 2010, with attached Exhibit A.
5. Affidavit of Robert Gagen, dated May 13, 2010, Affidavit of Robert Gagen, dated May 13, 2010.
6. Affidavit of Gerald Bunting, dated May 19, 2010.