Sanko v Roth
2015 NY Slip Op 30296(U)
March 2, 2015
Supreme Court, New York County
Docket Number: 650025/14
Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN **PART** 7
Justice

ANTON SANKO,
Plaintiff,

-against-

JEFFREY ROTH,
Defendant.

INDEX NO. 650025/14

MOTION SEQ. NO. 002

The following papers were read on this motion by the plaintiff to dismiss defendant's counterclaims.

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

Cross-Motion: ☐ Yes ■ No

Before the Court is a motion by Anton Sanko (Sanko or plaintiff) to dismiss Jeffrey Roth's (defendant) counterclaims, pursuant to CPLR 3211(a)(7), and seeking sanctions against the defendant, a pro se attorney, pursuant to 22 NYCRR § 130-1.1(a).

Plaintiff is a tenant-in-common who owns a one-third interest in two adjacent buildings located at 801 and 803 Greenwich Street in Manhattan. Defendant, appearing pro se, is an attorney who represented the other two tenants-in-common in nonpayment and holdover proceedings. The petitions in the nonpayment and holdover proceedings named Sanko as a petitioner. Plaintiff alleges that he was not a petitioner, that he did not consent to be part of those proceedings, and that he asked the other tenants-in-common and defendant to remove his name from the petitions, which they all refused to do. Plaintiff brings this action alleging that the defendant wrongly purported to represent him in the above proceedings. On the same date that the instant motion was made, defendant consented to a preliminary injunction enjoining

defendant from holding himself out as plaintiff's attorney in any way.

Defendant's first counterclaim seeks the imposition of sanctions and costs against plaintiff on the basis that this action is frivolous. The fourth counterclaim seeks the imposition of costs and sanctions against plaintiff on the basis that he failed to advise the Court that the instant action is related to another action currently pending before this Court entitled, *Mark Family Realty LLC v Anton Sanko*, Index No. 105925/11. Plaintiff correctly argues that courts do not recognize an independent cause of action for sanctions (*see Cerciello v Admiral Ins. Brokerage Corp.*, 90 AD3d 967, 968 [2d Dept 2011]; *360 W. 11th LLC v ACG Credit Co. II, LLC,* 90 AD3d 552, 554 [1st Dept 2011]) and, indeed, defendant does not oppose that portion of plaintiff's motion. Accordingly, the first and fourth counterclaims must be dismissed.

The third counterclaim alleges both malicious prosecution and abuse of process. Abuse of process has three essential elements.

> First, there must be regularly issued process, civil or criminal, compelling the performance or forebearance [*sic*] of some prescribed act. Next, the person activating the process must be moved by a purpose to do harm without that which has been traditionally described as economic or social excuse or justification . . . Lastly, defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process (*Board of Ed. v Farmingdale Classroom Teachers Assoc.*, 38 NY2d 397, 403 [1975]).

The commencing of a civil action by summons and complaint does not constitute abuse of process (*Curiano v Suozzi,* 63 NY2d 113, 116 [1984]). The Court finds that plaintiff did not abuse process by bringing this action. For abuse of process to exist, the process objected to must involve some unlawful interference with person or property (*Mago, LLC v Singh,* 47 AD3d 772, 773 [2d Dept 2008]). In addition, the complaining party must allege that process was improperly used after it was issued (*Curiano,* 63 NY2d at 117). Here, defendant does not contend that there has been unlawful interference of any sort, but rather that plaintiff sues

solely to harm and harass him. However, the harboring of a malicious or improper motive for bringing an action does not by itself show abuse of process (*id.*; *Board of Ed.*, 38 NY2d at 403). The action itself must bring about some improper and unjustifiable wrong to the defendant, a wrong not warranted by the valid adjudication of the action. That is not alleged here.

Defendant claims that he correctly named plaintiff as a petitioner, because petitions in housing court must name all the owners of the real property as petitioners; otherwise, the petition is defective on its face. Assuming that this is a correct statement of the law, abuse of process is still not shown.

The elements of an action for malicious prosecution are the commencement of a judicial proceeding, without probable cause and with malice, which proceeding was terminated in favor of the party claiming malicious prosecution, and by which that party sustained special damages (*Wilhelmina Models, Inc. v Fleisher,* 19 AD3d 267, 269 [1st Dept 2005]). As defendant does not identify a lawsuit commenced by plaintiff in which defendant has been adjudicated to be the prevailing party, and as defendant has failed to allege special damages, the counterclaim for malicious prosecution cannot stand. The second counterclaim for malicious prosecution and abuse of process is dismissed.

After the motion was made, defendant emailed plaintiff's attorney that he withdrew the third counterclaim for intentional infliction of emotional distress. As plaintiff argues, the counterclaim fails to state a cause of action for such injury, since it fails to allege conduct that is extreme, outrageous, or beyond the bounds of decency (*see Goldstein v Massachusetts Mut. Life Ins. Co.*, 60 AD3d 506, 508 [1st Dept 2009]; *Berrios v Our Lady of Mercy Med. Ctr.*, 20 AD3d 361, 362 [1st Dept 2005]). The counterclaim is dismissed. The fact that defendant withdrew this claim in response to plaintiff's motion is not sanctionable.

Plaintiff is not entitled to sanctions on the basis that the counterclaims are frivolous, as

defined by 22 NYCRR § 130-1.1. Part 130 of the Rules of the Chief Administrator permits courts to sanction an attorney and/or a party for engaging in frivolous conduct, and such conduct is frivolous if it is: (1) "completely without merit in law"; (2) "undertaken primarily to... harass or maliciously injure another"; or (3) "assert[ing] material factual statements that are false" (*see* 22 NYCRR § 130-1.1; *Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]). The counterclaims don't raise to that level since there is no pattern of frivolous conduct here (*see Sarkar v Pathak*, 67 AD3d 606, 607 [1st Dept 2009]).

CONCLUSION

Upon the foregoing, it is

ORDERED that plaintiff's motion to dismiss defendant's counterclaims and for sanctions is granted to the extent that the counterclaims are hereby dismissed, but is denied as to sanctions; and it is further,

ORDERED that the parties are directed to appear for a Status Conference on March 4, 2015 at 11:00 a.m. in Part 7, 60 Centre Street, Room 341; and it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendant and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 3/2/15

PAUL WOOTEN ***J.S.C.***

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**