

<b>Abrazi v Kotlyarsky</b>
2017 NY Slip Op 32327(U)
November 1, 2017
Supreme Court, New York County
Docket Number: 153597/17
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30

-----X  
BELLA ABRAZI a/k/a BELLA ABRAMOVICH,

Plaintiff,

-against-

BORIS KOTLYARSKY,

Defendant.

-----X  
SHERRY KLEIN HEITLER, J.S.C.

Index No. 153597/17  
Motion Sequence 001

**DECISION AND ORDER**

Defendant Boris Kotlyarsky (Defendant) moves pursuant to CPLR 3211(a)(7) to dismiss Plaintiff Bella Abrazi's (Plaintiff) verified complaint<sup>1</sup> in its entirety on the ground that it fails to state a cause of action. The motion is granted for the reasons set forth below.

The Complaint reveals that the parties' dispute dates back to 1999 when Plaintiff's father, Mark Abrazi, commenced proceedings against Defendant in Supreme Court, Kings County (Index No. 32472/99). As a result of that action, Defendant obtained a judgment against Mr. Abrazi in the amount of \$90,480 (¶¶ 5, 9). In or about December of 2002 Mr. Abrazi transferred ownership of his Brooklyn residence to Belrich, LLC, an entity wholly owned by Plaintiff and her brother Richard Abrazi (¶ 11). On February 20, 2004 Defendant obtained another judgment against Mr. Abrazi, this time in the amount of \$292,979.25 (¶ 10). In or about July of 2016 Defendant commenced a special proceeding in Supreme County, Kings County seeking to compel Plaintiff's deposition (510753/16) in connection with the judgments against her father. That proceeding was dismissed by order of Justice Bernard Graham dated August 18, 2016 for failure to submit proof of personal service.<sup>2</sup> A motion for the same relief brought under the 1999

<sup>1</sup> Plaintiff's April 18, 2017 complaint is annexed to Defendant's moving papers as Exhibit A (Complaint).

<sup>2</sup> Plaintiff's Exhibit B.

index number was denied by order of Justice Debra Silber on November 3, 2016, also because of defective service.<sup>3</sup> Defendant's bid to depose Plaintiff was eventually granted by Justice Karen Rothenberg by order dated February 2, 2017.<sup>4</sup> On June 26, 2017 Defendants commenced a new action against Plaintiff (and others) in Supreme Court, Kings County seeking a money judgment to satisfy Mr. Abrazi's unsatisfied judgments.<sup>5</sup>

Plaintiff commenced this action on April 18, 2017. The Complaint asserts two causes of action: abuse of process and prima facie tort. Essentially Plaintiff alleges that there was no justification for pursuing Plaintiff's testimony other than to seek "personal revenge" against Mr. Abrazi by "harassing and abusing" his daughter (§24-25).

On a CPLR 3211 motion to dismiss, the court must afford the pleadings a liberal construction, must accept the facts as alleged in the complaint as true, and must accord Plaintiff the benefit of every favorable inference. *Roni LLC v Arfa*, 18 NY3d 846, 848 (2011); *see also Leon v Martinez*, 84 NY2d 83, 88 (1994) ("We . . . determine only whether the facts as alleged fit within any cognizable legal theory"). A motion to dismiss will fail if "from [the Complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law . . ." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977); *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 (1976). On the other hand, while factual allegations contained in a Complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Beattie v Brown & Wood*, 243 AD2d 395, 395 (1st Dept 1997).

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<sup>3</sup> Plaintiff's Exhibits C, D.

<sup>4</sup> Defendant's reply, Exhibit 1. The fact that Plaintiff's deposition was eventually ordered should not have been omitted from Plaintiff's counsel's affirmation.

<sup>5</sup> Plaintiff's Exhibit E.

To sustain a claim for abuse of process, a plaintiff must plead three essential elements: “(1) regularly issued process, either civil or criminal, (2) and 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). “A malicious motive alone . . . does not give rise to a cause of action for abuse of process.” *Curiano*, 63 NY2d at 117. Likewise, “[t]he mere commencement of a lawsuit cannot serve as a basis for a cause of action alleging abuse of process.” *Lynn v McCormick*, 153 AD3d 688, 688 (2d Dept 2017). Rather, “[t]he gist of the action for abuse of process lies in the improper use of process after it is issued.” *Dean v Kochendorfer*, 237 NY 384, 390 (1924). Thus, for example, if a party were to commence an action and then threaten the other party that the action would continue unless he/she pays to end it, a cause of action for abuse of process will lie. *See Hauser v Bartow*, 273 NY 370 [1937]).

As to damages, to sustain a cause of action for abuse of process, the plaintiff must also allege special damages with sufficient particularity. *Jaroslawicz v Cohen*, 12 AD3d 160, 160 (1st Dept 2004). The law is settled that a plaintiff may not plead special damages by way of conclusory language and unitemized round numbers. *See Vigoda v DCA Productions Plus*, 293 AD2d 265, 266 (1st Dept 2002). Furthermore, “the expense arising from the defense of a lawsuit is an insufficient injury to sustain [a] cause of action [for abuse of process.]” *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 (1st Dept 1990).

Plaintiff does not cite to a single case where an abuse of process claim was upheld. In fact, in the almost 100 years since the abuse of process cause of action was first recognized (*Dean*, 237 NY at 390), there have been very few of these cases, and none of them are comparable to this case. One of them is *Board of Education v Farmingdale Classroom Teachers Asso.*, 38 NY2d 397 (1975). There, a school district charged the teachers’ association with

violating the Taylor law when a number of teachers were absent for two successive days. The attorney for the association prepared and issued judicial subpoenas to 87 teachers in order to compel their attendance as witnesses on the same day. The association then refused a request from the district to excuse the majority of the teachers from the first hearing day or at least to stagger the appearances. As a result, all 87 teachers attended the hearing and the school district was forced to hire 77 substitute teachers. Based on these allegations, the Court of Appeals sustained the school district's abuse of process claim against the teachers' association. In so doing, the court found that the association was "motivated by an intent to harass and to injure" and that the refusal to comply with the request to stagger the appearance supported an inference that the "process was being perverted to inflict economic harm." *Id.* at 404.

Abuse of process can also occur where one files a false police report that results in criminal proceedings. *See D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 960 (4th Dept 2014). For example, in *Parkin v Cornell University, Inc.*, 78 NY2d 523 (1991), plaintiffs were members of a union that was engaged in bitter negotiations with the defendant university. They sued the university for abuse of process after being arrested and charged by university officials with stealing four boxes of envelopes from their print shop. The charges were eventually dropped, but not before plaintiffs had to appear in town court. The court upheld a jury's determination that the university intentionally brought baseless charges for the purpose of interfering with plaintiff's union activities.

Plaintiff's claim for abuse of process does not fall into one of these narrow exceptions. To the contrary, it fits squarely within the long line of decisions dating back to *Curiano* holding that the commencement of the civil lawsuit cannot form the basis of an abuse of process claim, even if the action was commenced with malicious intent. *See e.g., Perini v Leo*, 147 AD3d 877,

879 (2d Dept 2017); *Matthews v New York City Dep't of Social Servs., Child Welfare Admin.*, 217 AD2d 413, 415 (1st Dept 1996); *Burgwardt v Cook*, 171 AD2d 1039, 1039 (4th Dept 1991). Moreover, Plaintiff's "special damages" are actually legal fees which are not set forth with any particularity. Under the circumstances, these allegations are not sufficient to support an abuse of process claim. *Howard v Block*, 454 N.Y.S.2d 718, 719 (1st Dept 1982); *Ginsberg v Ginsberg*, 84 AD2d 573, 574 (2d Dept 1981); *Miller v Stern*, 262 AD 5, 7 (1st Dept 1941).

Turning to Plaintiff's claim for *prima facie tort*, that cause of action "affords a remedy for the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful." *Freihofer v Hearst Corp.*, 65 NY2d 135, 142 (1985). "The requisite elements of a cause of action for *prima facie tort* are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." *Id.* As with the cause of action for abuse of process. "[a]n essential element of [*prima facie tort*] is an allegation of special damages, fully and accurately stated with sufficient particularity as to identify and causally relate the actual losses to the allegedly tortious acts. Failure to do so lays the cause of action open to summary dismissal." *Broadway & 67th St. Corp. v New York*, 100 AD2d 478, 486 (1st Dept 1984); *see also Britt v City of New York*, 151 AD3d 606, 607 (1st Dept 2017).

Given these particularity requirements, Plaintiff's *prima facie tort* claim must also be dismissed. *See Curiano*, 63 NY2d at 118 ("New York courts have consistently refused to allow retaliatory lawsuits based on *prima facie tort* predicated on the malicious institution of a prior civil action.") Instead of itemizing its special damages, Plaintiff merely alleges that "Defendant caused special damages against Plaintiff" (Complaint ¶ 32). And to the extent Plaintiff claims that she suffered harm in excess of \$10,000,000, this must be deemed a representation of general

damages, not special damages. *See Drug Research Corp. v Curtis Publishing Co.*, 7 NY2d 435, 441 (1960); *see also Phillips v New York Daily News*, 111 AD3d 420, 421 (1st Dept 2013); *Hicks v City of New York*, 2015 NY Misc. LEXIS 353, \*20 (Sup. Ct. NY Co. 2015, Freed, J.).

In light of the foregoing, it is hereby

ORDERED that Defendant's motion is granted in its entirety; and it is further

ORDERED that the Complaint is hereby dismissed.

The Clerk is directed to enter judgment and mark his records accordingly.

This constitutes the decision and order of the court.

**ENTER:**

**DATED:** *Nov 1, 2017*

  
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**SHERRY KLEIN HEITLER, J.S.C.**