

BR 352E51, LLC v AVO Constr. LLC
2022 NY Slip Op 32764(U)
August 16, 2022
Supreme Court, New York County
Docket Number: Index No. 653869/2019
Judge: Dakota D. Ramseur
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAKOTA D. RAMSEUR **PART** **34M**

Justice

-----X

BR 352E51, LLC, BEEKMAN REIM LLC,

Plaintiffs,

- v -

AVO CONSTRUCTION LLC, ELIZABETH MCDONALD,
ROCCO BASILE

Defendants.

-----X

INDEX NO. 653869/2019

MOTION DATE N/A

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for

DISMISS

Plaintiffs, BR 352E51, LLC and Beekman Reim LLC (plaintiffs), commenced this action seeking damages for breach of contract and negligence stemming from an agreement to perform construction work at the premises owned by plaintiff located at 352 East 51st Street, New York, New York (premises). Plaintiffs now move pursuant to CPLR 3211(a)(5) and (7) to dismiss defendants Elizabeth McDonald and Rocco Basile (collectively, the individual defendants), counterclaims for abuse of process. The motion is opposed. For the following reasons, plaintiffs' motion is granted.

By way of background, plaintiff commenced this action against co-defendant AVO Construction (AVO) related to construction work AVO performed at the premises. AVO was the general contract hired to perform work at the premises, including the construction on a penthouse unit on top of the existing building. Plaintiff thereafter filed the amended complaint asserting claims against the individual defendants pursuant to the New York State Lien Law, Article 3-A and conversion.

The individual defendants thereafter sought to dismiss plaintiff's claims pursuant to the Lien Law and conversion. Another justice of this court denied the individual defendant's motion, finding that:

“[d]efendants’ argument for dismissal of plaintiffs’ NYC Lien Law Article 3-A claim pursuant to CPLR 3211(a) (7) is not warranted, since plaintiffs are permitted to amend the complaint without leave of court to allege a Lien Law trust fund conversion claim during or after trial pursuant to CPLR 3025 (c)”

(BR 352E51, LLC v AVO Const. LLC, Sup St, New York County, Mar. 01, 2021, King, J., index no. 653869/2019).

The individual defendants then filed an answer, including two counterclaims for abuse of process. The counterclaims allege that by “[w]rongfully commencing and maintaining the action against [the individual defendants], [p]laintiffs intend to do [the individual defendants] harm without excuse or justification” (NYSCEF doc. no. 49 at ¶65, ¶69). The counterclaims further allege that plaintiffs “[e]ngaged in the foregoing conduct and used civil process in a perverted manner to obtain a collateral objective” (*id.* at ¶ 66). The counterclaims further state that the individual defendants “[h]ave suffered special injury, including but not limited to damage to their reputation and payment of legal fees” (*id.* at ¶73). The individual defendants seek damages in “[a]n amount to be determined at trial, but anticipated to be in excess of \$500,000, plus attorneys’ fees, costs, expenses and disbursements” (*id.* at ¶74).

In support of their motion to dismiss the counterclaims, plaintiffs first argue that the individual defendants fail to state a claim for abuse of process in that the counterclaims fail to allege: a regularly issued process used by plaintiff; that the counterclaims allege an intent to do harm; and there is no allegation of use of process in a perverted manner to obtain a collateral objective. Plaintiffs further argue that the individual defendants fail to allege specific damages resulting from plaintiff’s commencement of this action. Finally, plaintiff argues that plaintiff is entitled to dismissal of the counterclaims, as the identical matter was litigated in the individual defendants’ motion to dismiss.

The individual defendants primarily argue that the amended complaint fails to allege facts sufficient to state a claim under Article 3-A of the Lien Law. Specifically, the individual defendants argue that the amended complaint fails to allege the elements of a claim under Article 3-A, including that the individual defendants diverted funds and that the claims were not plead as a representative claim and representative action in compliance with Lien Law §77 and Article 9 of the CPLR. The individual defendants further argue that plaintiff’s motivation behind asserting the abuse of process claims was “[i]n an attempt to coerce the [individual defendants] to pay money to [p]laintiffs” (NYSCEF doc. no. 52, individual def opp at ¶24).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPhanna Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). “Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus” (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1,6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]). Although factual allegations in a plaintiff’s pleading may be accorded favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration (*see Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

The elements of the tort of abuse of process are: “(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 [1984]).

Plaintiffs demonstrate their entitlement to the dismissal of the counterclaims sounding in abuse of process. At the outset, plaintiff correctly argues that the mere filing of a summons and complaint does not constitute process capable of being abused (*Casa de Meadows Inc. [Cayman Islands] v Zaman*, 76 AD3d 917, 921 [1st Dept 2010] [“The institution of a civil action by summons and complaint is not legally considered process capable of being abused”], quoting *Curiano* at 116; *see Influx Cap., LLC v Pershin*, 186 AD3d 1622, 1625 [2d Dept 2020] [“We also agree with the Supreme Court’s determination that the complaint failed to state a cause of action to recover damages for abuse of process, as the mere commencement of a civil action cannot serve as the basis for a cause of action alleging abuse of process”]; *Roberts v 112 Duane Assocs. LLC*, 32 AD3d 366, 368 [1st Dept 2006] [“The motion court also correctly determined that the filing of the third-party complaint could not serve as a basis for an abuse-of-process claim, since the institution of an action is not process capable of being abused, regardless of third-party plaintiffs’ motives”]). Here, the individual defendants fail to state a claim sounding in abuse of process as those claims are premised on the allegation that the filing of the amended complaint as against them constitute process. The individual defendants do not address this point in opposition. Accordingly, plaintiff fails to allege sufficient facts demonstrating that plaintiff initiated a legal process within the meaning of a claim for abuse of process.

Counsel for the individual defendants argues in opposition that plaintiffs commenced the instant action to “[p]ressure [AVO] to capitulate to the [p]laintiffs in resolving this action on terms that are favorable to the Plaintiffs” (individual def opp at ¶4). Even if these allegations appeared in the counterclaims, as alluded to above, “[a] malicious motive alone does not give rise to a cause of action to recover damages for abuse of process” (*Kaufman v Kaufman*, 206 AD3d 805, 807 [2d Dept 2022], quoting *Tenore v Kantrowitz, Goldhamer & Graifman, P.C.*, 76 AD3d 556, 557 [2d Dept 2010] [“Here, although the defendant law firm alleges that the plaintiff commenced this action with the collateral objective of inflicting economic harm and obtaining a tactical advantage in a pending divorce action, a malicious motive alone does not give rise to a cause of action to recover damages for abuse of process”]). Thus, the individual defendants’ allegation that plaintiffs commenced the instant action with malice is insufficient to state a claim for abuse of process.

Moreover, even assuming that the commencement of this action constituted a legal process, the individual defendants’ allegations that plaintiff initiated the instant action seeking to do harm without excuse or justification and to obtain a collateral objective are also insufficient to withstand plaintiff’s motion to dismiss, as they are bare legal conclusions without any factual support (*see e.g., Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]; *Aviaev v Nissan Infiniti LT*, 150 AD3d 807, 808 [2d Dept 2017] [bare legal conclusions are not presumed to be true]). In any event, another justice already determined that plaintiffs stated a claim pursuant to Article 3-A of the Lien Law. The individual defendants fail to address this point in any substance. Accordingly, the individual defendants fail to state a counterclaim for abuse of process.

Accordingly, it is hereby

ORDERED that plaintiff’s motion to dismiss the individual defendants’ counterclaims sounding in abuse of process is granted, and those claims are dismissed; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon all parties, with notice of entry, upon all parties within ten (10) days.

This constitutes the decision and order of the Court.

<u>8/16/2022</u>				
DATE		DAKOTA D. RAMSEUR, J.S.C.		
CHECK ONE:	☒	CASE DISPOSED	☒	NON-FINAL DISPOSITION
	☒	GRANTED	☐	DENIED
APPLICATION:	☐	SETTLE ORDER	☐	GRANTED IN PART
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN	☐	SUBMIT ORDER
	☐		☐	FIDUCIARY APPOINTMENT
	☐		☐	REFERENCE