

**Lee Litig. Group, PLLC v A&B Rest. Group, LLC**

2023 NY Slip Op 31116(U)

April 11, 2023

Supreme Court, New York County

Docket Number: Index No. 151574-2022

Judge: Lynn R. Kotler

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

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Lee Litigation Group, PLLC

INDEX NO. 151574-2022

- v -

MOT. DATE

A & B Restaurant Group, LLC, et al

MOT. SEQ. NO. 3, 4 and 5

The following papers were read on this motion to/for dismiss, sanctions and recusal

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). \_\_\_\_\_

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). \_\_\_\_\_

Replying Affidavits

NYSCEF DOC No(s). \_\_\_\_\_

This is an action for tortious interference with contract and for aiding and abetting a breach of fiduciary duty. Specifically, plaintiff seeks damages against defendants for allegedly settling a matter with its clients without plaintiff's involvement or knowledge. There are three motions before the court. In motion sequence 3, plaintiff, Lee Litigation Group, PLLC ("Lee") moves for an order pursuant to CPLR § 3211(a)(7) dismissing defendants' counterclaims and for sanctions pursuant to 22 NYCRR § 130-1.1. In motion sequence 4, plaintiff moves to recuse defendants' counsel, Spinella Law Group ("Spinella"). Finally, in motion sequence 5, plaintiff moves to compel defendants to provide discovery. Defendants oppose each of the motions.

Sequence 3

The court will first consider motion sequence 3. Plaintiff argues that defendants' counterclaims for malicious prosecution and abuse of process should be dismissed because none of the elements are satisfied for either cause of action. Defendants respond that plaintiff is engaging in malicious prosecution and abuse of process because, despite plaintiff's knowledge that the class action against defendants had been settled, it continued to press the case, and that it did so without serving or getting proper personal jurisdiction over the defendants. For the reasons that follow, plaintiff's motion is granted to the extent that defendants' counterclaims for malicious prosecution and abuse of discretion are dismissed.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). 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 (*id.* citing *Morone v. Morone*, 50 NY2d

Dated: 4/11/23

  
\_\_\_\_\_  
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one:  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. Check if appropriate:  SETTLE ORDER  SUBMIT ORDER  DO NOT POST
- FIDUCIARY APPOINTMENT  REFERENCE

481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976].

A cause of action for malicious prosecution in New York has four elements: "(1) the commencement or continuation of a . . . proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the [plaintiff], (3) the absence of probable cause for the . . . proceeding and (4) actual malice" (*Facebook Inc. v. DLA Piper LLP (US)*, 134 AD3d 610 [1st Dept 2015] quoting *Broughton v. State of New York*, 37 NY2d 451 [1975]). A malicious prosecution claim also must demonstrate special injury (*Engel v. CBS, Inc.*, 93 NY2d 195 [1999]). A plaintiff asserting a cause of action for malicious prosecution must satisfy a heavy burden (*Tray Wrap, Inc. v Pacific Tomato Growers Ltd.*, 2008 NY Slip Op 50156[U] [Supreme Court Bronx County 2008] citing *Smith-Hunter v Harvey*, 95 NY2d 191 [2000]).

A civil malicious prosecution claim cannot be maintained in this case because Lee was an attorney in the predecessor action, not a party. A nonparty attorney cannot be sued for malicious prosecution; such a scheme would open the floodgates to lawsuits (*Tray Wrap, Inc. v Pacific Tomato Growers Ltd.*, 2008 NY Slip Op 50156[U] [Supreme Court Bronx County 2008]; *Curiano v. Suozzi*, 63 NY2d 113 [1984] [referencing "the long standing belief that the court system is open to all without fear of reprisal by way of retaliatory lawsuits"]; see Model Code of Prof. Responsibility Canon 7 [stating that a lawyer has a responsibility to zealously represent their client]; see *In re Abbott*, 167 AD2d 617 [3d Dept 1990] [demonstrating that there are other legal avenues to seek redress for an attorney's alleged professional misconduct, including seeking sanctions and disciplinary hearings with the possibility of disbarment]).

Assuming, *arguendo*, that the attorney non-party in an earlier action can be sued for malicious prosecution, this cause of action still fails for two reasons. Firstly, the damages that are alleged in this cross claim do not rise to the level atypical of engaging in litigation. Defendants state that they were damaged because the continued litigation led to increased court costs and attorney's fees as well as emotional distress and suffering. These burdens do not rise to the level necessary to be considered a special injury in a malicious prosecution case (See *Engel v. CBS, Inc.*, 93 NY2d 195 [1999] [demonstrating that damages incurred in the natural course of litigation cannot qualify as special injury]). Secondly, the predecessor case terminated in favor of the defendants via a settlement, thereby voluntarily dismissing all claims. A voluntary dismissal as a result of a settlement cannot support a claim for malicious prosecution (See *Smith-Hunter v. Harvey*, 95 NY2d 191 [2000]). Therefore, the crossclaim for malicious prosecution is dismissed pursuant to CPLR § 3211.

Concerning the crossclaim for abuse of process, an "action for abuse of process lies in the improper use of process after it is issued." (*Williams v. Williams*, 23 NY2d 592 [1962] quoting *Dean v. Kochendorfer*, 237 NY 384 [1924]; *Hauser v. Bartow*, 273 NY 370 [1937]). "Abuse of process has three essential elements: (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 N.Y.2d 113 [1984]). "The mere commencement of a lawsuit cannot serve as the basis for a cause of action alleging abuse of process" (*Geraci v. Gatsby Dining LLC*, 2020 NY Slip Op 32148[U] [Sup Ct. Kings Cty 2020]; *Lynn v. McCormick*, 153 AD3d 688 [2d Dept 2017]). In this case, the counterclaim asserts that Lee's commencement of this litigation is abuse of process because plaintiff knew that the underlying action had already been settled. Defendant's claim that the continuation of the litigation is separate from the commencement of the action is unavailing. Defendants cannot bring an abuse of process claim based upon the commencement of an action, so this counterclaim must also be dismissed.

Finally, in motion sequence 3, plaintiff argues that sanctions should be levied against the defendants because they filed such counterclaims when they knew, or ought to have known, that none of the elements were satisfied. Defendants respond that they should not have sanctions levied against them because they successfully pled all of the elements of the causes of action and the claims were not frivolous.

With regard to sanctions, 22 NYCRR § 130-1.1 states that "the court, in its discretion, may impose financial sanctions upon a party or attorney... who engages in frivolous conduct" including conduct that

it “completely without merit in law and [that] cannot be supported by a reasonably argument.” However, “the making of a somewhat colorable argument is sufficient to avoid sanctions (*Kremen v. Bendict P. Morelli & Associates, P.C.*, 80 AD3d 521 [1st Dept. 2011]), and the imposition of sanctions requires a pattern of frivolous behavior (*Sarkar v. Pathak*, 67 AD3d 606 [1st Dept. 2009]). Here, the court finds that defendants’ counterclaims do not rise to the level of frivolous conduct. Therefore, the branch of the claim seeking sanctions is denied. Accordingly, motion sequence 3 is granted only to the extent that that defendants’ counterclaims for malicious prosecution and abuse of discretion are dismissed

#### Sequence 4

The court now turns to motion sequence 4. In this motion, plaintiff argues that Spinella should be disqualified because Spinella improperly interfered with plaintiff’s contractual relationship, communicated with plaintiff’s client without consulting plaintiff and improperly distributed funds subject to an attorney’s lien. Plaintiff argues that Spinella is likely to be a witness in this action, that it does not meet any of the exceptions to the advocate witness rule, and that it is early enough in proceedings that disqualification of Spinella would not present a substantial hardship on defendants. Defendants did not file a proper response to this motion, but rather filed an oppositional letter to the court. In that letter, defendants argue that Spinella is not likely to be a witness of a significant factual issue because everything that Spinella testified to can be testified to by the defendants, and that the source of the knowledge underlying Spinella’s affirmation is and was conversations with the defendants and files from the case.

The decision to disqualify an attorney rests within the court’s discretion (*Mayers v. Stone Castle Partners, LLC*, 126 AD3d 1 [1st Dept 2015]; see also *Gjoni v. Swan Club, Inc.*, 134 AD3d 896 [2d Dept 2015]). Disqualification is required only where the testimony by the attorney is considered necessary and prejudicial to the adverse parties’ interests (*Ullman-Schneider v. Lacher & Lovell-Taylor PC*, 110 AD3d 469 [1st Dept 2013]). “Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence” (*Broadwhite Associates v. Truong*, 237 AD2d 162 [1st Dept 1997] quoting *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 NY2d 437 [1987]). Since a party has the right to be represented by counsel of his or her choice, an adversary seeking to disqualify that party’s attorney “bears a heavy burden” (*Mayers, supra*). Here, Spinella was not present on the day that the settlement was signed. Although Attorney Jack Spinella has filed an affirmation in this action which sets forth specific factual assertions, some of which were made upon information and belief, plaintiff has failed to establish that Spinella and/or Attorney Spinella are material witness. Therefore, motion sequence 4 is denied without prejudice to renewal after party depositions have been completed upon a proper showing.

#### Sequence 5

As for motion sequence 5, this case was calendared for a conference before the court, at which point the court directed the parties to work to resolve the motion and file a joint letter as to status. A joint letter was filed on NYSCEF (Doc No. 84) advising that defendants had provided supplemental responses and that plaintiff finds said responses inadequate because, *inter alia*, “it knows Defendants responses are materially untrue [and] Defendants continue to withhold documents.” Plaintiffs further assert that the following discovery responses are still missing information: document demand nos. 4, 5, 6, and 8; interrogatory response nos. 6, 7 and 8. Meanwhile, defense counsel takes the position that defendants have complied with the Court’s order and responded to the discovery demands, object to plaintiffs’ statements and characterizations and “wish to make the Court aware of this position while complying with the Court’s directives.”

Demand no. 4 seeks: “All documents related to Defendants’ communications, occurring between July 1, 2020 and September 30, 2020, regarding the related matter.” Defendants have responded with objections and provide copies of a check to Gent Hajdaraj and confirmation of a wire transfer from Chase. This is not a proper response to Demand No. 4. The court will give defendants one final opportunity to properly respond to this demand. To the extent responsive records do not exist, defendants

must provide an affidavit attesting to the search for records responsive to this demand made by a custodian of records containing sufficient information to substantiate defendants' claim that responsive records do not exist. The court notes that while plaintiff may believe defendants are withholding documents, plaintiff has provided no proof on this motion to substantiate this claim and the court cannot assume that defendants' representation that such documents do not exist is false. Thus, plaintiff is entitled to an affidavit from a custodian of records and may be entitled to further discovery on the issue of such records at a later juncture.

Defendants have not provided a supplemental response to demand nos. 5 and 6, which sought drafts of all settlement agreement and emails from counsel (both in-house and external, which include any draft settlement agreements referencing both Clients and Defendants. Defendants' response merely objects on various grounds and with respect to demand no. 5, defendants claim that they 'are not currently aware of documents responsive to the demand.'

With respect to demand no. 5, defendants' objections are overruled. Defendants must provide an affidavit attesting to the search for records responsive to this demand made by a custodian of records containing sufficient information to substantiate defendants' claim that responsive records do not exist. With respect to demand no. 6, this demand is stricken, as it is overbroad, cumulative and seeks privileged communications.

As for demand no. 8, plaintiff seeks copies of all emails and text messages with proposed search terms. Defendants have provided another nonresponse, with various inapplicable objections and otherwise claiming, without any basis, that "[d]efendants are not in possession, custody, or control of material or information responsive to this [d]emand" because "[a]ll communications were by telephone, and on information and believe occurred during or about the week prior to the execution of the Related Matter's settlement agreements with Plaintiff's Clients." Again, the court will give defendants one final opportunity to provide an affidavit from a custodian of records attesting to the search for records responsive to this demand containing sufficient information to substantiate defendants' claim that responsive records do not exist.

Defendants did not choose to supplement their response to plaintiff's interrogatories. The interrogatories at issue, nos. 6-8, are as follows:

**Interrogatory No. 6:** Please detail any communication between Clients and Defendants occurring between July 1, 2020 and September 30, 2020. Please include the following: a) names of individuals present for the communication; b) titles of any of Defendants present or engaging in the communication; date of the communication; method of the communication (i.e., text, email, in-person, or remote teleconference); and purpose of the communication.

**Interrogatory No. 7:** Please detail any communication between Defendants, Defendants' counsel, and Plaintiff occurring between July 1, 2020 and September 30, 2020. Please include the following: a) names of individuals present for the communication; b) titles of any of Defendants present or engaging in the communication; date of the communication; method of the communication (i.e., text, email, in-person, or remote teleconference); and purpose of the communication.

**Interrogatory No. 8:** Please identify all individuals known to Defendants, who were aware of Plaintiff's representation of the Clients at the time when Defendants entered into any settlement agreement with the clients. Please include each individual's name(s), address(es), email(s), and telephone number(s).

Defendant's substantive response to nos. 6 and 7 indicate that they are "not aware of any such communications other than those that occurred on or about the date of execution of the settlement agreements [] and/or within a week or two of such execution." Defendants cannot provide information

which does not exist. To the extent that they claim that no such communications were made, their response to these interrogatories is proper.

As for interrogatory no. 8, defendants identify "Plaintiff law firm, its owners, principals, attorneys, staff, and employees; Defendants; Defendants' former labor and employment counsel." This response is insufficient since plaintiff asked for names, addresses, emails and telephone numbers. Thus, the court will grant defendants an additional opportunity to supplement their response to this item as well.

Accordingly, the court will give defendants one final opportunity to comply with their discovery obligations in this case as outlined herein. Defendants' failure to comply with this order shall result in an order of preclusion or an adverse inference upon plaintiff's application to the trial judge or on a dispositive motion.

## CONCLUSION

In accordance herewith, it is hereby

**ORDERED** that motion sequence 003 is granted to the degree that that defendants' counterclaims for malicious prosecution and abuse of discretion are dismissed; and it is further

**ORDERED** that the branch of motion sequence 003 that sought sanctions against the defendants is denied; and it is further

**ORDERED** that motion sequence 4 is denied without prejudice to renew at a later date; and it is further

**ORDERED** that motion sequence 5 is granted to the extent that, within 20 days from entry of this decision/order, defendants shall supplement their responses to:

[1] demand nos. 4, 5 and 8 by providing an affidavit attesting to the search for records responsive to these demands made by a custodian of records containing sufficient information to substantiate defendants' claim that responsive records do not exist; and

[2] interrogatory no. 8.

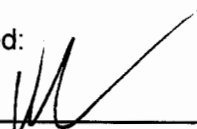
Defendants' failure to fully comply with this decision/order shall result in an order of preclusion or an adverse inference upon plaintiff's application to the trial judge or on a dispositive motion; and it is further

**ORDERED** that plaintiff's document demand no. 6 is stricken; and it is further

**ORDERED** that within 30 days, the parties are directed to meet and confer and set deadlines for all remaining discovery in a written stipulation to be so ordered by the court and present same to the court for signature.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 4/11/23  
New York, New York

So Ordered:   
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Hon. Lynn R. Kotler, J.S.C.