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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PhD,	*	
Plaintiff,	*	
	*	**2012 CA 008263 B**
v.	*	**Judge Jennifer M. Anderson**
	*	**Civil I, Calendar 3**
NATIONAL REVIEW, INC., *et al.*,	*	
Defendants.	*	

ORDER GRANTING MOTION TO DISMISS THE COUNTERCLAIMS OF COUNTER-PLAINTIFF MARK STEYN

This matter is before the Court is upon consideration of the Motion to Dismiss the Counterclaims of Counter-Plaintiff Mark Steyn ("Steyn"), filed by and through his attorneys on March 17, 2014. Counter-Defendant Michael E. Mann ("Mann") moves the Court to dismiss the Counterclaims with prejudice pursuant to pursuant to D.C. Super. Ct. Civ. R. 12(b)(6) and award Mann attorneys' fee incurred in filing this motion.

This case began on October 22, 2012 when Mann filed his Complaint for defamation and intentional infliction of emotional distress against National Review, Inc. ("NRI"), Competitive Enterprise Institute ("CEI"), Rand Simberg, and Mark Steyn (collectively, "Defendants"). On December 14, 2012, Steyn filed a Special Motion to Dismiss Pursuant to D.C. Anti-SLAPP Act (D.C. Code § 16-5501 *et seq.*) and Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim. On July 10, 2013, Mann filed his Amended Complaint. On July 19, 2013, Judge Combs Greene issued an Order denying Defendant Steyn's Motion.

On July 24, 2013, Steyn filed a Special Motion to Dismiss Plaintiff's Amended Complaint Pursuant to D.C. Anti-SLAPP Act (D.C. Code § 16-5501 *et seq.*) and Rule 12(b)(6) Motion to Dismiss Plaintiff's Amended Complaint for Failure to State a Claim. Also on July 24,

2013, Steyn filed a Motion for Reconsideration of the Court's July 19, 2013 Order denying his initial Motion to Dismiss. On August 30, 2013, Judge Combs Greene issued an Order denying Defendant's Motion for Reconsideration of July 19, 2013 Order.

On January 21, 2014, Defendant filed a Motion to Vacate Order of July 19, 2013. On January 22, 2014, Judge Weisberg issued an Order denying Steyn's Motion to Dismiss the Amended Complaint.

On March 12, 2014, Steyn filed the Amended Answer and Counterclaims to the Amended Complaint. On March 17, 2014, Mann filed the Motion to Dismiss the Counterclaims. On April 1, 2014, Steyn filed his Opposition to Motion to Dismiss the Counterclaims.

Legal Standards

In a Rule 12(b)(6) motion, the court must accept the allegations of the complaint as true, construe all facts and interferences in favor of the claimant, and resolve any uncertainties or ambiguities involving the sufficiency of the complaint in favor of the pleader. Atkins v. Indus. Telecommunications Ass'n, 660 A.2d 885, 887 (D.C. 1995). Although Rule 12 (b)(6) tests only the legal sufficiency of the complaint, Vincent v. Anderson, 621 A.2d 367, 372 (D.C. 1993), to survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face; in other words, the pleader must plead factual content that allows the court to draw a reasonable inference that defendant is liable. Ashcroft v. Iqbal, 556 U.S. 662, 678.

Counterclaim I: Violation of Anti-SLAPP Statute

Steyn alleges Mann's defamation lawsuit violates D.C.'s Anti-SLAPP (Strategic Lawsuit against Public Participation) statute. The statute expressly provides Steyn with the right to pursue a motion to dismiss the underlying lawsuit as a defensive mechanism. D.C. Code § 16-5502.

Steyn argues, however, that the statute also implicitly provides him with the right to affirmatively assert a claim against the filer of the underlying lawsuit and recover damages if the underlying lawsuit is found to be a SLAPP. Therefore, it is worthwhile to discuss whether the statute provides such right.

The Anti-SLAPP statute was enacted to give a defendant the ability to fend off the a lawsuit filed by one side of the political or public policy debate aimed to punish or prevent the expression of opposing point of view. Council of the District of Columbia, Rep. of Comm. on the Public Safety and Judiciary on Bill 18-893, at 1 (Nov. 8, 2010). SLAPPs are often without merit and used as a means to muzzle speech. Id. The D.C. Anti-SLAPP statute provides such a defendant with substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest. Id. at 4.

To achieve the legislative objectives stated above, the statute gives a SLAPP defendant the power to obtain a dismissal of the action with prejudice by making a *prima facie* showing that the claim at issue arise from the act in furtherance of the right of advocacy on issues of public interest, a much lower standards than a Rule 12(b)(6) motion, and the power to stay discovery while the motion is pending to save legal fees. D.C. Code § 16-5502. Also, the statute gives a defendant the right to have an expedited hearing on the motion to dismiss and obtain a ruling as soon as practicable after the hearing. Id. Finally, the statute allows a defendant to recover the litigation costs, including reasonable attorneys fees, if the case is dismissed under §16-5502. Id. § 16-5504.

Steyn argues that the statute implicitly allows him to affirmatively assert a claim against Mann and recover damages if Mann's defamation lawsuit is found to be a SLAPP. As support

for this argument, Steyn cites Cort v. Ash, 422 U.S. 66, 78 (1975) and Kelly v. Parents United, 641 A.2d 159, 164 (D.C. 1994). Both cases used a three-factor test to determine whether a private remedy is implied in a statute: (1) is the plaintiff is within the class of people the statute designed to protect, (2) did the legislature intend to create a private remedy, and (3) is implying a private remedy consistent with purpose of the statute?

This test, however, is inapplicable in this situation because the D.C. Anti-SLAPP statute expressly provides a private remedy to a SLAPP defendant: the special motion dismiss with a lower burden of proof and expedited hearing, a stay of discovery when the motion is pending, a special motion to quash discovery request and the recovery of attorneys fees. Steyn availed himself of that remedy and lost when the Court denied his Motion to Dismiss and the Court of Appeals affirmed that denial. He cannot now seek the same remedy in the guise of a counterclaim.

Neither Cort or Kelly cited by Steyn is analogous here because the statutes in both cases involve the extension of government enforcement to private enforcement, and D.C. Anti-SLAPP statute involves only private enforcement. In Cort, the statute at issue is a criminal one: 18 U.S.C. § 610, Coercion of Political Activity, and the plaintiff there wanted to file a civil action based on the criminal offense. 422 U.S. 66. Here, the Anti-SLAPP statute is a civil statute and it already gives substantial rights to the defendant to fend off SLAPPs expeditiously and economically. In Kelly, the court held that private actions were available to the plaintiff- parents to enforce D.C.'s Nurse Assignment Act because the statute at issue provided no means of enforcement whatsoever unless a private action was implied. 641 A.2d at 165. That is not the case here. As discussed above, the Anti-SLAPP statute gives defendants a means of enforcement

including the ability to file a motion to dismiss the case, quash discovery requests and recovery of attorneys fees.

Based on the analysis above, the Court concludes that the D.C. Anti-SLAPP statute does not create an implied right to affirmatively assert a claim against the plaintiff. Therefore, Steyn's first counterclaim has no legal basis and should be dismissed.

Counterclaim II: Constitutional torts

Steyn claims that Mann's use of the court system as an instrument to carry out the alleged wrongful interference of Steyn's First Amendment rights constitutes a constitutional tort. Def.'s Countercl. ¶ 141. In support of this claim, Steyn argues that Mann's lawsuit constitutes state action because it invokes the District of Columbia courts to apply their laws to the case.

State action is an action in which the state has so far insinuated itself into a position of interdependence with the private party that it must be recognized as a joint participant. Henry v. First Nat'l Bank, 444 F.2d 1300, 1310 (5th Cir. 1971). Equating filing a lawsuit in a state court, an open forum where everyone can present a case, with state action demeans the judicial system. Id. Only after the court has reached its decision does the power of state come to play. Id.

Steyn cites Shelley v. Kraemer, 334 U.S. 1 (1948) where the Supreme Court of the United States found the Supreme Court of Missouri's decision to enforce a discriminatory agreement in land sale constituted state action. In Shelly, the Supreme Court made clear that, but for the active intervention of the state courts, petitioners would have been free to buy the property without restraint. Id. at 19. Shelly is one of the cases where the state has made its full coercive power of government available to private individuals to deny the other party's constitutional rights. Id.

Here, the District of Columbia Court of Appeals has not made any final decision that substantially deprives Steyn of his constitutional rights, so the power of District of Columbia government has not come to play. See Henry, 444 F.2d at 1310 (stating only after the court has reached its decision does the power of state come to play). Also, Steyn fails to allege any facts that show D.C. courts' active intervention, interdependence with Mann, or acting as a joint participant with Mann. Mann's action does not constitute state action, at least not state action yet before the District of Columbia Court of Appeals issues a final decision. Therefore, Steyn's constitutional tort claim must be dismissed.

Counterclaim III: Abuse of Process, malicious prosecution and abusive litigation

Next, Steyn claims that Mann's lawsuit constitutes a form of abusive litigation that is akin to abuse of process, malicious prosecution and so on. Def.'s Countercl. ¶ 146.

In an abuse of process action, the plaintiff must allege: (1) the existence of an ulterior motive of the filer; and (2) an act of improper use of the litigation after the issuance of the lawsuit. Hall v. Hollywood Credit Clothing Co., 147 A.2d 866, 868 (D.C. 1959). The mere issuance of a lawsuit is not actionable no matter what ulterior motive may have prompted it, and the gist of this action lies in the act of improper use after issuance. Morowitz v. Marvel, 423 A.2d 196, 198 (D.C. 1980). The act of improper use is to use the legal system to accomplish some end which is without the regular purview of the process, or to compel the opposing party to do something collateral which he could not be legally required to do. Bown v. Hamilton, 601 A.2d 1074, 1079 (D.C. 1992).

Here, Steyn claims Mann misused the process of court by bringing the present lawsuit. Def.'s Countercl. ¶ 144. However, bringing a lawsuit alone is not actionable. Steyn also claims Mann intentionally suppressed Steyn's freedom of speech by abusing the litigation system.

Def.'s Countercl. ¶¶ 145-46. Accepting this ulterior motive allegation is true, Steyn still fails to allege any improper act engaged by Mann after the issuance of the current lawsuit. Indeed, Steyn alleges Mann's improper acts of stalling the discovery process in the actions against other critics in the British Columbia and Virginia courts. Def.'s Countercl. ¶¶ 130-31. However, such acts are not considered by this Court because those acts occurred prior to the current lawsuit. See Park v. Brahmbhatt, 2016 D.C. Super. LEXIS 16, *15 (stating courts in D.C. only consider the filer's acts after the issuance of the lawsuit to satisfy the act element). Thus, the counterclaim based on the theory of abuse of process must be dismissed.

In a malicious prosecution action, the plaintiff must allege: (1) the underlying suit terminated in plaintiff's favor; (2) malice on the part of defendant; (3) the underlying suit lacks of probable cause; and (4) a special injury occasioned by plaintiff as the result of action. Morowitz, 423 A.2d at 198. Here, the underlying suit has not been resolved in Steyn's favor, as his special motion to dismiss and Rule 12(b)(6) motion was denied and the case is still ongoing. Since the Court has concluded that a reasonable jury is likely to find in favor of Mann, Mann v. Nat'l Review, Inc., No. 2012 CA 8263 B, *5 (D.C. Super. Jan. 22, 2014), the lack of probable cause element cannot be satisfied.

Steyn also fails to allege the special injury element. Special injury is the type of injury that would not necessarily result from similar causes of action. Ammerman v. Newman, 384 A.2d 637, 639. The injury alleged by Steyn includes but is not limited to the harm of freedom of expression and the present and future litigation costs and attorneys fees. Def.'s Countercl. ¶ 147. Litigation costs and attorneys fees are incident to any litigation and, thus, not actionable. See Morowitz, 423 A.2d at 198 (holding the costs incident to litigation are not actionable in a malicious prosecution claim). The alleged harm to Steyn's freedom of expression is likely to be

the retraction of the defamatory statements if Mann succeeds eventually. Such injury is the result for most defamation lawsuits and thus does not rise to the level of special injury. Although Steyn alleges the intentionality of Mann's action, which is likely to satisfy the malice element at this stage, the other elements are missing. Thus, the counterclaim resting on malicious prosecution cannot proceed.

Having realized the unlikely success under either malicious prosecution or abuse of process, Steyn urges the court to create a new tort named abusive litigation to fill the gap between abuse of process and malicious prosecution. In supporting his proposal, Steyn cites Yost v. Torok, 344 S.E.2d 414 (Ga. 1986), the Supreme Court of Georgia's decision that merged Georgia's malicious use of process and malicious abuse of process into a single tort and asks this Court to do the same. We decline to do so. First, it is not within a trial court's authority to create a new common law. Second, the Georgia court's action is a response to the then-newly-enacted Georgia statute O.C.G.A. § 9-15-14. Id. at 417; but here, we do not have such legislative or policy demand. Third, even based on Georgia's tort law, Steyn's counterclaim would still fail because it does not allege any of the facts required under the Georgia tort law. See id. at 417 (requiring the plaintiff to show that suit does not have any justiciable issue of law or fact that a court could reasonably accept, or lacks substantial justification, or is interposed for delay or harassment, or unnecessarily expands the proceeding by improper acts such as abusing the discovery procedures).

It is D.C.'s announced policy to allow unfettered access to the courts and courts are cautious not to adopt positions that will have a chilling and inhibitory effect on future litigants who have justiciable issues; likewise, the courts are aware of the obligation to protect innocent defendants against frivolous and groundless litigation. Morowitz, 423 A.2d at 197-98. Since

Steyn's special motion to dismiss and Rule 12(b)(6) motion were denied on the grounds that a reasonable jury is likely to find in favor of Mann in his defamation lawsuit, Mann's lawsuit against Steyn is far from frivolous or groundless.

Accordingly, it is hereby this 29th day of August 2019, hereby

ORDERED that Counter-plaintiff Mark Steyn's counterclaims are **DISMISSED WITH PREJUDICE**.

Jennifer M. Anderson

Judge Jennifer M. Anderson

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