IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, Plaintiff, v. KISLING, NESTICO & REDICK, LLC, et al., Defendants.	)	CASE NO. CV-2016-09-3928 JUDGE TODD MCKENNEY **DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM UNDER CIV.R. 12(C)**

I. INTRODUCTION

Through their social media posts and communications with the media, Plaintiff's agents have abused the legal process since filing this frivolous lawsuit, with the intent of damaging the good names and reputations of Defendants Kisling, Nestico & Redick, LLC ("KNR") and Alberto R. Nestico. Accordingly, Defendants filed a Counterclaim against Plaintiff for: (1) frivolous conduct under R.C. 2323.51; (2) abuse of process; (3) tortious interference with existing and prospective business relationships; and (4) deceptive trade practices under R.C. 4165.02. The 49 paragraph Counterclaim on its face, let alone after construing the facts in favor of Defendants, unequivocally establishes that Defendants can recover on their claims. In other words, Plaintiff cannot prove beyond doubt that Defendants can prove no set of facts in support

of each of their claims. Therefore, her Motion to Dismiss Defendants' Counterclaim Under Civ.R. 12(C) should be denied.[1]

II. RELEVANT FACTS

A. Defendants' Counterclaim alleges more than sufficient facts to support each of their claims.

Defendants' Counterclaim is based on Plaintiff and her attorneys' frivolous conduct and abuse of the legal process in filing and pursuing this baseless lawsuit against Defendants. On the face of her Complaint, Plaintiff asserts that she is pursuing a fraud, breach of contract, and unjust enrichment claims to recover the $50 investigation fee, but her ulterior purpose in using the legal process is to defame Defendants and ruin their good names and reputations. (Counterclaim.) She, through her agents, basically wants to destroy Defendants' business. Defendants have alleged more than sufficient facts to establish their Counterclaim.

The Counterclaim contends, and Plaintiff admits, that she agreed to settle her claim, and that she reviewed and signed the Settlement Memorandum, which expressly sets forth the investigation fee as the first expense to be deducted from the settlement. (Counterclaim, ¶9; Pl.'s Answer, ¶9; Ex. C to Complaint.) Plaintiff also admits that KNR would charge her expenses only if recovery was made on her behalf. (Counterclaim, ¶7; Pl.'s Answer, ¶7; Ex. A to Complaint.) Despite these admissions, Plaintiff filed this lawsuit. (Counterclaim, ¶10; Pl.'s Answer, ¶10.)

[1] Both in her Introduction and Conclusion sections of the Motion to Dismiss, Plaintiff insinuates that this case is based on allegations from a whistleblower and that Defendants may not be protected from a defamation claim based on their Counterclaim. (Mot. to Dismiss, p. 2, 6.) In support, Plaintiff misleadingly cites to *A&B-Abell*. But that case does not support a whistleblower status for anyone involved in this case (there is absolutely no basis for this assertion) or that Defendants have opened themselves to a defamation claim by filing the Counterclaim. Rather, *A&B-Abell* states that when a party brings both a defamation claim and a tortious interference claim based on the same statements, the heightened standard of malice applies to both claims. *A&B-Abel Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 14-15, 651 N.E. 2d 1283 (1995). Plaintiff has no support for these arguments.

The Counterclaim then alleges that, during the course of this lawsuit, Plaintiff's agents abused the legal system: "Williams, acting through her agent, posted a request for assistance in finding new potential class members on social media. These posts include inaccurate and prejudicial language, including but not limited to, the incorrect allegation that KNR 'has engaged in business practices that constitute fraud and other unlawful breaches against the majority of its clients dating back to 2006.'" (Counterclaim, ¶14.) These posts are false and misleading. (*Id*., ¶¶ 23, 30, 37.) Defendants also allege that they requested, through Plaintiff's attorneys, that she cease and desist from these defamatory posts and that, as of the filing of the Counterclaim, the posts had not been removed.[2] (*Id*., ¶15.) By making these posts and other conduct (e.g., requesting an article in Cleveland.com on change of venue), Defendants assert that Plaintiff's, and her agent's, intent is to defame Defendants and harm their reputations, name, and goodwill. (*Id*., ¶¶17, 22, 26, 35.)

Based on these factual allegations, including Plaintiff's admissions, Defendants have asserted counterclaims for: (1) frivolous conduct under R.C. 2323.51; (2) abuse of process; (3) tortious interference with existing and prospective business relationships; and (4) deceptive trade practices under R.C. 4165.02. As demonstrated below, the Counterclaim's allegations more than sufficiently to set forth the elements of each claim with supporting facts to survive Plaintiff's Motion to Dismiss.

[2] Plaintiff eventually removed the posts. (Pl.'s Answer, ¶15.)

III. LAW AND ARGUMENT

A. Ohio courts allow defendants to assert R.C. 2323.51 frivolous conduct claims as counterclaims.

Plaintiff misleads this Court by contending that Ohio law automatically bars a frivolous conduct claim under R.C. 2323.51 from being asserted as a counterclaim. (Mot. to Dismiss, p. 3.) That is not Ohio law. Even the cases cited by Plaintiff undermine her argument.

Plaintiff cites to *Luchansky* and *Scrap Yard* to support her argument that a violation of R.C. 2323.51 cannot be raised as a counterclaim. (*Id*.) That, however, is not what those cases conclude. In *Luchansky*, the appellate court stated: "Initially, we note that an award pursuant to R.C.2323.51 is not an independent cause of action that can **be brought in a separate civil suit**." *Luchansky v. Jagnow*, 7th Dist. Mahoning No. 97CA191, 1998 Ohio App. LEXIS 4255, *14.[3] This conclusion is silent on pursuing the statutory violation as a counterclaim. Indeed, the appellate court affirmed the award against appellee on appellant's counterclaim under R.C. 2323.51. *Id*., at *12-14 (rejecting appellee's argument that he was entitled to a jury trial on the frivolous conduct counterclaim). *Luchansky* completely belies Plaintiff's position.

Similarly, *Scrap Yard* does not support Plaintiff's position. In *Scrap Yard*, the plaintiff filed a suit in federal court asserting a R.C. 2323.51 frivolous conduct claim based on defendant's prior lawsuit against plaintiff in state court. *Scrap Yard v. City of Cleveland*, 513 Fed. Appx. 500, 504 (6th Cir. 2013). The Sixth Circuit under these facts, which are not present in this case, affirmed dismissal, primarily based on the lack of factual allegations. *Id.*, at 506. The Sixth Circuit did not specifically address whether a R.C. 2323.51 frivolous conduct claim can be raised as a counterclaim.

[3] Plaintiff also cites to *Wochna v. Mancino*, 9th Dist. Medina No. 07CA0059-M, 2008-Ohio-996, for this same argument. (Mot. to Dismiss, p. 3.) Interestingly, however, the appellate court reversed summary judgment in favor of plaintiff on the frivolous conduct counterclaim. *Id*., at ¶30.

Ohio appellate courts, however, have concluded that a frivolous conduct claim can be brought as a counterclaim. *See, e.g., Texler v. Papesch*, 9th Dist. Summit No. 18977, 1998 Ohio App. LEXIS 4070, *6 ("Although the statute does not specify whether a party can make a claim for attorney's fees in the form of counterclaim, **the case law makes clear** that it is an accepted method.") (emphasis added); *Odita v. Phillips*, 10th Dist. Franklin No. 09AP-1172, 2010-Ohio-4321, ¶59 (citing to *Texler* and concluding: "Ohio courts have recognized that a claim for frivolous conduct under R.C.2323.51 may be made by way of a counterclaim, rather than strictly by way of motion."); *Jones v. Billingham*, 105 Ohio App. 3d 8, 12, 663 N.E.2d 657 (2nd Dist. 1995) ("In our view, the Sixth Count of Billingham's **counterclaim sets forth a claim** that the Complaint filed by plaintiffs-appellees is a frivolous claim under the ambit of Civ. Pro. 11 and **R.C. 2323.51**.") (emphasis added); *Buettner v. Est. of Herbert Bader*, 6th Dist. Lucas No. L-97-1106, 1998 Ohio App. LEXIS 2, *5-6 (in concluding that the trial court did not lack jurisdiction, the appellate court stated: "In the case *sub judice*, appellees' counterclaim set forth a claim within the ambit of R.C.2323.51."); *Craine v. ABM Services, Inc.*, 11th Dist. Portage No. 2011-P-0028, 2011-Ohio-5710, ¶10 (string cite of cases, including *Texler*, that have allowed a frivolous conduct claim under R.C. 2323.51 to proceed via a counterclaim); *Burrell v. Kassicieh*, 128 Ohio App. 3d 226, 232, 714 N.E.2d 442 (3rd Dist. 1998) (retained jurisdiction over R.C. 2323.51 frivolous conduct counterclaim and affirmed judgment in favor defendant on it). Plaintiff failed to cite to these cases, including the Ninth District decision in *Texler*, that permit a defendant to pursue a R.C. 2323.51 frivolous conduct claim as a counterclaim. Because Ohio law allows for such a counterclaim, Plaintiff's Motion to Dismiss should be denied.

B. Defendants satisfy the elements of an abuse of process claim.

Plaintiff correctly states that the elements of an abuse of process claim are that: (1) a legal proceeding has been set in motion in proper form and with probable cause; (2) the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) direct damages has resulted from the wrongful use of process. *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St. 3d 294, 298, 1994-Ohio-503, 626 N.E.2d 115. However, that is all Plaintiff got right in her argument on the abuse of process claim. Plaintiff contends that Defendants did not satisfy the first or second element. (Mot. to Dismiss, p. 4.) Plaintiff's argument fails. Defendants clearly have set forth facts to support their abuse of process claim.

1. Defendants' Counterclaim meets the first element.

Plaintiff specifically contends that Defendants did not follow the explicit language of the first element that "a legal proceeding has been set in motion in proper form and with probable cause." (*Id*.) Plaintiff, however, completely ignores that Defendants allege: "On July 13, 2016, Williams filed this action." (Counterclaim, ¶10.) Of course, Plaintiff admits this allegation. (Pl.'s Answer, ¶10.) Plaintiff's motion further disregards that the Counterclaim incorporates and expressly states that Defendants deny the allegations of Plaintiff's Complaint. (Counterclaim, ¶21.) Again, Plaintiff admits this assertion. (Pl.'s Answer, ¶21.) On their face, let alone after reasonable inferences are drawn in Defendants' favor, these allegations clearly satisfy the first element of an abuse of process claim. *See Jones v. Carpenter*, Franklin No. 13CV8943, 2015 Ohio Misc. LEXIS 8514, *5 (the assertion that "the filing of the instant lawsuit was commenced" satisfied the first element). Moreover, one Ohio court concluded that by filing the abuse of process claim as a counterclaim, the defendant satisfies the first element of the claim. *Anderson*

v. Eyman, 5th Dist. Fairfield No. 00CA26, 2000 Ohio App. LEXIS 5982, *9 ("The basis for appellants' abuse of process claim centers on appellee's filing of the instant action, **which satisfies the first element**.") (emphasis added).

In a further vain attempt to support her argument, Plaintiff incorrectly cites to the record. First, she cites to paragraphs 17-19 of the Counterclaim to support her position that Defendants did not satisfy the first element. (Mot. to Dismiss, p. 4-5.) Paragraphs 17-19, however, involve the R.C. 2323.51 frivolous conduct claim, and not the abuse of process claim. Defendants are allowed to plead in the alternative with their frivolous conduct and abuse of process claims. *See* Civ.R. 8(E)(2). Paragraphs 17-19 are irrelevant to the abuse of process claim.

Second, Plaintiff incorrectly attributes to Defendant a quote from a case in which that language is not in the Counterclaim: "Defendants 'allege that the underlying legal proceedings were instituted without regard for probable cause…." (*Id*., p. 4, citing to *P.N. Gilcrest*.) But that is not the case at bar. Nowhere in the Counterclaim do Defendants allege that Plaintiff filed this lawsuit without probable cause. Again, to the extent that frivolous conduct, for purposes of their R.C. 2323.51 claim, equates to no probable cause, Defendants are allowed to plead in the alternative. Civ.R. 8(E)(2). By the plain reading of the Counterclaim and under Ohio law, Defendants satisfy the first element of the abuse of process claim.

2. <u>Defendants' Counterclaim satisfies the second element</u>.

In the "Issues Presented" and in a heading on page 4, Plaintiff merely contends that Defendants did not satisfy the second element of ulterior purpose. (Mot. to Dismiss, p. 1, 4.) But Plaintiff offers no substantive argument to buoy these conclusory statements. There simply is no support for them.

Defendants unmistakably contend that, through social media posts by Plaintiff's counsel (having a mundane article written about change of venue in this case and other tactics), Plaintiff is using this lawsuit for the ulterior purpose to defame Defendants and harm their reputations, name, and goodwill. (Counterclaim, ¶¶21-22; 26.) This conduct was all done after Plaintiff filed the lawsuit and is using the lawsuit for an improper purpose. *See Yaklevich*, 68 Ohio St. 3d at 299 ("In a typical case, the abuse of process…arises from events that occur during the course of the underlying litigation."). Litigation is not designed with the ulterior purpose of destroying a person or company's good reputation and name.

These allegations are more than sufficient to survive dismissal under Civ.R. 12(C). *Jones*, 2015 Ohio Misc. LEXIS 8514, *6 (denying motion to dismiss). They place Plaintiff on notice of her agent's conduct that is at issue and the ulterior motive in using the legal process. Plaintiff's Motion to Dismiss should be denied.

C. Defendants properly assert a valid tortious interference with business relationship claim against Plaintiff.

According to Plaintiff, to establish a tortious interference with a business relationship claim, a party must show: (1) a business relationship, (2) known to the tortfeasor, (3) an act by the tortfeasor that adversely interferes with that relationship, (4) done without privilege, and (5) resulting in damage. (Mot. to Dismiss, p. 5.) Plaintiff then argues that the third element specifically requires that the tortfeasor's act causes a person not to enter into or continue a business relationship. (*Id*.) Plaintiff contends that this specific requirement must be included in Defendants' Counterclaim, and because that it is not, Defendants' tortious interference claim should be dismissed. (*Id*.) Plaintiff's argument is nonsensical.

Plaintiff does not dispute that the Counterclaim satisfies the first, second, fourth, and fifth elements of a tortious interference claim. The Counterclaim states that Defendants have ongoing

business relationships with their clients and that they are always marketing to and obtaining new clients. (Counterclaim, ¶28.) This allegation fulfills the first element. The next paragraph states: "Williams and her agents have actual and/or constructive knowledge of KNR and Nestico's business relationships and the importance of maintaining their business reputations to obtain new clients. (*Id*., ¶29.) Indeed, Plaintiff admits these allegations in her Answer. (Pl.'s Answer, ¶29.) They meet the second prong. Plaintiff concedes that for purposes of Rule 12(C) Defendants satisfy the fourth and fifth element. (Counterclaim, ¶¶31-32.)

Likewise, the third element is met. The third element merely requires an allegation that Plaintiff adversely interfered with Defendants' relationships. *Telxon Corp. v. Smart Media of Del., Inc.*, 9th Dist. Summit Nos. 22098 & 22099, 2005-Ohio-4931, ¶88. "The comments to § 766 state that intentional interference includes an interference 'in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action.' Restatement (Second) of Torts § 766 cmt. j (1979)." *Kuvedina, LLC v. Cognizant Tech. Solutions*, 946 F. Supp. 2d 749, 757 (S.D. Ohio 2013). The Counterclaim satisfies the third prong.

Defendants allege: "Williams, by and through her agents, has recklessly, willfully, wantonly and/or intentionally **interfered with KNR and Nestico's present and future business relationships** by disseminating, without any justification and beyond any reasonable scope, false and inflammatory allegations against KNR and Nestico including but not limited to Williams' claim that KNR defrauded her as well as the majority of its clients since 2006." (Counterclaim, ¶30, emphasis.) The conduct was counsel's posting on social media. (*Id*., ¶14.) For purposes of a pleading and surviving a motion to dismiss, that is all Ohio law requires. *See Stebelton v. Bloom Twp. Bd. of Zoning Appeals*, Case No. 2:09-CV-808, 2010 U.S.

Dist. LEXIS 39525, *21 (S.D. Ohio. Apr. 21, 2010) (denying motion to dismiss tortious interference with a business relationship); *Kuvedina,* 946 F. Supp. 2d at 757 (same).

Yet Plaintiff argues that because Defendants "have not pled that any person has been 'cause[d]…not to enter into or continue a business relation with another[,]'" Defendants fail to assert a proper tortious interference claim. (Mot. to Dismiss, p. 5.) Plaintiff's argument is completely illogical, as she is merely playing semantics with "interference" vs. "caused not to enter into or continue." For obvious reasons, Plaintiff cites to no case law supporting her meritless argument. Based on the factual allegations in the Counterclaim and Ohio law, Defendants have the right to pursue discovery to establish that there were in fact relationships with which Plaintiff's agents interfered.[4] Defendants have properly alleged the third element of a tortious interference claim.

D. <u>Because Plaintiff's agents were acting in the course of their business, Defendants have alleged a valid deceptive trade practices claim under R.C. 4165.02</u>.

Under Ohio law, a person, in the course of his business, vocation, or occupation, cannot engage in a deceptive trade practice as outlined in the statute. R.C. 4165.02. Plaintiff argues that because Plaintiff did not act in the course of her business, vocation, or occupation, Defendants' cannot pursue a deceptive trade practices claim under R.C. 4165.02. (Mot. to Dismiss, p. 6.) But Plaintiff utterly misconstrues Defendants' Counterclaim, thus defeating her argument.

Defendants' Counterclaim, including the deceptive trade practices claim, is against Plaintiff based, at least in part, on the conduct of her agents (attorneys). (Counterclaim, ¶¶14, 37, 40-42, and 44-46.) Because of the agents' conduct of false and misleading statements,

[4] Although this is a Motion to Dismiss under Civ.R. 12(C), discovery to date has established that one of the putative class members that Plaintiff has identified because of her counsel's social media postings has not paid KNR the investigation fee, and now because of the posts, the putative member probably will not.

Defendants have caused, and will continue to, damage to consumer confidence in KNR and KNR's sales, profits, reputation, and goodwill. (*Id*. ¶¶39, 41, 43.) Defendants then contend that Plaintiff acquiesced and/or ratified her agents' misconduct. (*Id*., ¶38.) Therefore, Plaintiff is being held, in part, vicariously liable for her agents' conduct.

It is indisputable that Plaintiff's attorneys are in a business, vocation, or occupation, one that competes with Defendants. Because Defendants' deceptive trade practices claim is based on her attorneys' conduct, Defendants satisfy the statutory requirement that the wrongful conduct be against a party that is in a business, vocation, or occupation. *Akron-Canton Waste Oil v. Safety-Kleen Oil Services, Inc.*, 81 Ohio App. 3d 591, 600, 611 N.E.2d 955 (9th Dist. 1992) (affirming judgment that defendant violated R.C. 4165.02 by circulating false reports to plaintiff's customers that plaintiff was guilty of theft). In construing the allegations in Defendants' favor, it is absolutely not beyond doubt that Defendants cannot prove a set of facts to support this claim. Accordingly, Plaintiff's Motion to Dismiss should be denied.

IV. CONCLUSION

As demonstrated above, the Counterclaim on its face, let alone after construing the facts in favor of Defendants, establishes that Defendants have asserted more than sufficient facts on which it can recover for: (1) frivolous conduct under R.C. 2323.51; (2) abuse of process; (3) tortious interference with existing and prospective business relationships; and (4) deceptive trade practices under R.C. 4165.02. Accordingly, Plaintiff's Motion to Dismiss Defendants' Counterclaim Under Civ.R. 12(C) should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of Defendants' foregoing Brief in Opposition to Plaintiff's Motion to Dismiss Defendants' Counterclaim Under Civ.R. 12(C) was filed electronically with the Court on this 9th day of December, 2016. The parties may access this document through the Court's electronic docket system.

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