IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, Plaintiff, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. CV-2016-09-3928 Judge Todd McKenney

PLAINTIFF WILLIAMS'S REPLY IN SUPPORT OF HER MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS UNDER CIV.R. 12(C)

I. Introduction

Defendants' opposition to Plaintiff's motion to dismiss further exposes their counterclaims as a Trojan horse, intended to avoid the protection afforded to allegedly defamatory statements made in connection with litigation "merely by the use of creative pleading." *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St. 3d 1, 14–15, 651 N.E.2d 1283 (1995). In substance, Defendants have alleged nothing more than that Named Plaintiff's claims against them in this suit are false and defamatory, which could be alleged of any plaintiff who sues any defendant for unlawful conduct in any case involving contested allegations. For good reason, Ohio law requires more than this on each of the counterclaims Defendants attempt to assert, to the extent that it allows such counterclaims at all. None of Defendants' arguments excuse their

insufficient pleading, which they make no attempt to correct. Defendants' counterclaims should thus be dismissed with prejudice.

II. Law and Argument

A. This Court should dismiss Defendants' counterclaim for "frivolous conduct" under R.C. 2323.51 (Count 1) because "R.C. 2323.51 does not create a separate cause of action for frivolous conduct."

Defendants first ask this Court to ignore R.C. 2323.51's plain language, and the Ninth District's holding that the statute "does not create a separate cause of action for frivolous conduct." *Wochna v. Mancino*, 9th Dist. Medina No. 07CA0059-M, 2008-Ohio-996, ¶ 29 citing *Shaver v. Wolske & Blue*, 138 Ohio App.3d 653, 673, 742 N.E.2d 164 (10th Dist. 2000). Defendants also ignore the Ohio Supreme Court's requirement that courts may not find that a statute creates a private cause of cause of action absent express statutory language or some other "clear implication" that the General Assembly intended to provide such a remedy. *Fawcett v. G. C. Murphy & Co.*, 46 Ohio St. 2d 245, 249, 348 N.E. 2d 144 (1976); *Aylward v. First Bank Corp.*, 9th Dist. Summit No. 11628, 1984 Ohio App. LEXIS 11449, *3–4 (Sept. 12, 1984). Ohio law is clear that "congressional intent is the exclusive factor used in the determination of whether a private right of action exists under a statute." *Grey v. Walgreen Co.*, 197 Ohio App. 3d 418, 421, 2011-Ohio-6167, 967 N.E.2d 1249 (8th Dist.) citing *Fawcett*. Thus, "the task of courts is limited solely to whether Congress intended to create the private right of action." *Id.*

Here, there is no language in the statute providing a separate cause of action, and there is no other "clear implication" in the statute or legislative history that a separate cause of action was intended. And in fact, the statute's express language and "clear implication" is to the contrary, because it expressly provides that "a party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal." *Wochna* at ¶ 29 (citing R.C. 2323.51(B)(1)); *See also Wooten*

v. Knisley, 79 Ohio St. 3d 282, 291, 680 N.E.2d 1245 (1997) (Moyer, C.J., dissenting) ("[A] reasonable and restrained judiciary must resist the temptation to find new statutory causes of action in ambiguous text and must resolve to await explicit language from the General Assembly before attributing that body the intent to establish a new cause of action. This principle is particularly compelling where, as here, the law already provides other means of compensating an injured party.").

None of the decisions that Defendants cite in support of their argument apply or even acknowledge the Ohio Supreme Court's "clear implication" test announced in *Fawcett*. Defs' Opp. at 5. Nor do any of these cases otherwise find that the legislature "clearly implied" a private cause of action in enacting 2323.51(B)(1). Thus, these cases were wrongly decided and none of them bind this court.

If Defendants wish to recover for "frivolous conduct" under 2323.51, they should comply with the statute by filing a motion to show that discovery and a hearing under the statute would be warranted (it would not be). Their purported counterclaim under the statute should be dismissed.

B. This Court should dismiss Defendants' Counterclaim for Abuse of Process (Count 2) because Defendants do not allege that Plaintiff's claims have been brought with probable cause and do not allege that Plaintiffs have perverted these legal proceedings for an ulterior purpose.

In their opposition, Defendants continue to make clear that they "misunderst[an]d the nature of the abuse of process claim." *Levey & Co. v. Oravecz*, 9th Dist. Summit No. 21768, 2004-Ohio-3418, ¶ 10.

First, they again disregard the requirement that "to support," and thus plead, "a claim for abuse of process, a party must show," and thus plead, "that a claim was originally filed properly, with probable cause, and for a proper purpose." *Id.* at ¶ 8. Defendants make no such allegation, and all allegations in their Complaint are to the contrary, so their second counterclaim should be dismissed for this reason alone. *See also Kremer v. Cox*, 114 Ohio App. 3d 41, 52–53, 682 N.E.2d 1006

(9th Dist. 1996) ("[O]n the record before this court, it is clear that [abuse-of-process claimant's] argument is that [the opposite party's] suit was not properly initiated … . Even (perhaps especially) if we accept [these] claims as true, such allegations do not provide a sufficient legal foundation for a claim of abuse of process; rather, they would provide support for, if anything, a malicious prosecution claim.").

Providing further and independent grounds for dismissal, Defendants fail to allege "that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed," which would require allegations that Plaintiff has made "demands which are not properly involved in the proceeding." *Vitrano v. CWP Ltd. Pshp.*, 9th Dist. Summit No. 19516, 1999 Ohio App. LEXIS 6179, *9–11 citing *Edward D. Jones & Co., L.P. v. Wentz*, 9th Dist. Summit No. 23535, 2007-Ohio-3237, ¶ 13. The Ohio Supreme Court has explained that this "ulterior purpose" "usually takes the form of coercion to obtain a collateral advantage, *not properly involved in the proceeding itself*, such as the surrender of property or the payment of money, by the use of the process as a threat or a club." *Robb v. Chagrin Lagoons Yacht Club*, 75 Ohio St. 3d 264, 271, 1996-Ohio-189, 662 N.E.2d 9, (1996) (emphasis supplied) (finding sufficient evidence of abuse-of-process claim where appellees instituted suit to coerce yacht-club members to vote in their favor in internal election, a result that the court could not be order). And Ohio courts, including the Ninth District, uniformly hold that an abuse-of-process claim will not lie where the claimant merely alleges that the opposing party has "attempt[ed] [t]o accomplish the ulterior purpose of causing damage … through … additional unnecessary legal fees and defending himself in the above lawsuit." *Wochna*, 2008-Ohio-996 at ¶ 27. In short, an abuse-of-process claim cannot be supported by allegations that a lawsuit is "premised on falsehoods" intended to harm a defendant's business or otherwise harm the defendant "financially." *Elite Designer Homes, Inc. v. Landmark Partners*, 9th Dist. Summit No. 22975, 2006-Ohio-4079, ¶ 51 (Ohio Ct. App., Summit County Aug. 9, 2006); *Willis & Linnen Co., L.P.A. v. Linnen*, 163

Ohio App. 3d 400, 2005-Ohio-4934, 837 N.E.2d 1263, ¶ 24 (9th Dist.); *Levey*, 2004-Ohio-3418 at ¶ 9–10. "Malicious motives … do not establish abuse of process." *Wochna*, 2008-Ohio-996 at ¶ 27.

Here, Defendants merely allege that, "Plaintiff is using this lawsuit for the ulterior purpose to defame Defendants and harm their reputations, name, and goodwill." Defs' Opp. at 8. This is precisely the type of allegation that the controlling case law identifies as insufficient to support an abuse-of-process claim. And for good reason, as any allegations of unlawful conduct by any plaintiff would likely harm any defendant's "reputation, name, and goodwill."

If Defendants want to recover for alleged damages caused by allegedly defamatory statements made by Named Plaintiff in this litigation, the proper avenue would be a claim for malicious prosecution, which could only be instituted upon termination of this litigation in Defendants' favor. *See Kremer*, 114 Ohio App. 3d 41 at 52 (allegations that a lawsuit was filed "without probable cause and for nefarious purposes … may support a claim for malicious prosecution, but cannot provide a sufficient foundation for an abuse of process action"). Their counterclaim for abuse of process should be dismissed.

C. This Court should dismiss Defendants' counterclaim for tortious interference with business relations (Count 3) because Defendants do not allege that a third party has not entered into or continued a business relationship with them due to Plaintiff's conduct.

Defendants make no excuse for their failure to allege, as required, in support of their tortious-interference claim, that Plaintiff's actions have "cause[d] a third person not to enter into or continue a business relation with [Defendants]." *Telxon Corp. v. Smart Media of Del., Inc.*, 9th Dist. Summit Nos. 22098 & 22099, 2005-Ohio-4931, ¶ 88 citing *A&B-Abell Elevator Co.,* 73 Ohio St.3d 1 at 14. Instead, Defendants inexplicably accuse Plaintiff of "playing semantics," and claim that "Plaintiff cites to no case law supporting [this requirement]." Defs' Opp. at 3. But the Ninth District's opinion in *Telxon* is clear, relying on the Ohio Supreme Court's decision in *A&B-Abell Elevator Co.* to "require[] an act that causes a third person not to enter into or continue a business

relation with another," and Plaintiff cited to this case law in her motion to dismiss. Pl's Mot. at 5. Thus, Defendants have not justified their failure to allege a claim for tortious interference with business relations and their third count should be dismissed.

D. This Court should dismiss Defendants' counterclaim for Deceptive Trade Practices under R.C. 4165.02 (Count 4) because R.C. 4165.02 only allows for recovery against a person acting "in the course of the person's business, vocation, or occupation."

Finally, Defendants attempt to avoid R.C. 4165.02(A)'s requirement that the alleged damages at issue be caused "as a proximate result of false representations of fact by another *made in the course of his own business, vocation, or occupation*." *Akron-Canton Waste Oil v. Safety-Kleen Oil Servs.*, 81 Ohio App. 3d 591, 599, 81, 611 N.E.2d 955 (9th Dist. 1992) citing R.C. 4165.02(A) (emphasis added). Defendants again have no excuse for their failure to allege that Plaintiff has acted "in the course of [her] own business, vocation, or occupation," and instead argue that the statute should apply to Plaintiff anyway, because she allegedly "acquiesced and/or ratified her [attorneys' alleged] misconduct," and her attorneys were acting in "a business, vocation, or occupation." Defs' Opp. at 10-11. But even if Plaintiff did "acquiesce and/or ratify" any misconduct by her attorneys, for Defendants to recover for her in connection with it, they would still have to allege that Plaintiff was acting "in the course of [her] own business, vocation, or occupation" in so acquiescing and/or ratifying. R.C. 4165.02(A). Defendants cite no case law in support of their position, which is contrary to the statute's plain language, and would allow for any corporate defendant to allege "deceptive trade practices" against any plaintiff who alleged unlawful conduct against it in court, thus eviscerating the absolute privilege protecting defamatory statements made in litigation. *See Hecht v. Levin*, 66 Ohio St. 3d 458, 460, 613 N.E.2d 585 (1993). Defendants have not excused their failure to plead a claim under R.C. 4165.02(A) and their claim should be denied.

III. Conclusion

The social-media posts and newspaper article of which Defendants complain (Defs' Opp. at 1) contain no information that is not contained in this lawsuit's pleadings. Thus, they are protected by the First Amendment and R.C. 2317.05, and expressly authorized by Prof.Cond.R. 3.6(B). *See also Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 647, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985). ("An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal right of potential clients."). The allegations in Named Plaintiff's Complaint are protected by the absolute privilege afforded to allegedly defamatory statements made in the course of litigation. *Hecht*, 66 Ohio St. 3d 458 at 460. This Court should not sanction Defendants' efforts to circumvent these protections and violate Plaintiff's rights to free speech and access to the courts (including her ability to investigate and collect evidence) by excusing Defendants' failure to adequately plead their frivolous counterclaims.

There is nothing special about this lawsuit that permits Defendants to file counterclaims just because they are unhappy that they are being sued. Were that the case, then counterclaims could be filed upon counterclaims, *ad infinitum*. If the Court permits Defendants to proceed with their counterclaims, then Named Plaintiff would also be authorized to amend her Complaint and add additional claims based on the same theories as the Defendants's purported counterclaims. And then Defendants could file new counterclaims based on those. And so on.

Of course, as explained above, the law does not permit such infinite tit for tat, or Defendants' pleading here of generalized disgruntlement at being sued. Plaintiff's Motion to Dismiss Defendants' Counterclaims should be granted.

Dated: December 14, 2016 Respectfully submitted,

THE CHANDRA LAW FIRM, LLC

/s/ Peter Pattakos

Subodh Chandra (0069233)
Donald Screen (00440770)
Peter Pattakos (0082884)
1265 W. 6th St., Suite 400
Cleveland, OH 44113-1326
216.578.1700 Phone
216.578.1800 Fax
Subodh.Chandra@ChandraLaw.com
Donald.Screen@ChandraLaw.com
Peter.Pattakos@ChandraLaw.com

Attorneys for Plaintiff Member Williams

CERTIFICATE OF SERVICE

The foregoing document was served on all necessary parties by operation of the Court's e-filing system on December 14, 2016.

/s/ Peter Pattakos
One of the Attorneys for Plaintiff