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

PRESENT: Madden Justice

PART 11

Edwards, Laurene

- v -

Posner, Leslie

INDEX NO. 106869/10

MOTION DATE 2-12-12

MOTION SEQ. NO. 005

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for Strike Answer

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that ~~this motion~~ these cross motions are decided in accordance with the annexed Memorandum Decision and order.

Dated: July 2, 2012

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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LAURENCE EDOUARDS, Index No. 106869/10

Plaintiff and
Counterclaim Defendant,

-against-

LESLIE ROSNER,

Defendant and
Counterclaim Plaintiff.

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JOAN A. MADDEN, J.:

Defendant and Counterclaim plaintiff Leslie Rosner ("Rosner") cross moves[1] pursuant to CPLR 3025(b) for an order granting him permission to amend his answer and counterclaims and to compel plaintiff and counterclaim defendant Laurence Edouards ("Edouards") to produce certain discovery. Edouards opposes the cross motion and cross moves to dismiss the counterclaims, and for a protective order.

Background

This action arises out of allegations by Edouards that on the night of June 17, 2009, and into the morning on June 18, 2009, Rosner, a 64 year-old businessman, drugged and sexually assaulted her at his apartment in Manhattan. According to the complaint, between December 2008 and June 16, 2009, Edouards and Rosner had met on no more than three occasions at public places, and that on June 17, 2009, Edouards telephoned Rosner from a bar at approximately 11:00 pm and Rosner invited her to his apartment. It is alleged that Edouards

[1]The cross motion was made in response to Edouards' order to show cause to strike Rosner's answer, and for various other discovery sanctions in connection with Rosner's failure to appear for a deposition. The order to show cause was resolved by interim order dated November 4, 2011, to the extent of directing Rosner's deposition. Mr. Rosner's deposition was taken on November 17, 2011.

does not recall arriving at the apartment or anything else until she awoke in Rosner's bed the morning of June 18 at which time she alleges that Rosner drugged and raped her. That morning, Edouards reported the incident to the police and went to the emergency room at Mount Sinai Hospital.

On May 4, 2010, a felony complaint was issued charging Rosner with rape in the third degree. Rosner was subsequently arrested. On December 2, 2010, Rosner pleaded guilty to, and was convicted of, forcible touching in violation of N.Y. Penal Code § 130.52, a Class A misdemeanor, and received a conditional discharge. At his allocation, Rosner stated that "[o]n June 18th 2009, in my apartment, in Manhattan, with my hand, I forcibly touched an intimate part of Laurence Edouards without her consent for the purpose of gratifying my sexual desire. I did this intentionally and for no legitimate purpose."

On May 25, 2010, Edouards filed this action in which she asserts causes of action for sexual assault (forcible touching),[2] sexual assault (rape), false imprisonment, and the intentional infliction of emotional distress. Rosner interposed an answer in which he denied the allegations in the complaint and alleged that he is the victim of a fraudulent scheme perpetuated by Edouards to extort money from him, and asserted counterclaims for defamation, false arrest and imprisonment, abuse of process and the intentional infliction of emotional distress.

Rosner now seeks to amend his answer to clarify the full extent of the allegations supporting his counterclaims and, in particular, to specify that Edouards allegedly filed a false police report, and that she made subsequent false and defamatory statements to medical personnel and others, including members of law enforcement, employees of the Manhattan District Attorney's Office, and social workers, that Rosner raped and drugged her. The proposed

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[2]By so-ordered stipulation dated March 26, 2012, the parties agreed the judgment would be entered as to liability for this cause of action.

amendment also clarifies that the intentional infliction of emotional distress counterclaim is based on Rosner's arrest and prosecution, and Edouards' purportedly false statements that Rosner drugged and raped her. While the proposed amended answer includes a proposed second counterclaim for false arrest and false imprisonment, Rosner withdrew this counterclaim before the cross motion to amend was submitted.

Rosner also seeks to amend his answer to include an eighth defense affirmative defense based on allegations that "[Edouard's] claims are simply a fraudulent attempt to obtain permanent residence in the United States by premising her application for a U-Visa upon the very claims asserted in the Amended Complaint" (Proposed Amended Answer, ¶ 9). According to Rosner, the merit of this proposed defense is sufficiently established by Edouard's deposition testimony that she was a resident of France and had sought legal status in the United States on numerous occasions by applying for various types of visa. Rosner also points to Eduards' deposition testimony that a friend who owned a restaurant the United States sponsored her application for Visa by asserting that Edouards would be employed as an intern at the restaurant, but that she had never interned or worked at the restaurant and never intended to do so.

At Edouards' deposition, counsel for Rosner requested that Edouards produce all documents submitted in connection with Edouards' Visa applications and Edouards' passport and contact information for Edouards' prior immigration attorneys. The discovery was not produced and Rosner now seeks to compel its production. Rosner also seeks production of documents relating to Edouard's 2005 mortgage loan application with BankUnited for the purchase of an apartment in Florida where she currently resides, asserting that it is relevant to her credibility, particularly as she testified that she was not employed when she obtained the mortgage.

Edouards opposes the motion to amend and cross moves to dismiss the counterclaims,

and for a protective order prohibiting Rosner from using or seeking any information related to her immigration file. With respect to the defamation counterclaim, Edouards asserts that it fails to plead "the particular words complained of," as required by CPLR 3016(b), and that, in any event, the statements by Edourds were made to law enforcement, medical personnel, or social services professionals are thus subject to a qualified privilege since Rosner has not sufficiently alleged that the statements were made with malice. She also argues that purportedly defamatory statements are "substantially true," based on Rosner's guilty plea.

Next, with respect to the abuse of process counterclaim, Edouards argues that Rosner cannot show that Edouards activated the legal process without excuse or justification or solely for collateral advantage, since Rosner admitted that he committed a sex offense against Edouards. In addition, Edouards asserts that the filing of this action does not provide a basis for an abuse of process claim. As for the intentional infliction of emotional distress counterclaim, Edouards contends that it is duplicative of the defamation claim, and that the conduct alleged is not sufficient to give rise to such a claim. Moreover, Edouards argues that the proposed amendments to the counterclaims are insufficient to remedy the defects in these counterclaims, and therefore the request to amend should be denied and the counterclaims should be dismissed with prejudice.

Edouards next argues that she is entitled to a protective order with respect to her immigration file and related requests as information as to her immigration status is irrelevant and designed to harass and intimidate her. In this connection, Edouards argues that based on Rosner's guilty plea, her status as a crime victim of a sexual assault is a "historical fact" and entitles her to apply for a U-Visa, and that whether or not she succeeds in this action is irrelevant to her visa status. See 8 U.S.C. 1101(a)(15)(u)(listing both "sexual assault" and "abusive sexual contact" as crimes that enable a victim to apply for a U-Visa).

Edouards also argues that information about a 2005 bank loan made when Edouards lived in France, two years before she moved to the United States and three years before she met Rosner, is not subject to disclosure.

In reply, Rosner argues, *inter alia,* the proposed amended defamation claim quotes, verbatim, various statements made by Edouards, and that even assuming the statements are protected by a qualified privilege, such protection cannot be said to apply as a matter of law since there are issues of credibility as to whether Edouards had a good faith belief the statements were true when made. Rosner further asserts that the guilty plea to forcible touching does not render Edouards' statements that Rosner raped and drugged her substantially true.

As for the abuse of process counterclaim, Rosner similar argues that as the crime he pleaded guilty to is different from the allegations of rape reported by Edouards to law enforcement, this counterclaim cannot be dismissed at the pleading stage. As for the intentional infliction of emotional distress counterclaim, Rosner's argues that allegations that Edouards intentionally and falsely accused him of raping and drugging her are sufficiently outrageous conduct to state such a claim.

As for the discovery of Edouards' visa applications and related information, Rosner asserts that this information is highly relevant to Edouard's motive in purportedly falsely alleging that Rosner raped and drugged her since her status as a crime victim would enable her to obtained a U-Visa, and also relevant to Rosner's defense to certain of Edouard's claims against him.

In reply, Edouards asserts, *inter alia*, that the statements on which Rosner basis his defamation claim are not the exact words but rather statements taken from reports from third parties, some of whom are unidentified and that the use of quotation marks does not alter this fact, and that the proposed amendment does not adequately identified the circumstances under

which the statements were made. As for the immigration file, Edouards argues that Rosner's guilty plea forecloses his argument that she planned her own assault in order to obtain a U-Visa, and the discovery requested is designed solely to harass and intimidate her into dropping her claims. See Gomez v. F&T Int'l (Flushing NY), LLC, 16 Misc3d 867 (Sup Ct NY Co. 2007)(holding that while a worker's alien status may be a legitimate issue in litigating a lost wage claim, allowing inquiry as to immigration status would "unnecessary intimidate plaintiffs from pursuing a legitimate claim").

Discussion

Leave to amend a pleading should be 'freely given' (CPLR 3025(b)) as a matter of discretion in the absence of prejudice and surprise. Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-56 (1st Dept 2005) (internal citation and quotations omitted). That being said, however, "in order to conserve judicial resources, an examination of the underlying merits of the proposed cause of action is warranted." Eighth Ave. Garage Corp. v. H.K.L. Realty Corp., 60 AD3d 404, 405 (1st Dept), lv dismissed, 12 N.Y.3d 880 (2009). At the same time, leave to amend will be granted as long as the proponent submits sufficient support to show that the proposed amendment is not "palpably insufficient or clearly devoid of merit." MBIA Ins. Corp. v. Greystone & Co. Inc., 74 AD3d 499 (1st Dep't 2010) (citation omitted). In addition, "[o]nce a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide a sufficient basis for a motion for summary judgment." Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 AD3d 363, 365 (1st Dep't 2007).[3] Here, as Edouards does not argue that she will be prejudiced or surprised by the proposed amended counterclaims, the only issue this court will consider is whether the proposed pleading is of

[3] As Rosner has sought to amend his counterclaims, the court will consider the counterclaims as amplified in his proposed pleading under the standard for a motion to amend.

sufficient merit.

"Defamation has long been recognized to arise from the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society." Dillon v. City of New York, 261 A.D.2d 34, 37-38 (1st Dep't 1999) (citations and quotations omitted). The pleading of a meritorious claim for defamation requires a showing of "[a] false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se. CPLR 3016(a) requires that in a defamation action, 'the particular words complained of . . . be set forth in the complaint.' The complaint also must allege the time, place and manner of the false statement and to specify to whom it was made." Id. at 38 (citation omitted).

Here, contrary to Edouards' position, the proposed defamation counterclaim sufficiently alleged the exact words and the time and manner in which they were made. In particular, while the counterclaim does not quote every word contained in the reports from medical and law enforcement or in the criminal complaint, it quotes the exact words of Edouards in the reports and complaint that provide that basis for the defamation claim, and provides the date the statements were made, the person to whom they were made, and the place where the statements were made. Under these circumstances, the proposed counterclaim satisfies the requirements of CPLR 3016(a). See Pezhman v. City of New York, 29 AD3d 164, 168 (1st Dept 2006)(allegations in the complaint recited content of letters with sufficient specificity as to the exact words and the time and manner in which the allegedly defamatory statements were made so as to satisfy 3016(a))

Next, while the purportedly defamatory statements are subject to a qualified privilege, the

proposed counterclaim should nonetheless be permitted since the pleading and supporting materials "are sufficient to potentially establish malice or are such that malice can be inferred." Weiss v. Lowenberg, 95 AD3d 405 (1st Dept 2012)(internal citations and quotations omitted). "Malice, defined as 'personal spite or ill will, or culpable recklessness or negligence (Stukuls v. State of New York, 42 N.Y.2d 272, 279 (1977)[internal quotation omitted]), 'refers not to defendant's general feelings about plaintiff, but to the speaker's motivation for making the defamatory statements.'" Pezhman v. City of New York, 29 AD3d at 168-169. Here, allegations that Edouards was motivated to make the false statements to obtain money from Rosner and/or to impact her immigration status are sufficient to show the prima facie merit of the defamation counterclaim. Moreover, it cannot be said that Rosner's guilty plea to forcible touching, a Class A misdemeanor, rendered Edouards' statements that Rosner raped and drugged her "substantially true." Accordingly, the motion for leave to amend the answer to add the defamation counterclaim is granted.

The next issue concerns whether the proposed counterclaim for abuse of process has prima facie merit. The proposed abuse of process counterclaim is based on allegations that Edouards, by making defamatory statements to the New York City Police Department, "caused the criminal prosecution of [Rosner] to ensue [and]... used the criminal process in a perverted manner to obtained a collateral objective, namely to extort money from Rosner" (Proposed Amended Answer and Counterclaims, ¶'s 21, 23).

"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 process in a perverted manner to obtain a collateral objective." Curiano v Suozzi, 63 NY2d 113, 116 (1984). "Some wrongful activity in the use of judicial process for a purpose not sanctioned by law must be alleged. Wrongful or malicious motive is not enough."Raved v. Raved, 105 AD2d 735, 736

(2d Dept 1984)(citation omitted); see also, Andesco, Inc. v. Page, 137 AD2d 349, 357 (1st Dept 1988). "The key to this tort is not impropriety in obtaining the process, but rather impropriety in using it." Matter of Simithis v. 4 Keys Leasing and Maintenance Co., 151 AD2d 339, 341 (1st Dept 1989). Moreover, the institution of a civil action by summons and complaint is insufficient to state a claim for abuse of process, even when an action is commenced with malicious intent, unless there is a showing that there has been some "unlawful interference with one's person or property." Walentas v. Johnes, 257 AD2d 352, 354 (1st Dept 1999)(internal citations and quotations omitted).

Under this standard, the court finds that prima facie merit of the proposed abuse of process counterclaim has not been established as the counterclaim does not adequately allege that the criminal process itself was used for an illegal purpose, and bald allegations that the process was used to extort money from Rosner are insufficient, particularly in view of Rosner's guilty plea. Instead, at best, the counterclaim alleges that Edouards illegitimately obtained the process by making false statements in the District Attorneys' Office and such allegations do not state a claim for abuse of process.[4] See Curiano v. Suozzi, 63 NY2d 113, 117 (1984)(finding that a claim for abuse of process was not stated as plaintiffs have not alleged "the gist of the action for abuse of process [which is] the improper use of process after it is issued "[internal citations and quotations omitted]).

The tort of the intentional infliction of emotional distress has four elements, (i) extreme and outrageous conduct, (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress, (iii) a causal connection between the conduct and injury, and (iv)

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[4]In contrast, a claim for malicious prosecution is based on the initiation of an action or causing process to be issued improperly. Pagiarulo v. Pagiarulo, 30 AD2d 840 (2d Dept 1968). However, Rosner cannot state a claim for malicious prosecution as his guilty plea precludes him from establishing that the criminal proceeding terminated in his favor. MacFawn v. Kresler, 88 NY2d 859 (1996).

severe emotional distress. See, Howell v. NY Post Co., 81 NY2d 115, 121 (1993). The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." Murphy v American Home Products Corp., 58 NY2d 293, 303 (1983)(internal quotations and citations omitted).

The Appellate Division, First Department has noted that the "threshold of outrageousness is so difficult to reach that, of the intentional infliction of emotional distress claims considered by the Court of Appeals, 'every one has failed because the alleged conduct was not sufficiently outrageous' (Howell v. New York Post Co., 81 N.Y.2d at 122 [citations omitted]) ..[and that] [t]hose few claims of intentional infliction of emotional distress that have been upheld by this court were supported by allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff." Seltzer v. Bayer, 272 AD2d 263, 264-265 (1st Dept 2000).

Of relevance here, under this standard, the First Department has held that the instigation of a criminal investigation by providing false information to the police does not constitute outrageous conduct even when such false information leads to an arrest.[5] See Kaye v. Trump, 58 AD3d 579 (1st Dept), lv denied, 13 NY3d 704 (2009)(allegations that defendants commenced two baseless lawsuits and filed a criminal complaint against her, and frightened her and her daughter by attempting to instigate her arrest did not constitute outrageous conduct); Slatkin v. Lancer Litho Packaging Corp., 33 AD3d 421, 422 (1st Dept 2006)(allegations that defendant

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[5]While in Levine v. Gurney, 149 A.D.2d 473 (2d Dep't.1989), the Appellate Division, Second Department upheld a claim for the intentional infliction of emotional distress based on false accusations of criminal conduct, it has been noted that "the unusual personal involvement of the police officer with the victim's husband makes that case a doubtful authority for inferring any generalized rule." Bender v. City of New York, 78 F.3d 787, 791 (2d Cir.1996); See Rivers v. Towers, Perrin, Forster & Crosby, Inc., 2009 WL 817852 (ED NY 2009).

threatened plaintiff's arrest and criminal prosecution and instigated plaintiff's arrest by false statements were insufficient to state a claim for the intentional infliction of emotional distress);compare Vasarhelyi v. The New School for Social Research, 230 AD2d 658 (1st Dept 1996)(where defendant president of an academic institution used position to impair plaintiff's professional standing by engaging criminal attorneys to investigate plaintiff and threaten plaintiff with prosecution, complaint was sufficient to state a claim for the intentional infliction of emotional distress).

In any event, the proposed counterclaim for the intentional infliction of emotional distress counterclaim is duplicative of the defamation counterclaim and must be dismissed on that ground. Akpinar v. Moran, 83 AD3d 458, 459 (1st Dept), lv denied, 17 NY3d 707 (2011). Accordingly, the proposed counterclaim for the intentional infliction of emotional distress is not sufficiently meritorious to permit its addition.

The next issues concern whether leave to amend should be granted the eighth affirmative defense relating to Edouards' allegedly fraudulent attempt to obtain permanent residence in the United States based on her application for a U-Visa based on the claims, and whether Edouards should be compelled to produce all documents submitted in connection with her visa applications, her passport, and contact information for her immigrations attorneys. Rosner also seeks an executed Freedom of Information Act ("FOIA") request permitting disclosure of all immigration request filed by Edouards.

As a preliminary matter, contrary to Edouards' position, Rosner's assertion of the eighth affirmative defense to raise the issue related to the Edouards' attempt to obtain permanent residence in the United States is proper. CPLR 3018 (b), entitled affirmative defenses, provides, in relevant part, that "[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior

pleading..." Here, even assuming *arguendo* that assertion of the eighth affirmative defense is unnecessary to avoid surprise to Edouards, the issues of fact relating to the issue of Edouards' application for a U-Visa do not appear in the complaint and therefore are properly pleaded as an affirmative defense, as opposed to a denial. See *Connors Practice Commentaries*, McKinney's Cons Laws of NY, Book 7B, C:3018:15 ("A simple 'denial' is something a defendant can accomplish only when the plaintiff has pleaded something to which the defendant can refer when answering. Whenever a defendant feels the need to deny something not mentioned in the complaint the defendant should transform the 'denial' into an affirmative defense and treated as such"); see generally Sinacore v. State, 176 Misc2d 1 (Ct. Claims 1998).

Moreover, the court finds that, at least without the benefit of discovery regarding Edouards' attempts to remain in the United States, it cannot be said that the information regarding such attempts is irrelevant to the issues in this case. In this connection, it is Rosner's contention that Edouards was motivated to falsely accuse him of raping and drugging her to obtain a U-Visa to allow her to stay in the United States. In addition, the merit of Edouards' argument that this information has been rendered irrelevant by Rosner's guilty plea to forcible touching since Edouards' status as a victim of that crime entitles her to obtain a U-Visa cannot be determined without the discovery. Furthermore, evidence that Edouards has not yet filed an application for a U-Visa is not dispositive of the issues surrounding the issue.

Next, precedent cited by Edouards' holding that evidence of immigration status is irrelevant to a plaintiff's ability to recovery damages for lost earnings (see e.g., Macedo v. J.D. Posillico, Inc., 68 AD3d 508, 511 [1st Dept 2009]), is not controlling here since Rosner is not seeking discovery of Edouards' immigration information to limit the amount of damages that Edouards may recover. Furthermore, whether discovery regarding the Edouards' immigration status may be used for impeachment is an issue for determination at the time of trial. Edouards'

contention that the request for the discovery is untimely is also unavailing since the relevance of the immigration information first became apparent during Edouards' deposition.

That being said, however, Rosner's request for contact information from Edouards' immigration attorneys is denied at this time since to the extent that the information held by Edouards' attorneys is not confidential in nature, Rosner has not shown that he cannot obtain it from other sources. Sartoga Harness Racing Inc. v. Roemer, 274 AD2d 887 (3d Dept 2000); 23 KT Gold Collectibles, Ltd. v. Dailty News, LP, 30 Misc3d 1241(A)(Sup Ct NY Co. 2011). Moreover, in view of the sensitive and confidential nature of the information contained in Edouards' passport and documents related to her visa applications, the court grants Rosner's motion to compel only to the extent of requiring Edouards to submit this information for in camera inspection as directed below. In addition, Edouards is directed to make a FOIA request for her immigration applications and shall require Edouards to submit the documents obtained from this request to the court for in-camera inspection. This order is subject to a continuing obligation.

Finally, with respect to Rosner's discovery request concerning Edouards' loan application with BankUnited that relates to a 2005 transaction, the court finds that Edouards is entitled to a protective order on the grounds that the discovery is not material or relevant to the issues in this action. See Duhe v. Midence, 1 AD3d 279 (1st Dept 2003); MBIA Ins. Corp v. Countrywide Home Loans, Inc., 27 Misc3d 1061 (Sup Ct NY Co. 2010).

Conclusion

In view of the above, it is

ORDERED that Rosner's cross motion to amend is granted to the extent of granting him leave to amend his answer to include the proposed counterclaim for defamation and the eighth affirmative defense and is otherwise denied; and it is further

ORDERED that within 20 days of the date of this decision and order a copy of which is being mailed by my chambers to counsel for the parties, Rosner shall file and serve an amended answer and counterclaim consistent with this decision and order, and Edouards shall serve an amended reply within 10 days of such service; and it is further

ORDERED that Rosner's cross motion to compel discovery is granted to the extent of (i) directing that at the pre-trial conference scheduled for July 27, 2012, counsel for Edouards shall submit to the court for in-camera inspection, Edouards' passport and her visa, and (ii) directing that, within 10 days of the date of this decision and order, Edouards make a FOIA request for her immigration applications and upon receipt of a response to her request submit any materials received to the court for in-camera inspection, and Edouards shall have a continuing obligation to provide to the court for in-camera inspection any further visa applications or other related records during the pendency of this action; and it is further

ORDERED that Edouards' cross motion to dismiss Rosner's counterclaims is granted to the extent of dismissing Rosner's counterclaims for false arrest and imprisonment, abuse of process and the intentional infliction of emotional distress; and it is further

ORDERED that Edouards' cross motion for a protective order is granted to the extent of prohibiting Rosner from seeking information related to Edouards' loan application with BankUnited.

DATED: July 2012

J.S.C.