

**James v St Johns Holding 2015 LLC**

2017 NY Slip Op 30293(U)

February 14, 2017

Supreme Court, New York County

Docket Number: 100982/2016

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

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

\_\_\_\_\_  
JOHN JAMES

Index No.: 100982/2016

Plaintiff,

DECISION/ORDER

-against-

ST JOHNS HOLDING 2015 LLC,

Defendants.  
\_\_\_\_\_

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	<u>1</u>
Notice of Cross-Motion and Affidavits/ Affirmations/Memos of Law annexed	<u>2</u>
Opposition to Cross-Motion and Reply	<u>3</u>

***ERIKA M. EDWARDS, J.:***

Plaintiff John James (“Plaintiff”) brought this action against Defendant St Johns Holding 2015 LLC (“Defendant”) seeking to recover damages for Defendant’s alleged misconduct by adding Plaintiff, who is an attorney, as a defendant to a Kings County Supreme Court law suit filed against Plaintiff’s former client, which was ultimately dismissed. Plaintiff’s complaint alleges tortious interference with business relations or economic advantages, malicious prosecution, malicious abuse of process and abuse of process. Defendant moved to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7). For the reasons set forth herein, Defendant’s motion to dismiss is GRANTED in its entirety and Plaintiff’s complaint is dismissed.

In the underlying lawsuit, Defendant sued Plaintiff and Plaintiff’s client for specific performance of a contract for Defendant to purchase properties from Plaintiff’s client, tortious

interference and attorney's fees as a distinct cause of action. The contract specified that time was of the essence for the sale to proceed by a certain date. Defendant alleged that Plaintiff's client breached the contract by refusing to close by the deadline, or any time after the deadline, refusing to communicate with Defendant and by entering into a sales contract for one of the properties with another entity, which also did not close. Defendant also alleged that two principals of the other entity threatened and coerced Defendant's business associate, who did not have authority to act on Defendant's behalf, to email Plaintiff to say that the sales contract was void and he wanted Plaintiff to return Defendant's down payment. Plaintiff returned the down payment and Defendant alleged that Plaintiff was personally involved in the "pressure" placed on Defendant's associate to cancel the contract.

Plaintiff's carrier assigned defense counsel and Plaintiff's counsel moved to dismiss the complaint based on lack of personal jurisdiction for improper service of process, because an attorney cannot be held liable for tortious interference of contract for allegedly inducing his client to breach a contract with another, Plaintiff cannot be held liable based on specific performance because he was not a party to the contract and New York does not recognize attorney's fees as a separate cause of action. Plaintiff alleged that Defendant's complaint against him was frivolous and had no legal basis. He argued that Defendant canceled the sales contract on his own terms and failed to close by the agreed upon deadline. The court granted Plaintiff's motion to dismiss, found no legal basis for tortious interference or attorney's fees and found that Defendant failed to state a claim for specific performance.

Plaintiff did not seek sanctions against Defendant or his attorney for filing a frivolous law suit.

In the instant matter, Plaintiff alleges in his complaint that Defendant filed the underlying action against Plaintiff with malicious intent and with intent to wrongfully interfere with Plaintiff's ability to represent his client. Plaintiff alleges that Defendant's attorney on the underlying matter threatened to add Plaintiff as a Defendant to the law suit unless Plaintiff convinced his client to go through with the contract to sell one of the properties to Defendant. When Plaintiff refused to do so, Defendant added Plaintiff to the law suit in retaliation and a conflict arose which prevented Plaintiff from representing his client on that matter. Plaintiff claims that Defendant's actions caused Plaintiff to suffer economic loss from the loss of business and, since Plaintiff had to disclose the suit to his professional liability carrier, his malpractice insurance costs will increase for five years.

Defendant moves to dismiss Plaintiffs' complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7), and alleges in substance that Plaintiff's complaint is retaliatory and against New York's public policy and the mere filing of a summons and complaint are insufficient to sustain Plaintiff's claims of abuse of process, malicious abuse of process and malicious prosecution. Additionally, Plaintiff's claims of abuse of process and malicious abuse of process fail because Plaintiff failed to demonstrate Defendant's use of process in a perverted manner after commencement of the action by resorting to a provisional remedy. Plaintiff's malicious prosecution claim also fails because Plaintiff failed to demonstrate Defendant interfered with Plaintiff's person or property through the use of an incidental remedy or that Defendant's previous suit lacked probable cause. Defendant also argues that Plaintiff's allegations of malice are conclusory and insufficient. Finally, Defendant alleges that Plaintiff's claim of tortious interference fails because it is barred by the *Noerr-Pennington* immunity

doctrine, Defendant had a valid reason for filing the underlying action and there was no contractual relationship between Plaintiff and his client.

Plaintiff opposes the motion and argues in substance that the court should deny Defendant's motion because Plaintiff's complaint is not retaliatory, Plaintiff sufficiently pled his abuse of process and malicious abuse of process claims since Defendant amended his summons and complaint and filed a notice of pendency after Defendant filed the initial summons with notice. Plaintiff also argues that he sufficiently pled Defendant's ulterior and malicious motives. However, Plaintiff seeks an opportunity to amend his malicious prosecution claim to add the element of interference with person, which he inadvertently omitted, and to amend his claim for tortious interference with business relations or economic advantages to add "prospective" business relations.

When considering Defendant's motion to dismiss Plaintiff's complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the Plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457, 579 NYS2d 335 [1<sup>st</sup> Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52, 945 NYS2d 222, [2012]).

Based on the facts set forth herein, the court agrees with many of Defendant's arguments and finds that Plaintiff failed to sufficiently set forth each element of any of his causes of action set forth in the complaint and grants Defendant's motion to dismiss.

Plaintiff's claims cannot be sustained merely because Defendant commenced an action against Plaintiff and such action was dismissed (*see Curiano v Suozzi*, 63 NY2d 113, 118 [1984]; *I.G. Second Generation Partners, L.P. v Duane Reade*, 17 AD3d 206, 207 [1<sup>st</sup> Dept 2005]). Plaintiff failed to demonstrate that Defendant was motivated by malice, that it had an improper purpose or that it filed suit without justification. Plaintiff's claims for abuse of process and malicious abuse of process fail because Plaintiff failed to demonstrate Defendant used process in a perverted manner after commencement of the action by resorting to a provisional remedy and Defendant's filing of an amended summons and complaint and notice of pendency are insufficient to satisfy this element.

Plaintiff's malicious prosecution claim fails because Plaintiff failed to demonstrate that Defendant lacked probable cause for filing the action, that it was begun with malice, that it was dismissed on its merits and that Defendant interfered with Plaintiff's person or property through the use of a provisional remedy (17 AD3d at 207).

Plaintiff's claim of tortious interference fails because it is barred by the *Noerr-Pennington* immunity doctrine, which gives civil litigants immunity for filing actions as long as the litigation is not a sham (*see id. at 208*; *United Mine Workers of Am. v Pennington*, 381 US 657 [1965] and *Eastern R. Presidents Conference v Noerr Motor Freight, Inc.*, 365 US 127 [1961]). Here, Plaintiff failed to demonstrate that the previous law suit was a sham, that Defendant's alleged actions were the sort of egregious wrongdoing that might have supported this claim or that such actions were independently unlawful, that they constituted an independent

tort or that they had an evil motive (*Carvel Corp. v Noonan*, 3 NY3d 182, 190-191 [2004]). However, the court disagrees with Defendant that a contractual relationship is necessary to sustain this cause of action, because a claim for tortious interference of prospective contract rights can be sustained, but Plaintiff would have to prove more culpable conduct by Defendant and such conduct must be against the potential client, not Plaintiff (*see NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996] and *Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 193-194 [1980]). However, here, Plaintiff fails to establish a sufficient basis for this prospective business relationship.

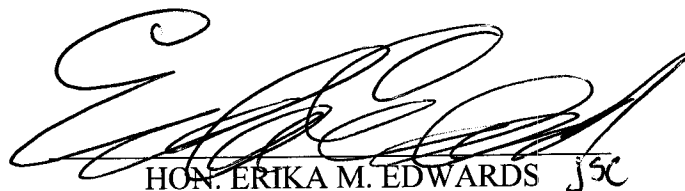
In his opposition, Plaintiff seeks the opportunity to amend some of his claims if the court believes he has satisfied at least one of his claims. However, the court does not believe that any of Plaintiff's claims are sufficient enough to proceed. As such, the court grants Defendant's motion to dismiss in its entirety and dismisses Plaintiff's complaint with prejudice.

Accordingly, it is hereby

**ORDERED** that Defendant's motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against Defendant without costs and the Clerk is directed to enter judgment accordingly in favor of Defendant.

This constitutes the decision and order of the court.

Date: February 14, 2017



HON. ERIKA M. EDWARDS JSC