SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

----------X

JOHN ZONG YUE DU, MIKA FURUYA,

Plaintiff,

- v -

MARC LATAMIE, MALDOROR, LLC, LORI LATAMIE, ASSIA FRATZ

Defendant.

----------X

INDEX NO. 157432/2021

MOTION DATE 04/18/2022

MOTION SEQ. NO. 001 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 23, 24, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 104

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 110

were read on this motion to/for DISMISS.

On August 9, 2021, Plaintiffs John Du and Mika Furuya, who are married, commenced this action against Marc Latamie,[1] a neighbor residing in their building, by filing a verified complaint, alleging causes of action for private nuisance and seeking permanent injunctive relief. (NYSCEF Doc No. 2, Original Complaint.) Plaintiffs simultaneously moved by order to show cause ("OSC") seeking a preliminary injunction and temporary restraining order ("TRO") prohibiting Latamie from, inter alia, contacting Plaintiffs, causing intentional nuisance to Plaintiffs' use and enjoyment of their home, engaging in any prohibited conduct, and coming within 100 feet of their places of employment. (NYSCEF Doc No. 14, Unsigned OSC; NYSCEF Doc No. 21, Ms001 Memo.) The complaint contained allegations that Du took issue with Latamie

[1] Maldoror LLC, a company owned by Latamie and the deed owner of Latamie's condominium unit, was also named as a Defendant. Latamie is a sculptor by profession.

communicating with Furuya in general, and in particular on June 9, 2020, after Latamie consoled Furuya after overhearing an argument between Furuya and Du. It is alleged that tensions escalated over the following months, culminating in accusations of racism, vandalism, and harassment in the building and at Plaintiffs' restaurant, Mika.

On August 12, 2021, the ex parte judge, Hon. David Cohen, signed the OSC but did not grant the TRO. (NYSCEF Doc No. 23, Cohen OSC.) On August 18, 2021, the case was assigned to Hon. W. Franc Perry, who signed a duplicate copy of the OSC, and granted the TRO. (NYSCEF Doc No. 24, Perry OSC.)

Latamie did not receive notice of the OSC and requested TRO because Plaintiffs' counsel had called, left a voicemail message, and emailed Mr. Douglas Wasser, who no longer represented Latamie at that time. (NYSCEF Doc No. 45, Mazer Affidavit.) Mr. Wasser avers that Plaintiffs' counsel had sent him an email titled "Urgent – Please Contact Me ASAP" at 9:30 am on August 9, 2021, the date of this action's commencement, which stated that Plaintiffs would be filing the OSC and TRO. (NYSCEF Doc No. 50, Wasser Affidavit.) Further, Mr. Wasser avers that he replied to the email at 10:43 am, stating that he no longer represented Latamie, and that he provided Latamie's email address to Plaintiffs' counsel in a subsequent email at 11:54 am, after having spoken with him on the phone. (*Id*. at 2-3.) The NYSCEF docket reflects that Plaintiffs' counsel filed the commencement documents at 10:57 am, including the affirmation of good faith (NYSCEF Doc No. 15) stating that "the application for relief was filed with the Court in accordance with the notice given to Defendants' counsel." (Wilson Affidavit at ¶ 9.)

As such, Latamie did not receive actual notice of the pendency of the OSC and TRO, although Plaintiffs submitted affidavits of service indicating that Latamie and Maldoror were served with the OSC on August 19, 2021; however, the record demonstrates that Plaintiffs served

the OSC which did not include a TRO, that was signed on August 9, 2021 by Hon. Cohen, the ex parte judge. (NYSCEF Doc No. 25.) Plaintiffs also submitted affidavits of service indicating that Defendants were served with the Perry OSC and TRO, four days later, on August 23, 2021. (NYSCEF Doc No. 27.)

Latamie appeared with counsel on September 23, 2021, informing the court that on August 25, 2021, while still in the process of retaining counsel, he was arrested in his home and held by police for 16 hours, allegedly as the result of Plaintiffs having called the police to report that Latamie had violated the TRO. (NYSCEF Doc No. 30, Latamie Affidavit, at ¶ 54.) Latamie submitted opposition to the OSC, arguing that the injunction sought violates his First Amendment right to Free Speech, that it was overly broad and vague, and that Plaintiffs were unable to demonstrate a likelihood of success on the merits for the alleged private nuisance. (NYSCEF Doc No. 29, Ms001 Opposition, at 8-23.) Latamie further argued that the TRO should be vacated for Plaintiffs' failure to provide notice pursuant to 22 NYCRR 202.8-e ["Temporary Restraining Orders"] and for the related intentional misrepresentations made by Plaintiffs' counsel. (NYSCEF Doc No. 45, Mazer Affidavit.)

After a remote hearing on the record on September 24, 2021, the court vacated the TRO and directed a further hearing to be held on the preliminary injunction. (NYSCEF Doc No. 53; NYSCEF Doc No. 84, Transcript, at 26:10.) Defendants Latamie and Maldoror filed motion sequence 002 to dismiss on November 8, 2021. (NYSCEF Doc No. 54.) However, after Plaintiffs filed their amended complaint on November 15, 2021 (NYSCEF Doc No. 60, Am. Cmplt.), the parties stipulated to the withdrawal of the motion and for the preliminary injunction to be taken on submission. (NYSCEF Doc No. 64, Stipulation.)

The amended complaint added as Defendants Latamie's daughters, Lori Latamie and Assia Fratz, and set forth causes of action for: 1) private nuisance against all Defendants; 2) permanent injunctive relief against all Defendants; 3) defamation against Latamie for the publication of a flyer handed out to tenants in their building (NYSCEF Doc No. 9); 4) defamation against Latamie for placing paper and neon signs in his window which accuse Du of being a racist (NYSCEF Doc No. 13); 5) defamation against Latamie and his daughters for social media posts targeting Plaintiffs and their restaurant, Mika, and for organizing protests outside of Mika; 6) assault against Latamie; and 7) intentional infliction of emotional distress against Latamie and Maldoror. (Am. Cmplt. at ¶¶ 126-222.)

Latamie and Maldoror filed an answer on January 28, 2022 (NYSCEF Doc No. 66, Answer), denying the allegations in the Complaint and alleging counterclaims for: 1) abuse of process against both Plaintiffs; 2) false imprisonment against both Plaintiffs; 3) trespass to chattels against Du; and 4) conversion against Du. (*Id*. at ¶¶ 235-388 and ¶¶ 389-426.) Defendants Lori Latamie and Assia Fritz filed separate answers. (NYSCEF Doc Nos. 88 and 89.)

On March 17, 2022, Plaintiffs filed motion sequence 003 to dismiss the counterclaims for abuse of process and false imprisonment, pursuant to CPLR 3211[a][7], arguing that Defendants fail to allege that Plaintiffs' use of the issued-TRO was improper and that their limited act of calling the police is insufficient to give rise to a cause of action for false imprisonment. (NYSCEF Doc No. 100, Ms003 Memo, at 9-14.) The motion is fully submitted and consolidated with the remainder of motion sequence 001 seeking a preliminary injunction.

Discussion

On a motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], "the court should accept as true the facts alleged in the complaint, accord plaintiff the

benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) However, "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

Abuse of process

"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 the process in a perverted manner to obtain a collateral objective." (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984], *citing Bd. of Educ. v Farmingdale Classroom Teachers Assn.*, 38 NY2d 397, 403-04 [1975].) "However, the mere commencement of a civil action by summons and complaint does not constitute abuse of process, and the gist of the tort is 'the improper use of process after it is issued' by 'an unlawful interference with one's person or property.' … [A] malicious motive alone does not give rise to a cause of action to recover damages for abuse of process." (*Tenore v Kantrowitz, Goldhamer & Graifman, P.C.*, 76 AD3d 556, 557 [2d Dept 2010] [internal citations omitted].)

Defendants allege that Plaintiffs caused the issuance of the summons, complaint, and order to show cause in bad faith, with an intent to harm Latamie and restrict his freedom, which was premised on false affidavits and their counsel's false sworn statement to the court regarding notice to Latamie about the TRO. (NYSCEF Doc No. 66, Answer at ¶¶ 389-398.) Defendants further allege that after the TRO was granted ex parte, based on the false representation that notice had been provided, Plaintiffs made a false report to the police, resulting in Latamie's arrest. (*Id*. at ¶¶ 399-400.) Defendants allege that Du's conduct was motivated by racial hatred against black

people, and that Du "pressured Furuya using physical and verbal abuse" to participate in his scheme to harm Latamie through use of process. (*Id*. at ¶¶ 401-405.)

Plaintiffs argue that Defendants "fail to allege, and are unable to allege, any improper use of the TRO," as the process in this case was obtained and used for legal purposes, i.e., "to prevent Defendant Latamie from harassing, menacing, and stalking Plaintiffs." (NYSCEF Doc No. 100, Ms003 Memo, at 9-10.) Plaintiffs also argue that Defendants "fail to, and are simply unable to, point to any action of Plaintiffs which would constitute a 'perverted manner'" and that none of Defendants' allegations "can be deemed as evidence of any falsity of Plaintiffs' sworn statements in their supporting affidavits." (*Id*. at 11.)

Plaintiffs' motion to dismiss is denied. On a motion to dismiss, the court must accept as true the allegations in Defendants' answer and accord Defendants the benefit of every possible inference (*Frank*, 292 AD2d at 121). "[T]he temporary restraining order constituted a regularly issued process which compelled the forbearance of a prescribed act, satisfying the first element to establish an abuse of process." (*Dixon v Roy*, 21 Misc 3d 1117[A], at *4 [Sup Ct, Kings County 2008]; *see also* Lee S. Kreindler, New York Law of Torts § 1:88, West's NY Prac Series 2022 ["Arrests … and other similar provisional remedies can be considered 'abusable' interference with one's person or property."].)

Defendants' allegations that Plaintiffs were motivated to cause Latamie harm due to, inter alia, Du's racial hatred against black people and Du's jealousy of Latamie's communications with Furuya, must also be accepted as true thus, the second element of abuse of process, "an intent to do harm without excuse or justification" is inferred. (Answer at ¶¶ 401-402; NYSCEF Doc Nos. 67-69 [texts between Latamie and Furuya] and 74 [Furuya's texts to Latamie apologizing for Du's June 9, 2020 outburst and calling Du "crazy"]; *see also* NYSCEF Doc Nos. 76 ["Beware of

Monkey" sign hung on Plaintiffs' door, which Latamie alleges is a racial epithet directed towards him]; 77 [elevator surveillance footage showing Du allegedly imitating a monkey while arguing with Latamie]; 87 and 88 [photographs of Du's door decorated with, inter alia, printouts of Latamie and Furuya's text message conversations, an image of Latamie's arrest on August 25, 2021 captioned with the word "PRICELESS", and a meme of Jesus bearing the caption "Thy shall not covet thy neighbor's wife"].)

Finally, Defendants have alleged the third element of the tort, that Plaintiffs used the TRO in a "perverted manner to obtain a collateral objective." (*Curiano*, 63 NY2d at 116.) Although Plaintiffs argue that the purpose of the TRO was to "prevent Defendant Latamie from harassing, menacing, and stalking" them (Ms003 Memo at 9-10), Defendants sufficiently allege that Plaintiffs' collateral objective was to obtain retribution via Latamie's imprisonment. (Answer at ¶ 398; *compare with Dixon*, 21 Misc 3d 1117[A] at *5 [TRO not used for collateral objective where it was used to "preserve the status quo pending a hearing" which occurred three weeks later]; *Khandalavala v Artsindia.com, LLC*, 2014 WL 1392220, at *7 [Sup Ct, NY County 2014] [same]; *Hornstein v Wolf*, 109 AD2d 129, 134 [2d Dept 1985] [TRO not used for collateral objective where it was sought for the purpose of protecting against irreparable injury by enjoining the transfer of property pending a hearing]; *see also Bd. of Educ.*, 38 NY2d at 404 ["legal procedure must be utilized in a manner consonant with the purpose for which that procedure was designed. Where process is manipulated to achieve some collateral advantage, [such as] retribution, the tort of abuse of process will be available to the injured party"].)

Plaintiffs' reliance on *Gidumal v Cagney*, 144 AD3d 550 [1st Dept 2016] (NYSCEF Doc No. 100, Ms003 Memo at 9-10), is unavailing, as the plaintiff in that case sued a process server who had served plaintiff with documents pertaining to an unrelated divorce proceeding, and the

abuse of process claim was based on the process server's affidavit of service stating that plaintiff had called her a "f… bitch and f…. whore … and not the actual process at issue – the order to show cause[.]" (*Id*. at 551.) Further, Plaintiffs' repeated arguments that Defendants' allegations are conclusory and unsupported by evidence are inapposite (Ms003 Memo at 9-11), as "[w]hether a [party] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*Magee-Boyle v Reliastar Life Ins. Co. of New York*, 173 AD3d 1157, 1159 [2d Dept 2019].)

False imprisonment

To establish a cause of action for false imprisonment, a plaintiff "must show that: (1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged." (*Broughton v State of New York*, 37 NY2d 451, 456 [1975].)

Plaintiffs argue that Defendants cannot satisfy the first element, as Defendants "must establish that [Plaintiffs] did not merely report a crime or participate in the prosecution, but actively importuned the police to make an arrest without 'reasonable cause in the culpability.'" (Ms003 Memo at 12, *quoting Rivera v County of Nassau*, 83 AD3d 1032, 1033 [2d Dept 2011].) Plaintiffs argue that Defendants must show that Plaintiffs "affirmatively induced the officer to act, such as [by] taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting upon his own volition." (*Id*., *quoting Petrychenko v Solovey*, 99 AD3d 777, 779 [2d Dept 2012].)

The court finds that Defendants' allegations sufficiently set forth a cause of action for false imprisonment, as Defendants allege that Plaintiffs obtained the TRO based on false affidavits and then used that TRO to make a false police report to have Latamie arrested. (Answer at ¶¶ 407-

413; *see Matthaus v Hadjedj*, 148 AD3d 425, 426 [1st Dept 2017] [the allegation that a party "knowingly provided false information to the police, in retaliation for a domestic dispute, was sufficient … to form the basis for a claim for false arrest"]; *M & M Environmental v Myrick*, 2021 WL 143489, at *1 [Sup Ct, NY County 2021] [denying motion to dismiss claim for false arrest as the allegations that plaintiff "made false statements to the authorities leading to his arrest and detainment … go beyond showing that plaintiff merely provided information to law enforcement authorities who then exercised their own judgement whether to arrest defendant and initiate criminal charges as argued by plaintiff"]; *Santiago v Agadjani*, 2020 WL 3507693, at *2 [Sup Ct, Queens County 2020] [denying motion to dismiss where plaintiff alleged that defendant had "knowingly provided false information to the police and as a result, plaintiff was subsequently arrested and incarcerated"].)

Plaintiffs' reliance on *Oszustowicz v Admiral Ins. Brokerage Corp.*, 49 AD3d 515 [2d Dept 2008] (NYSCEF Doc No. 110, Reply, at ¶¶ 53-58) is unavailing, as, in that case, there was no allegation that the information furnished to the police was false.

Plaintiffs' Divorce and Letter Applications for Discovery

As alleged in Defendants' answer, Furuya has moved out of the condominium unit she shared with Du and the Plaintiffs are involved in divorce proceedings, *John Du v Mika Furuya*, Index No. 323383/2021. (Answer at ¶ 7.) The facts, circumstances, and pleadings of the divorce action are not before this court and are not contained in the record, as, Domestic Relations Law § 235 ["Information as to details of matrimonial actions or proceedings"], requires that they be kept confidential absent a court order. (*See Applehead Pictures LLC v Perelman*, 80AD3d 181, 192 [1st Dept 2010] ["the rule reflects a clear legislative design that those proceedings be kept secret and confidential"].)

Counsel for Plaintiffs and Defendants submitted letters dated May 20, May 24, May 25, and June 1, 2022 (NYSCEF Doc No. 104, Pls.' Letter 1; NYSCEF Doc No. 105, Defs.' Letter 1; NYSCEF Doc No. 109, Pls.' Letter 2; NYSCEF Doc No. 106, Defs.' Letter 2), advising the court that, in addition to the divorce proceeding, there is also a separate action pending in Family Court, Index No. O-00940-22 (Kingo, Hasa, J.), in which Furuya allegedly obtained an order of protection against Du, prohibiting him from entering the condominium building. These records are also not in the record, pursuant to Family Court Act § 166 ["Privacy of records"].

Defendants, via letter application, request an order directing disclosure of the pleadings from the divorce proceeding and the order of protection from the Family Court proceeding, on the grounds that the documents are relevant to this proceeding. (Defs.' Letter 1 at 3.) Specifically, Defendants argue that the documents would undermine the Plaintiffs' theory of the case and their credibility, as well as give credence to Defendants' assertions that Du "forced" Furuya to send certain accusatory text messages to Latamie (Answer at ¶ 269) and "pressured [her] using physical and verbal abuse" into submitting her false affidavit. (*Id*. at ¶ 402; NYSCEF Doc No. 18, Furuya Affidavit.)

The court denies Defendants' letter application for discovery, without prejudice to seek relief through a motion on notice. (*See Solomon v Meyer*, 103 AD3d 1025 [3d Dept 2013].)

Preliminary injunction

The remainder of Plaintiffs' motion sequence 001 seeking a preliminary injunction against Latamie for private nuisance (NYSCEF Doc No. 21, Ms001 Memo, at 13-19) is denied.

"[T]he elements of the common law cause of action for a private nuisance are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure

to act." (*61 West 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330, 334 [1st Dept 2010].) "In order to obtain a preliminary injunction, [Plaintiffs are] required to put forth evidence demonstrating "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in [their] favor." (*Id*.)

Based on this record, the court finds that Plaintiffs are unable to satisfy any of the requirements for a preliminary injunction, and the motion is denied in its entirety. (*Doe v Axelrod*, 73 NY2d 748, 750 [1988] ["The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts"].) Accordingly, it is hereby

ORDERED that Plaintiffs' motion sequence 003 seeking dismissal of Defendants Marc Latamie and Maldoror LLC's counterclaims for abuse of process and false imprisonment is denied; and it is further

ORDERED that Plaintiffs' motion sequence 001 seeking a preliminary injunction against Defendants Marc Latamie and Maldoror LLC is denied.

8/24/2022
DATE

WILLIAM PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE