



IN THIS FORECLOSURE ACTION, DEFENDANT'S COUNTERCLAIMS FOR ABUSE OF PROCESS AND MALICIOUS PROSECUTION SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this foreclosure action, determined defendant's (Yeshiva's) counterclaims for abuse of process and malicious prosecution should have been dismissed:

Supreme Court should have granted those branches of Maspeth's [the bank's] motion which were to dismiss Yeshiva's second and third counterclaims, sounding in abuse of process and malicious prosecution, respectively. To state a cause of action to recover damages for abuse of process, a party must allege the existence of (1) regularly issued process, (2) an intent to do harm without excuse or justification, and (3) the use of process in a perverted manner to obtain a collateral objective Here, Yeshiva failed to allege any actual misuse of the process to obtain an end outside its proper scope Moreover, "[t]he elements of the tort of malicious prosecution of a civil action are (1) prosecution of a civil action against the plaintiff, (2) by or at the instance of the defendant, (3) without probable cause, (4) with malice, (5) which terminated in favor of the plaintiff, and (6) causing special injury" Here, Yeshiva failed to adequately allege malice on the part of Maspeth in commencing the action, a termination of the action in favor of Yeshiva, or the requisite special injury. [Maspeth Fed. Sav. & Loan Assn. v Elizer, 2021 NY Slip Op 05030, Second Dept 9-22-21](#)

COMMENCING A LAWSUIT, STANDING ALONE, DOES NOT CONSTITUTE ABUSE OF PROCESS (SECOND DEPT).

The Second Department determined defendants' motion for summary judgment was properly granted, noting that commencing a lawsuit, standing alone, does not constitute 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" The mere commencement of a lawsuit cannot serve as the basis for a cause of action alleging abuse of process "[T]here must be an unlawful interference with one's person or property under color of process in order that action for abuse of process may lie" [Lynn v McCormick, 2017 NY Slip Op 06169, Second Dept 8-16-17](#)

INTENTIONAL TORTS (ABUSE OF PROCESS, COMMENCING A LAWSUIT, STANDING ALONE, DOES NOT CONSTITUTE ABUSE OF PROCESS (SECOND DEPT))/ABUSE OF PROCESS (COMMENCING A LAWSUIT, STANDING ALONE, DOES NOT CONSTITUTE ABUSE OF PROCESS (SECOND DEPT))

ABUSE OF PROCESS AND ATTORNEY'S FEES COUNTERCLAIMS PROPERLY DISMISSED IN THIS DISPUTE BETWEEN BROKERS OVER A COMMISSION, CRITERIA FOR BOTH COUNTERCLAIMS EXPLAINED.

In a dispute between real estate brokers over plaintiff's entitlement to a percentage of a commission, the Second Department determined defendants' counterclaims for abuse of process, prima facie tort, tortious interference with prospective business relations, and attorney's fees were properly dismissed. The (unsuccessful) claim for attorney's fees was based upon language in a real estate policy and procedure manual the language of which was deemed too vague to supplant the general rule that parties are responsible for their own attorney's fees. With regard to the abuse of process and attorney's fees claims, the court explained:

"The three essential elements of the tort of abuse of process are (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" "[T]he gist of the tort is the improper use of process after it is issued' by an unlawful interference with one's person or property" Here, the gravamen of the first counterclaim was that the plaintiff initiated this lawsuit with the intent to harm the defendants, knowing that the brokerage community would find out about the lawsuit, which would damage the defendants' ability to do business in that community. However, "the institution of a civil action by summons and complaint is not legally considered process capable of being abused" Moreover, there was no allegation that the plaintiff improperly used process after it was issued. Furthermore, "a malicious motive alone does not give rise to a cause of action to recover damages for abuse of process" * * *

In the fourth counterclaim the defendants sought to recover attorneys' fees incurred in defending this action pursuant to a provision in their "Policy & Procedure Manual," which states, inter alia, that "[i]f a dispute arises due to a commission and a legal action is commenced as a result thereof, the costs of the legal action will be deducted from the fee collected," and "[i]f [a] suit is a result of an agent's action, he/she will be responsible for payment of damages incurred as a result." Since "a promise by one party to a contract to



indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise" Here, the provision relied upon by the defendants is vague, and a promise by the plaintiff to indemnify the defendants for attorneys' fees incurred in litigation between them cannot be clearly implied from the language and purpose of the entire manual. [Goldman v Citicore I, LLC, 2017 NY Slip Op 03156, 2nd Dept 4-26-17](#)

REAL ESTATE (ABUSE OF PROCESS AND ATTORNEY'S FEES COUNTERCLAIMS PROPERLY DISMISSED IN THIS DISPUTE BETWEEN BROKERS OVER A COMMISSION, CRITERIA FOR BOTH COUNTERCLAIMS EXPLAINED)/INTENTIONAL TORTS (ABUSE OF PROCESS AND ATTORNEY'S FEES COUNTERCLAIMS PROPERLY DISMISSED IN THIS DISPUTE BETWEEN BROKERS OVER A COMMISSION, CRITERIA FOR BOTH COUNTERCLAIMS EXPLAINED)/ABUSE OF PROCESS (ABUSE OF PROCESS AND ATTORNEY'S FEES COUNTERCLAIMS PROPERLY DISMISSED IN THIS DISPUTE BETWEEN BROKERS OVER A COMMISSION, CRITERIA FOR BOTH COUNTERCLAIMS EXPLAINED)/COMMISSIONS (REAL ESTATE, ABUSE OF PROCESS AND ATTORNEY'S FEES COUNTERCLAIMS PROPERLY DISMISSED IN THIS DISPUTE BETWEEN BROKERS OVER A COMMISSION, CRITERIA FOR BOTH COUNTERCLAIMS EXPLAINED)

MALICIOUS PROSECUTION AND ABUSE OF PROCESS CAUSES OF ACTION NOT SUFFICIENTLY PLED.

In finding the pleading insufficient for malicious prosecution and abuse of process causes of action, the Fourth Department explained the flaws:

Where, as here, the underlying action is civil in nature, the party alleging a claim for malicious prosecution must allege a special injury In the instant case, defendant "fail[ed] to plead that the civil proceeding involved wrongful interference with [his] person or property" Instead, defendant alleged damages amounting to "the physical, psychological or financial demands of defending a lawsuit," which is insufficient to constitute a special injury for a claim of malicious prosecution

To the extent that defendant contends that the second counterclaim is for abuse of process and not malicious prosecution, we conclude that it must still be dismissed as well. "Insofar as the only process issued [here] was a summons, the process necessary to obtain jurisdiction and begin the lawsuit, there was no unlawful interference with [defendant's] person or property because the institution of a civil action by summons and complaint is not legally considered process capable of being abused" Defendant alleges that plaintiff acted maliciously in bringing the action, but "[a] malicious motive alone . . . does not give rise to a cause of action for abuse of process" [Reszka v Collins, 2016 NY Slip Op 00807, 4th Dept 2-5-16](#)

MALICIOUS PROSECUTION (WHERE UNDERLYING ACTION IS CIVIL, SPECIAL INJURY MUST BE PLED)/ABUSE OF PROCESS (MALICIOUS MOTIVE ALONE DOES NOT GIVE RISE TO THE CAUSE OF ACTION)

Elements of Malicious Prosecution and Abuse of Process Explained

In reversing the pre-answer dismissal of a malicious prosecution cause of action and affirming the dismissal on an abuse of process cause of action, the Third Department explained the elements of both:

...[W]e conclude that Supreme Court erred in dismissing plaintiff's malicious prosecution cause of action. The elements of such a claim are "(1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice" As is particularly relevant here, "[i]n order for a civilian complainant to be considered to have initiated a criminal proceeding, 'it must be shown that [the complainant] played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act'" * * *

With respect to the abuse of process claim, the three essential elements are "(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" In general, such a claim "will only lie for improperly using process after it is issued" ..., and a malicious motive alone is insufficient to give rise to a cause of action to recover for abuse of process Here, plaintiff's allegations in the complaint pertaining to this cause of action, even construed liberally, fail to allege that defendant actually used process improperly [] either the order of protection or the arrest warrant [] "in a manner inconsistent with the purpose for which it was designed" [Place v Ciccotelli, 2014 NY Slip Op 07237, 3rd Dept 10-23-14](#)



Sheriff's (Lack of) Liability Under Respondeat Superior, Elements of Malicious Prosecution, Abuse of Process, False Imprisonment and Libel Per Se Explained

In a lengthy and detailed decision the Fourth Department explained the negligence actions against the sheriff based on respondeat superior were properly dismissed, the action for malicious prosecution was properly dismissed (because the underlying criminal action was not dismissed on the merits and could be renewed), but the actions for abuse of process, false imprisonment, and libel per se should not have been dismissed. The decision is too lengthy to summarize here, but it includes detailed explanations of the sheriff's immunity from suit under respondeat superior and the elements of malicious prosecution, abuse of process, false imprisonment, and libel per se. The action stemmed from the allegation plaintiff was falsely accused of stealing a computer. [D'Amico v Correctional Med Care Inc, 2014 NY Slip Op -5737, 4th Dept 8-8-14](#)