

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
ESSEX VICINAGE,  
LAW DIVISION, CIVIL PART  
DOCKET NO. ESX-L-2889-18

XINBA CONSTR. GROUP CO., LTD.,

Plaintiffs,

v.

JIN XU, ET AL,

Defendants.



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Decided: September 20, 2019

Matthew Stockwell, Eric Epstein, and Michael Pisko for plaintiff (Pillsbury Winthrop Shaw Pittman LLP)

Gregory Hindy and Scott Weingart for defendants (McCarter English, LLP)

PETRILLO, J.S.C.

**STATEMENT OF REASONS**

This matter comes before the Court by way of a motion filed by plaintiff, Xinba Construction Group Company, Ltd. (“plaintiff ” hereinafter) against Jin Xu, Fang Liu, Yan Liu, JLifetime LLC, amongst other defendants, (collectively “defendants” hereinafter), seeking dismissal, with prejudice, of defendants’ counterclaim, for failure to state a claim for which relief can be granted, pursuant to R. 4:6-2(e).

This matter has a current discovery end date of October 19, 2019. There is presently no arbitration or trial date scheduled.

## **BACKGROUND**

Plaintiff filed a fraudulent transfer action to recover sums allegedly owed to it pursuant to construction contracts. Plaintiff contends that defendants were involved in looting funds from various entities which owed it monies under the underlying contracts. Plaintiff notes that defendant Jin Xu and defendant Fang Liu are listed on People's Republic of China's (either "PRC" or "China" hereinafter) "100 most wanted" criminal fugitive list, for charges of fraud and bribery.

Defendants claim that plaintiff is serving as a proxy for the PRC and the Chinese Communist Party ("CCP" hereinafter), who view defendants as political enemies of the state. Defendant contend that, as proxy of same, plaintiff has been instructed to assert pressure on defendants to return to China. Defendants have filed a counterclaim for abuse of process, which plaintiff now seeks to dismiss.

On April 21, 2018 plaintiff filed its original complaint. On July, 11, 2018, defendants filed a motion to dismiss the complaint, which was subsequently denied on February 22, 2019 after oral argument. On March 26, 2019, plaintiff filed its amended complaint, to which defendants filed a counterclaim on May 8, 2019. The counterclaim is the subject of the instant motion.

## **PLAINTIFF'S MOVING PAPERS**

First and foremost, plaintiff asserts that defendants' counterclaim neither alleges any conduct by plaintiff, subsequent to its filing of the initial complaint, nor claims plaintiff engaged in any procedurally improper litigation tactics. Additionally, plaintiff claims that defendants' allegations regarding purported conduct of the PRC and the CCP are meritless because they are not parties to the action, and defendants have offered no evidence that plaintiff is connected with these entities. In fact, plaintiff alleges that defendants have failed to produce such evidence upon request, and the evidence that it has produced was of an entirely different nature. In particular,

defendants' have: failed to produce a note in their exclusive possession; failed to produce any evidence that PRC boasted online about a lawsuit against them; and incorrectly characterized a social media post as a published article. The court notes that a picture of the aforementioned note can be found in Ex. C of defendants' reply.

Next, plaintiff argues that defendants have not proven the requisite elements to properly state a claim for abuse of process. Plaintiff proposes that three elements must be met for such a claim: (1) a coercive, illegitimate, or improper use of the judicial process; (2) an ulterior motive by the offending party; and (3) "some further act after the issuance of process representing the perversion of the legitimate use of process." Fielder Agency v. Eldan Constr. Corp., 152 N.J. Super. 344, 348 (Law Div. 1977); see also Wozniak v. Pennella, 373 N.J. Super. 445, 461 (App. Div. 2004).

Plaintiff specifically argues that defendants' claim is legally deficient because they have not alleged, and cannot allege, any facts to satisfy the "further acts" requirement. Plaintiff contends that, although defendants allege conduct by PRC and CCP, they fail to allege that it improperly litigated after the filing of its complaint. Furthermore, in their counterclaim, defendants' sole claim is that plaintiff filed the case and alluded to the alleged conduct prior to the filing. In fact, plaintiff asserts that defendants mention no acts conducted by plaintiff after the filing whatsoever. Plaintiff insists that defendants cannot bring an abuse of process claim based only upon the filing of a claim. See Hoffman v. AsSeenOnTV.com, Inc., 404 N.J. Super. 415, 431 (App. Div. 2009) ("The tort of malicious process lies not for commencing an improper action, but for misusing or misapplying process after it is issued.").

## DEFENDANTS' OPPOSITION

In opposition, defendants counter-argue that their counterclaim more than adequately plead an abuse of process claim. Defendants repeatedly allege that plaintiff harbored ulterior motives. Specifically, defendants posit that plaintiff is serving the Chinese government by coercing defendants either to return to China or be subject to harassment. Defendants distinguish this case from Fielder, 152 N.J. Super. at 348 wherein there was an actual dispute between the parties, because here plaintiff commenced this action to further an end outside of the scope of this litigation, rather than in an effort to vindicate its own rights.

Likewise, defendants assert that plaintiff cannot argue, with any merit, that maintaining this litigation will allow the Chinese government to coerce defendants to return to China; thus, it does not amount to “coercive, illegitimate, or improper” use of process. Defendants analogize this case to Wozniak, 373 N.J. Super. at 461 wherein the appellate division upheld a claim for abuse of process against a defendant who filed a criminal complaint in order to employ leverage against plaintiffs to dismiss a civil complaint brought against defendant.

As to the third element, which is the crux of plaintiff’s argument, defendants contend that there are two instances of “further acts” that reveal a motive to coerce or oppress them. First, they allege that the counterclaim pleads that the PRC boasted online that it is waging a legal war against defendants. Defendants posit that plaintiff has not provided any alternative for the allegations contained in the article. Second, the counterclaim alleges that a PRC agent left a note on Jin Xu’s door eluding that the case against him would go away if he returned to China and served ten years in prison. Defendants assert that this note is evidence that the plaintiff’s primary purpose is to coerce defendants to return to China.

Moreover, defendants argue that PRC and CCP's actions are attributable to plaintiff on the theory of vicarious liability. Defendants rely primarily on the RESTATEMENT (SECOND) OF TORTS, § 876 (AM. LAW. INST. 1979) quoted favorably in Podias v. Mairs, 394 N.J. Super. 338, 352 (App. Div. 2007), which explains that a person is subject to liability for harm resulting to a third person from the tortious conduct of another if he: (1) does a tortious act in concert with the other, or pursuant to a common design with him; or (2) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself; or (3) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Therefore, the alleged fact that the Chinese government was immediately responsible for these two "further acts" does not relieve plaintiff, whom was plainly acting "in concert with" and "pursuant to a common design" with that government, from liability for this conduct.

### **PLAINTIFF'S REPLY**

On reply, plaintiff reiterates its position that an essential element of a claim for abuse of process is that there is an improper, unwarranted, and perverted use of process after it has been issued, and that no such conduct is present in this instance. Tedards v. Auty, 232 N.J. Super. 541 (App. Div. 1989). Plaintiff insists the facts cited by defendants, even if accepted as true, do not constitute as "further acts."

First, plaintiff notes that defendants' allegation that PRC boasted of a legal war against them online is not an allegation against plaintiff's own conduct, nor does it involve judicial process. Second, as to defendants' allegation that a PRC agent posted a note on Jin Xu's door, plaintiff contends that, for the same reasons, this does not satisfy as a "further act." Furthermore, plaintiff claims that the allegations as to its ulterior motives for initiating this action are

insufficient, because they must be supported by allegations of “further acts.” Penwag Property Co. v. Landau, 148 N.J. Super. 493, 499 (App. Div. 1977) (Coercive action or bad motives or intent prior or leading to the institution of the lawsuit do not suffice to expose a plaintiff to a cause of action for malicious abuse of process.).

As to defendants’ vicarious liability theory, plaintiff notes that this was not alleged by defendants counterclaim and cannot be resurrected at this juncture. The PRC and CCP are not parties to the case, and thus, by definition did not initiate or make use of process in this action. In addition, plaintiff posits that defendants have not provided proof as to the underlying claim that PRC or CCP were responsible for the alleged “further acts.”

Finally, plaintiff contends that any amendment to the counterclaim would be futile, and thus it is proper to dismiss the counterclaim with prejudice. Plaintiff reiterates its position that defendants cannot demonstrate that it engaged in any “further acts” and consequently have not put forth any facts that demonstrate it may be able to prove so in a subsequent, amended complaint.

### **STANDARD OF REVIEW**

#### **N.J. Ct. R. 4:6-2(e): Dismissal with Prejudice for Failure to State a Claim.**

Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses, unless otherwise provided by R. 4:6-3, may at the option of the pleader be made by motion, with briefs ... (e) failure to state a claim upon which relief can be granted.

In considering a motion to dismiss under R. 4:6-2(e), the court must accept the facts asserted in the pleading as true, and give the pleader the benefit of all inferences that may be drawn in its favor. Printing Mart v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). The complaint must be searched in depth and with liberality to determine if a cause of action can be gleaned from even an obscure statement. Id. That said, “if the complaint states no basis for relief and discovery

would not provide one, dismissal is the appropriate remedy.” Banco Popular North America v. Gandhi, 184 N.J. 161, 166 (2005). “The inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim.” Reider v. State, 221 N.J. Super. 547, 552 (App. Div. 1987). “[A] dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted.” Id. Ultimately, a “pleading must allege sufficient facts to give rise to a cause of action; mere conclusions and an intention to rely on discovery are inadequate.” Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998). Our Supreme Court has made it clear that a plaintiff “need show only that some form of inquiry is permissible and some form of remedy is available to survive a motion to dismiss,” McKelvey v. Pierce, 173 N.J. 26, 46 (2002), and that a motion to dismiss for failure to state a claim under R. 4:6-2(e) should only be granted in “the rarest of instances,” and, if granted, “after meticulous and indulgent examination,” generally “without prejudice.” Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 771-72 (1989). This onerous standard for dismissal suggests that the complaint need only convey a cause of action through either the actual language or through inferences drawn by the court. If the complaint satisfies this requirement, it should not be dismissed.

### **DISPOSITION**

Upon thorough review of the factual and legal arguments presented in the present case, even accepting all of the allegations in the complaint as true, defendants do not state a claim upon which relief can be granted. Accordingly, the court grants plaintiff’s motion to dismiss, pursuant to R. 4:6-2(e). The dismissal is without prejudice.

In order to establish a prima facie case for abuse of process, a movant must demonstrate: (1) a coercive, illegitimate, or improper use of the judicial process; (2) an ulterior motive by the

offending party; and (3) “some further act after the issuance of process representing the perversion of the legitimate use of process.” Fielder Agency v. Eldan Constr. Corp., 152 N.J. Super. 344, 348 (Law Div. 1977); see also Wozniak v. Pennella, 373 N.J. Super. 445, 461 (App. Div. 2004).

Where a party asserting an abuse of process claim fails to allege a “further act” other than filing a complaint and proceeding upon it, the claim must be dismissed. See Klesh v. Coddington, 295 N.J. Super. 51, 64 (Law Div. 1996) (holding that there is no set of facts alleged on which recovery could be had where the plaintiff alleged that the action itself was brought for an improper purpose, but failed to allege any further act by the plaintiff after or other than the filing of the complaints and proceeding upon them.); see also Fielder, 152 N.J. Super. at 348–49 (Finding that where the process caused to be issued by plaintiff was being utilized to obtain a determination of a genuine controversy existing between plaintiff and defendant constitutes a proper use of the judicial process, even if the claims therein asserted by plaintiff were actuated by unjust motives, because no facts have been presented which would support a conclusion or an inference that the suit was instituted to accomplish an end outside the scope of the litigation itself.).

Defendants contend that it is clear that plaintiff harbors an ulterior motive to support the Chinese government in coercing defendants to return to China and face persecution, based primarily on allegations that plaintiff delayed bringing its claim for seven years and a note allegedly written by an agent of the Chinese government. However, defendants provide nothing of substance to show that plaintiff’s decision to delay litigation had any relationship to the Chinese government’s interests in defendants. Furthermore, plaintiff clearly has a legitimate personal interest in the matter, as its claim, which survived defendants’ motion for dismissal, is for upwards of \$10 million. Likewise, defendants rely on the purely speculative conclusion that the note was in fact placed on Jin Xu’s door by an agent of the Chinese government. Based on a full review of



the record, the facts provided are insufficient to demonstrate, at this time, any relationship between plaintiff and the PRC or CCP.

Most importantly, defendants do not sufficiently allege that plaintiff engaged in any further act after process was issued. Although defendants claim that an online post in China quotes the PRC as boasting about a legal battle against defendants, and that Chinese government agents posted a note on Jin Xu's door, they fail to allege any action taken by plaintiff itself. Without facts alleging further acts by plaintiff, defendants claim is insufficient as they cursorily rely on the conclusion that plaintiff is working with the PRC and CCP without any support. Ultimately, a "pleading must allege sufficient facts to give rise to a cause of action; mere conclusions and an intention to rely on discovery are inadequate." Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998). Additionally, defendants' attempt to distinguish Fielder, 152 N.J. Super. at 348 fails, as there may be a genuine dispute between the parties based on plaintiff's allegations of fraud.

However, plaintiff does not provide clear evidence to establish that it has not engaged in any conduct that may constitute improper "further acts" for the purposes of an abuse of process claim. Plaintiff merely relies on the fact that defendants failed to allege any conduct to conclude that no such conduct may be alleged. At present, the court sees no reason to deny defendants the opportunity to amend their pleadings to include allegations of "further acts" by plaintiff should any, in fact, have been committed.

### **CONCLUSION**

In consequence, plaintiff's motion to dismiss, but without prejudice, pursuant to R. 4:6-2(e), is hereby **GRANTED**.