Docket: **1684CV03325-BLS2**
Date: **June 6, 2018**
Parties: **AMERICA'S TEST KITCHEN INC. V. CHRISTOPHER KIMBALL and Others[1]**
Judge: **/s/Kenneth W. Salinger Justice of the Superior Court**

MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION TO DISMISS WILLIAM THORNDIKE, JR.'s COUNTERCLAIMS

Christopher Kimball used to work for America's Test Kitchen on a television cooking show and on related programming and publications distributed through various media. This lawsuit arises from his development of a competing business.

Among its other claims, ATK sued William Thorndike, Jr., for allegedly misappropriating confidential information, aiding and abetting a breach of fiduciary duty by Kimball, and violating G.L. c. 93A, § 11.

Thorndike responded by asserting counterclaims against ATK for abuse of process and violation of G.L. c. 93A, § 11. Thorndike alleges that ATK asserted claims against him in order to harass, punish, and financially harm him for helping Kimball start a new business called CPK Media LLC, and in an attempt "to obtain an unlawful competitive advantage against CPK Media's business."

ATK has now moved to dismiss Thorndike's counterclaims, arguing that they are barred by the so-called anti-SLAPP statute, G.L. c. 231, § 59H, and in any case must be dismissed under Mass. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The Court concludes that this motion is without merit.

1. Anti-SLAPP Motion. The anti-SLAPP statute applies to and may bar civil claims that are based on a party's "exercise of its right of petition under the constitution of the United States or of the commonwealth." See G.L. c. 231, § 59H. "The acronym `SLAPP' stands for strategic lawsuit against public participation." Gillette Co. v. Provost, 91 Mass. App. Ct. 133, 134 n.2 (2017).

ATK has met its initial burden of showing that the anti-SLAPP statute is implicated here because Thormlike's counterclaims are based solely on the bringing

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[1] CPK Media, LLC; Melissa Baldino; Christine Gordon; Deborah Broide; CPK Holdco, LLC; and William Thorndike, Jr.

of this lawsuit, which is a petitioning activity, and have no substantial basis other than or in addition to ATK's petitioning activities. See Fabre v. Walton, 436 Mass. 517, 522-524 (2002) (abuse of process claim was based solely on defendant's petitioning activity).

The Court must nonetheless deny this part of the motion to dismiss because Mr. Thorndike has adequately shown that his counterclaims are not a "SLAPP" suit, in that they were not brought primarily to chill legitimate petitioning activities by ATK but instead were brought to seek damages for injury Thorndike suffered as a result of allegedly unlawful conduct by ATK. See Blanchard v. Steward Carney Hospital, Inc., 477 Mass. 141, 159 (2017).

Thorndike has stated colorable claims for abuse of process and violation of c. 93A, which is a "necessary but not sufficient factor" in proving that the counterclaims are not a SLAPP suit. Id. at 160-161. As discussed in more detail below, if a jury were convinced that ATK asserted baseless claims against Thorndike in order to hinder Kimball's ability to compete against ATK, it could find that ATK committed the tort of abuse of process and

violated G.L. c. 93A.

Furthermore, considering the circumstances as a whole, the Court is convinced that Thorndike's primary purpose in asserting his counterclaims is to seek and obtain compensation for injuries caused by ATK's alleged abuse of process and unfair trade practices. Cf. Blanchard, supra, at 160.

The anti-SLAPP statute does not bar such claims. See Alnylam Pharm., Inc. v. Dicerna Pharm., Inc., MICV20154126, 34 Mass. L. Rptr. 504, 2017 WL 6395719, at *5 (Oct. 23, 2017) (Leibensperger, J.). As the Supreme Judicial Court recently explained, "Wile Legislature did not intend" that the anti-SLAPP statute be used "to forestall and chill the legitimate claims—also petitioning activity—of those who may truly be aggrieved by the sometimes collateral damage wrought by another's valid petitioning activity." Blanchard, 477 Mass. at 157.

2. Rule 12(b)(6) Motion.

2.1. Abuse of Process Claim. In order to state a viable claim for abuse of process, a complaint or counterclaim must allege facts plausibly suggesting "that the process was used to accomplish some ulterior purpose for which it was not designed

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or intended, or which was not the legitimate purpose of the particular process employed," and that the claimant was damaged or harmed as a result. Ladd v. Polidoro, 424 Mass. 196, 198 (1997), quoting Gabriel v. Borowy, 324 Mass. 231, 236 (1949).

Thus, "mere commencement of litigation to enforce a claim which the person commencing the litigation knows or reasonably should have known to be groundless" does not support a claim for abuse of process unless the plaintiff also alleges facts plausibly suggesting that the lawsuit was brought "for an ulterior purpose by the party using the process" that commenced the action. Beecy v. Pucciarelli, 387 Mass. 589, 596 (1982).

Thorndike's allegations that ATK sued him in order harass and punish him do not suffice to state a claim for abuse of process. "[T]he ulterior purpose element is not satisfied merely by a showing that a person commenced litigation knowing it was groundless," or even that a lawsuit was brought "with an improper motive of vexation, harassment, or annoyance." Psy-Ed Corp. v. Klein, 459 Mass. 697, 713 (2011). "Rather, the ulterior purpose must be to gain some collateral advantage." Id. at 713-714.

But Thorndike also alleges that ATK's lawsuit, including its claims against him, was brought "to obtain an unlawful competitive advantage against CPK Media's business" and to "imped[e] lawful competition from Kimball, with Thorndike's support." The assertion that ATK brought a baseless lawsuit in order to make it harder for Kimball to compete against ATK states a viable claim for abuse of process.

2.2. Claim under G.L. c. 93A. These same allegations, that ATK asserted baseless claims against both Kimball and Thorndike in and attempt to stifle competition from Kimball's new venture, state a viable claim that ATK engaged in an unfair trade practice in violation of G.L. c. 93A. Cf. U.S. Enterprises, 410 Mass. at 273-274, 277 (bringing baseless lawsuit in order to block purchase of property would violate G.L. c. 93A, §§ 2(a) and 11; reversing grant of summary judgment in favor of defendant); Brooks Automation, Inc. v. Blueshift Technologies, Inc., Suffolk Sup. Ct. 05-3973-BLS2, 20 Mass. L. Rptr. 541, 2006 WL 307848 (2006) (Gants, J.) (filing frivolous complaint "becomes an act done in the conduct of trade or commerce

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when, as here, it is motivated by an intent to interfere with a competitor's contractual relationship with a key and much coveted customer"), aff'd, 69 Mass. App. Ct. 1107 (2007) (unpublished).

ATK may well be correct that Mr. Thorndike can only sue under G.L. c. 93A, § 11, and may not instead proceed under § 9 of that statute, because

Thorndike is in the private equity business and therefore was "acting in a business context" when he was dealing with Kimball and investing in Kimball's new venture. See Frullo v. Landenberger, 61 Mass. App. Ct. 814, 821 (2004).

But that provides no basis for dismissing Thorndike's c. 93A counterclaim. Cf. Guiffrida v. High Country Investor, Inc., 73 Mass. App. Ct. 225, 237 (2008) (treating claim as arising under § 11, even though plaintiff asserted claim under § 9). Even if Thorndike's pleading mistakenly invokes § 11 rather than § 9, that would not mean that his counterclaim under G.L. c. 93A must be dismissed. The complaint need not "state the correct substantive theory of the case." Jenson v. Daniels, 57 Mass. App. Ct. 811, 815 n.11 (2003), quoting Gallant v. City of Worcester, 383 Mass. 707, 709 (1981). A complaint will survive a Rule 12(b)(6) motion to dismiss so long as it alleges facts plausibly suggesting "relief on any theory of law," even if the complaint cites the wrong statute or invokes the wrong cause of action. Gallant, 383 Mass. at 710, quoting Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 89 (1979) (emphasis in original).

ORDER

Plaintiffs motion to dismiss the counterclaims asserted by William Thorndike, Jr., is DENIED.

/s/Kenneth W. Salinger Justice of the Superior Court