

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-895

RICHARD L. TERRY

vs.

KEVIN CASSIDY & others.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Richard Terry, appeals from an order and judgment of the Superior Court dismissing his complaint against the defendants, pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974).² We affirm.

Background. We derive the facts from Terry's complaint, accepting as true the facts alleged therein as well as any reasonable inferences fairly drawn therefrom. See Lopez v. Commonwealth, 463 Mass. 696, 700 (2012). As the motion judge did, we supplement the facts where necessary with information from court documents and records. See Jarosz v. Palmer, 436

¹ Joseph F. Cavanaugh, III and Steven T. Snow.

² Deirdre Frey-Terry was initially listed in the caption of the complaint as a plaintiff, but did not sign it; her name was later removed from it.

Mass. 526, 530 (2002). Terry represented defendant Kevin Cassidy in a criminal matter in the Woburn District Court for the charges of assault and battery on a family or household member, G. L. c. 265, § 13M (a), and intimidation of a witness, G. L. c. 268, § 13B; both charges were ultimately dismissed.

In May 2019, Terry filed a collection suit against Cassidy in the Falmouth District Court, seeking \$15,800 in attorney's fees for his representation provided to Cassidy in the Woburn District Court matter. Cassidy, by then represented by the Attorney Steven Snow and Attorney Joseph Cavanaugh, III, filed an answer and counterclaim against Terry, alleging, inter alia, violation of G. L. c. 93A, negligence, and abuse of process.

In February 2020, a Superior Court judge dismissed another action filed by Terry against Cassidy seeking attorney's fees under G. L. c. 231, § 6F for the filing of the counterclaim in the District Court proceeding.

In May 2020, while Terry's collection case against Cassidy was still ongoing, Terry filed a new complaint in the Barnstable Superior Court asserting numerous claims against both Cassidy and Snow. Cassidy and Snow, both represented by Cavanaugh, moved to dismiss Terry's complaint for the failure to state a claim, pursuant to rule 12 (b) (6), and the motion was allowed. Additionally, Cassidy and Snow both filed motions for attorney's fees and costs, pursuant to G. L. c. 231, § 6F. Each motion was

allowed, and the judge ordered Terry to pay Snow \$7,476.27 and Cassidy \$5,462.37 in attorney's fees and costs.

Following that judgment of dismissal and award of fees and costs, Terry filed the present complaint in the Barnstable Superior Court against Cassidy, Snow, and Cavanaugh.³ Among the several claims in Terry's complaint, he alleged that all three defendants committed abuse of process by filing an answer and counterclaim against him in his collection action against Cassidy, and that Snow and Cassidy specifically did so by filing numerous motions for attorney's fees and costs in the various proceedings.⁴ In his "prayer for relief," he requested that the order requiring him to pay attorney's fees and costs to Cassidy and Snow be suspended until his claims were adjudicated.

On April 15, 2021, Cassidy, Snow, and Cavanaugh each filed motions to dismiss pursuant to rule 12 (b) (6). Terry opposed the defendants' motions, and following a hearing, the judge allowed the motions, reasoning, inter alia, that Terry failed to

³ Terry appears to engage in a pattern, where he repeatedly files suit against Cassidy, and in doing so, adds the most recent attorney who represented Cassidy as a defendant.

⁴ In addition, Terry asserted that Snow and Cavanaugh violated the Massachusetts Rules of Professional Conduct, see S.J.C. Rule 3:07, as amended, 480 Mass. 1315 (2018), and the Massachusetts Rules of Civil Procedure, and sought to have a judge refer them to the Massachusetts Board of Bar Overseers for disciplinary action. Those claims, too, were dismissed, but the dismissal of those claims is not challenged on appeal.

establish, as required, that the defendants used process for an ulterior or illegitimate purpose. Judgment was entered in favor of the defendants. Terry filed a timely notice of appeal.

Discussion. We review de novo the allowance of a motion to dismiss under rule 12 (b) (6). See Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). In doing so, we accept "the facts asserted in the complaint as true and draw[] all reasonable inferences in the plaintiff's favor" to determine "'whether the factual allegations in the complaint are sufficient, as a matter of law, to state a recognized cause of action or claim, and whether such allegations plausibly suggest an entitlement to relief.'" Dunn v. Genzyme Corp., 486 Mass. 713, 717 (2021), quoting Dartmouth v. Greater New Bedford Regional Vocational Tech. High Sch. Dist., 461 Mass. 366, 374 (2012).

To establish a prima facie claim for abuse of process, a plaintiff must allege sufficient facts to support a finding that "(1) 'process' was used; (2) for an ulterior or illegitimate purpose; (3) resulting in damage." Datacomm Interface, Inc. v. Computerworld, Inc., 396 Mass. 760, 775-776 (1986), quoting Jones v. Brockton Pub. Mkts., Inc., 369 Mass. 387, 389 (1975).

1. Whether process was used. We must first determine whether Terry alleged facts that would support a conclusion that process was used in this case. "[I]n the context of abuse of

process, 'process' refers to the papers issued by a court to bring a party or property within its jurisdiction." Jones, 369 Mass. at 390. Thus far, in Massachusetts, abuse of process claims "have been limited to three types of process: writs of attachment . . . ; the process used to institute a civil action . . . ; and, the process related to the bringing of criminal charges" (citations omitted). Id. The question presented here is whether the filing of an answer and counterclaim constitutes process.⁵ The judge concluded that the defendants' action of filing an answer and counterclaim in response to Terry's complaint against Cassidy did not constitute process. We agree. An answer and counterclaim is not a "paper[] issued by a court to bring a party or property within its jurisdiction." Id. Nor does it fall within any of the three categories of process to which Massachusetts has limited abuse of process claims. "Although [Terry] has suggested that we broaden our definition of process to include [answers and counterclaims], we decline to do so on the facts of this case." Id.

2. Ulterior or illegitimate purpose. Even if we were to conclude that the facts alleged in Terry's complaint

⁵ To the extent that Terry argues that Snow and Cassidy committed an abuse of process by filing numerous motions for attorney's fees and costs, the filing of motions does not constitute process for purposes of an abuse of process claim. Compare Alphas Co. v. Kilduff, 72 Mass. App. Ct. 104, 115 (2008) (discovery activities not "process" for abuse of process claim).

sufficiently established that the defendants used process, we further agree with the judge that Terry failed to assert facts demonstrating that process was used for an ulterior or illegitimate purpose.

"To constitute a cause of action for abuse of process 'it must appear that the process was used to accomplish some ulterior purpose for which it was not designed or intended, or which was not the legitimate purpose of the particular process employed.'" Quaranto v. Silverman, 345 Mass. 423, 426 (1963), quoting Gabriel v. Borowy, 324 Mass. 231, 236 (1949). To satisfy the ulterior purpose element, it is not enough to show "improper motive of vexation, harassment, or annoyance. . . . Rather, the ulterior purpose must be to gain some collateral advantage." Psy-Ed Corp. v. Klein, 459 Mass. 697, 713-714 (2011). See id. at 713 n.35 ("An ulterior purpose is not simply the intent to harm the other party directly by bringing suit, but rather the intent to gain some other end indirectly").

Terry claims that the defendants' failure to produce evidence or provide specific factual allegations to support their counterclaims shows that the counterclaims were brought for an ulterior purpose. "Whether a person has grounds to bring a claim may of course be relevant in assessing whether he had an ulterior purpose." Millennium Equity Holdings, LLC v. Mahlowitz, 456 Mass. 627, 637 (2010). However, the bringing of

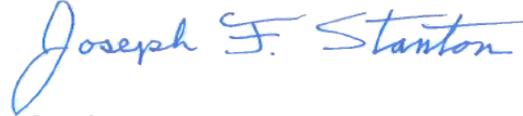
a groundless claim, alone, is not enough to show ulterior motive. Psy-Ed Corp., 459 Mass. at 715. Here, because Terry failed to allege in his complaint that the defendants brought the counterclaims for a purpose other than which they were intended in order to "obtain a collateral advantage, not properly involved in the proceeding itself," Powers v. Leno, 24 Mass. App. Ct. 381, 383-384 (1987), quoting Cohen v. Hurley, 20 Mass. App. Ct. 439, 442 (1985), he failed to sufficiently allege a cause of action for abuse of process against each of the defendants. Dismissal of these claims was therefore appropriate.

3. Request for appellate attorney's fees and costs. The defendants request appellate attorney's fees and costs, pursuant to Mass. R. A. P. 25, as appearing in 481 Mass. 1654 (2019), on the ground that Terry's appeal is frivolous, not advanced in good faith, and intended for delay. See Avery v. Steele, 414 Mass. 450, 455 (1993) ("Appellate courts are authorized by statute to award double costs to an appellee in a civil case when the appeal is frivolous, immaterial, or intended for delay"). We agree that such a remedy is appropriate here. Therefore, consistent with the requirements of Fabre v. Walton, 441 Mass. 9, 10 (2004), the defendants are invited to file a verified and itemized application for appellate attorney's fees and costs within fourteen days of the date of this decision.

Terry will have fourteen days thereafter in which to file any opposition to the amounts requested.

Corrected judgment affirmed.

By the Court (Desmond, Hand & Brennan, JJ.⁶),



Clerk

Entered: May 25, 2022.

⁶ The panelists are listed in order of seniority.