

STATE OF MINNESOTA

FILED

DISTRICT COURT

COUNTY OF HENNEPIN

2009 OCT -6 AM 9:47

FOURTH JUDICIAL DISTRICT

Chris Gregerson,

BY \_\_\_\_\_ DEPUTY  
HENN CO. DISTRICT  
COURT ADMINISTRATOR

File No. 27-CV-09-13489

Plaintiff,

**ORDER AND MEMORANDUM RE  
DEFENDANTS' MOTION TO DISMISS  
AND PLAINTIFF'S MOTION FOR SANCTIONS**

v.

\_\_\_\_\_  
Morgan  
Smith, Vladimir Kazaryan, Smith and Raver,  
LLP, Saliterman & Siefferman, PC, and Bassford  
Remele, PA, Minnesota Law Firms,

The above-entitled matter came on for a hearing before the undersigned Judge of District Court on January 20, 2009, on Defendants \_\_\_\_\_ Morgan Smith, Vladimir Kazaryan, Smith and Raver, LLP, Saliterman & Siefferman, PC, and Bassford Remele, PA, Minnesota Law Firms, motion to dismiss.

Appearances:

Chris Gregerson appeared pro se.

Paul C. Peterson, Esq., appeared on behalf of Defendants Bassford Remele PA, Boris Parker and Saliterman & Siefferman PC.


Morgan G. Smith, Esq., appeared on behalf of himself and Defendant Smith & Raver LLP.

Based upon all the files, records, and proceedings herein, including the arguments of counsel, the Court makes the following **ORDER**:

1. Defendants' motion to dismiss is **GRANTED** in part and **DENIED** in part.
2. The attached memorandum is incorporated herein as if set forth in full.

DATED:

BY THE COURT:

  
\_\_\_\_\_  
John Q. McShane  
Judge of District Court

## MEMORANDUM

This matter comes before this Court on Defendants' Motion to Dismiss and Plaintiff's Motion for Sanctions.

## INTRODUCTION

Plaintiff Chris Gregerson (Gregerson) is suing the attorney who represented his opponents in a copyright infringement lawsuit he began in federal district court in March, 2006. He has also named the law firm that the attorney was with at the time and for whom he works now. Gregerson also sued the individual defendants [REDACTED] and [REDACTED], but has settled and released his claims against them.

Gregerson's claims against the attorney and his firms, Defendants Boris Parker, Saliterman & Sifferman and Bassford Remele (Parker Defendants), are for malicious prosecution, abuse of process, and conspiracy. Gregerson also claims that the Saliterman and Bassford firms are vicariously liable for Parker's conduct under the doctrine of respondeat superior. He seeks treble damages under Minn. Stat. §§ 481.07 and 481.071. The lawyer and the firms seek dismissal of Gregerson's claims.

## APPLICABLE LEGAL STANDARD

In deciding a motion to dismiss, the Court must assume all facts in the Complaint to be true and construe all reasonable inferences from those facts in the light most favorable to the complainant. Northern States Power Co. v. Franklin, 265 Minn. 391, 395, 122 N.W.2d 26 (Minn. 1963). But the court need not accept "conclusions of law and unreasonable inferences or unwarranted deductions of fact." Hiland Dairy Inc. v. Kroger Co. 402 F.3d 968, 973 (8<sup>th</sup> Cir. 1986), cert. denied, 398 U.S. 961 (1969). The Court grants a motion to dismiss only if it is clear

beyond any doubt that no relief could be granted under any set of facts consistent with the allegations in the Complaint. Northern States Power Co. at 391, 27. The Court may grant a motion to dismiss on the basis of a dispositive issue of law. Neitzke v. Williams, 490 U.S. 319, 326, 109 S. Ct. 1827 (1989).

A motion to dismiss will be granted if it is not “possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” N. States Power Co. v. Minn. Metro. Council, 684 N.W.2d 485 (Minn. 2004); Noske v. Friedberg, 670 N.W.2d 740 (Minn. 2003). A motion to dismiss must be denied if the plaintiff has alleged sufficient facts to state a claim; the required showing is a minimal one. Id. Rule 12.02 of the Minnesota Rules of Civil Procedure requires this Court to dismiss a claim if the Court does not have subject matter jurisdiction. Minnesota Rule of Civil Procedure 12.02 allows for a motion to be made to dismiss a claim because it has failed to state a claim on which relief can be granted. Minn. R. Civ. P. 12.02 (e).

### **ANALYSIS**

Defendants raise seven arguments in their motion to dismiss: (1) Plaintiff Gregerson voluntarily released his claims against them; (2) the Parker Defendants are not liable for conspiracy because there was no underlying tort conspired to; (3) Minn. Stat. §§ 481.07 and 481.071 do not provide a private cause of action; (4) the Parker Defendants cannot be liable for malicious prosecution because their federal claims and counterclaims were brought with probable cause as a matter of law; (5) there is no factual support that Parker acted outside his role as counsel or had any ulterior motive in his representation of his client; (6) Defendants are immune from liability for their representation in this matter under the *Noerr-Pennington* doctrine; and (7) the damages Gregerson seeks are not recoverable.

1. **Plaintiff Gregerson voluntarily released his claims against [REDACTED] and its lawyers.**

A settlement and waiver agreement was entered into between Gregerson, [REDACTED], and [REDACTED] subsequent to the commencement of this lawsuit. It is undisputed that this agreement released Gregerson's claims of malicious prosecution, abuse of process, and conspiracy against [REDACTED] and [REDACTED] in exchange for a cash payment. Defendants argue that the present claims against them, as [REDACTED]'s agents, were waived under the explicit language of the agreement, which provides in relevant part, "Gregerson hereby releases and forever discharges [REDACTED], [REDACTED] and [REDACTED], and all of their...agents, from any and all past, present and future claims...This agreement shall insure to the benefit of and be binding upon the attorneys, agents...of all parties to this Agreement."

Plaintiff replies that the Parker Defendants were not parties to the settlement and were not intended to be third party beneficiaries of it. Gregerson maintains that it was the intention of the parties to release [REDACTED] and [REDACTED], along with their present agents, but to allow the suit against the remaining tort-feasors to continue.

Plaintiff notes that, at the very least, the agreement is ambiguous and, therefore, the court can examine external evidence to decipher the parties' true intentions. Gregerson cited an e-mail message sent during the waiver negotiations that clearly conveyed his intention to pursue all claims against the remaining Defendants.

There is a genuine issue of material fact as to whether the waiver Agreement between Gregerson, [REDACTED] and [REDACTED] extended to the Parker Defendants in this case. Therefore, Defendants are not entitled to a Rule 12 dismissal. Plaintiff could prove facts sufficient to show he is entitled to relief on his claims notwithstanding the alleged waiver.

2. **Defendant Parker's lawyers are not liable for conspiracy because there was no underlying tort conspired to.**

According to defendants, there is no such thing as a civil action for conspiracy. *Harding v. Ohio Cas. Ins. Co.*, 41 N.W.2d 818, 825 (Minn. 1950). Liability is predicated upon the tort committed by the conspirators and not upon the conspiracy, and allegations of conspiracy do not change the nature of the cause of action. *Id.* Additionally, a lawyer is not subject to a claim of conspiracy with his client absent any allegation that the lawyer acted outside the scope of his representation. See e.g. *General Refractories Co. v. Fireman's Fund. Ins. Co.*, 337 F.3d 297, 3130-314 (3d Cir. 2003).

In the present action Defendants argue Gregerson failed to allege in his complaint any underlying tort actually conspired to amongst the Defendants. Gregerson responds that his complaint referenced the underlying torts allegedly conspired to, including the torts of malicious prosecution and abuse of process.

Gregerson's complaint alleges a conspiracy among the Defendants to commit the torts of malicious prosecution and abuse of process. Consequently, Defendants are not entitled to a Rule 12 dismissal of the conspiracy claim. Gregerson's complaint states a claim for conspiracy upon which relief could be granted.

3. **Plaintiff Gregerson's claims for relief under Minn. Stat. §§ 481.07 and 481.071 do not provide a private cause of action.**

Defendants' motion to dismiss Plaintiff's claim for liability under these sections must be granted. The Minnesota Court of Appeals made clear in the case of *Milavetz, Gallop and Milavetz, P.A. v. Hill*, 1998 WL 422229 (Minn. Ct. App. 1998), that an attorney-client relationship between a plaintiff and defendant is an essential element of liability under §§ 481.07 and 481.071. As a result, Defendants cannot be held liable under those statutes in this case and

Plaintiff Gregerson, with respect to this claim, failed to state a claim upon which relief can be granted. Gregerson concedes this point.

4. **Defendant Parker's lawyers cannot be liable for malicious prosecution because Parker Defendants had probable cause to pursue their federal claims and counterclaims as a matter of law.**

Defendant alleges that a party claiming malicious prosecution must demonstrate that (1) a lawsuit was brought without probable cause and with no reasonable grounds on which to base a belief that the party would ultimately prevail on the merits; (2) the lawsuit was started and prosecuted with malicious intent; and (3) the lawsuit was ultimately terminated in favor of the defendant. *Jordan v. Lamb*, 392 N.W.2d 607, 609 (Minn. Ct. App. 1986).

Defendants contend that they cannot be held liable for malicious prosecution because their claims and defenses were based on probable cause as demonstrated by the fact that three of their counterclaims survived summary judgment in federal court.

Gregerson replies that although it is true that three of Defendants' counterclaims survived summary judgment in federal court, that fact is not proof that those claims were brought in good faith. It is proof of the fact that the lawyers deliberately and successfully misled the Court.

The fact that three of Defendants' counterclaims survived summary judgment in federal court does not prove as a matter of law that Defendants possessed probable cause for bringing those claims. All three claims may have survived summary judgment based on the false allegation that Zubitskiy was a real person. It would not be appropriate to dismiss Gregerson's claim for malicious prosecution if it can be proven that the Defendants successfully misled the court in a prior proceeding.

5. **Gregerson's abuse of process claim should be dismissed because there is no support that Parker acted outside his role as counsel or had any ulterior motive in his representation of his client.**

The essential elements of an abuse of process claim are the existence of an ulterior purpose and the act of using the process to accomplish a result not within the scope of the proceedings in which it was issued, whether such result might otherwise be lawfully obtained or not. *Kellar v. VonHoltum*, 568 N.W.2d 186, 192 (Minn. Ct. App. 1997). The test is whether the process was used to accomplish an unlawful end or to compel a party to do a collateral act that he is not legally required to do. *Kittler & Hedelson v. Sheehan Props., Inc.*, 203 N.W.2d 835, 840 (Minn. 1973). Defendants claim there is no evidence to support such a claim.

Defendants' motion to dismiss Gregerson's abuse of process claim should be granted. Defendants' attempts to shut Gregerson's website down through prosecuting their federal counterclaims was not an improper ulterior motive, but brought openly by Defendants for the purpose of preventing damage to their business interests that they claim would have been caused by the defamatory language the website allegedly contained. Contrary to Gregerson's contentions, this was not an improper motive in violation of his First Amendment free speech rights, but a legitimate use of process to prevent potential harm to the Defendants.

6. **Defendants are immune from liability for their representation in this matter under the Noerr-Pennington doctrine.**

Under the *Noerr-Pennington* doctrine, the act of filing a lawsuit is generally immune from tort liability under the protection of the First Amendment. See, e.g. *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Only "sham" lawsuits fall outside the cloak of immunity that the *Noerr-Pennington* doctrine provides. *Porous Media*, 186 F.3d at 1080 n. 4. A lawsuit is a "sham" and unprotected only where a defendant's resort to the courts is accompanied or characterized by illegal and reprehensible practices such as perjury,

fraud, conspiracy with or bribery of government decision makers, or misrepresentation, or is so clearly baseless as to amount to an abuse of process. *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 487 (8<sup>th</sup> Cir. 1985).

Defendants claim protection under *Noerr-Pennington* by arguing that: (1) they did nothing more than simply represent and advocate on behalf of their clients; and (2) that Gregerson has failed to allege such egregious conduct on their behalf that could classify their claims and counterclaims in federal court as a “sham” that falls outside the protection of the doctrine.

Gregerson responds that the claims and counterclaims in federal court were based on forged evidence, perjured testimony and baseless claims, which are not protected by the *Noerr-Pennington* doctrine.

Defendants will be entitled to protection under *Noerr-Pennington* if Gregerson is unsuccessful in proving that they participated in fraudulent and illegal conduct. But, at this stage of the proceedings, Plaintiff has sufficiently stated claims upon which relief can be granted, notwithstanding Defendants’ invocation of the *Noerr-Pennington* defense.

7. **Plaintiff Gregerson failed to state a claim upon which relief can be granted because the damages he seeks are not recoverable.**

Gregerson seeks three categories of damages in his Complaint: (1) attorney’s fees and costs from the underlying action; (2) loss of income for the time he spent representing himself; and (3) deprivation of his First Amendment rights for one week in 2005 when the TRO restricted his use of his web page.

Defendants’ first argument regarding damages is that Gregerson cannot recover attorney’s fees, costs and lost income because he represented himself. Second, Defendants are arguing that Gregerson has not established special injury in his malicious prosecution claim.



Third, Defendants claim they cannot be held responsible for the damages to Gregerson's First Amendment rights, because they had nothing to do with the TRO issued in October of 2005.

Gregerson has pled damages sufficient to survive a motion to dismiss. Judge Montgomery's attorney's fees ruling in the federal litigation is not binding on this court and it was limited to whether attorney's fees were recoverable from a pro se litigant under a certain federal statute which is not at issue here. Additionally, Gregerson is not required to show special injury under Minnesota law. Therefore, the first two types of damages claimed by Gregerson are potentially recoverable.

However, Gregerson has not shown how the Parker Defendants could be responsible for damages arising from the TRO issued in October, 2005, when the Parker Defendants were not representing the defendants. Consequently, Gregerson's third prayer for damages must be dismissed because such damages are not recoverable as a matter of law.

#### **PLAINTIFF'S MOTION FOR SANCTIONS**

Plaintiff's Motion for Sanctions is based on the following facts. On July 14, 2009, Plaintiff entered into a settlement agreement with [REDACTED]. The drafter of that document, Robert Smith, acting as [REDACTED]'s attorney, did not include a confidentiality clause. On Friday, July 24, Gregerson received a copy of a subpoena from Paul Peterson to Robert Smith seeking production of the settlement agreement between Gregerson and [REDACTED], giving a date and time for compliance of Monday, July 27, at 10:00 am. According to Gregerson, this allowed him one business hour, between 9:00 a.m. and 10:00 a.m. on a Monday, to bring a timely motion to quash the subpoena.

On July 26, Gregerson e-mailed Robert Smith requesting that he keep the agreement secret and confidential until he served his motion to quash on Monday, July 27. Gregerson later

learned that Robert Smith produced the settlement agreement by e-mail at 10:44 a.m. on Friday, July 24, one day after the July 23 signature date on the subpoena.

Plaintiff makes the following arguments in support of its motion: (1) Defendants failed to comply with the timely notice to parties requirement of Minn. R. Civ. P. 45.01(e), because Gregerson received notice less than one business day before the production date; and (2) Defendants violated Minn. R. Civ. P. 45.04(b) by failing to destroy or sequester the settlement agreement until Gregerson's claim of privilege was resolved.

Defendants reply that: (1) proper notice of the subpoena was given to Gregerson in compliance with Rule 45; and (2) Gregerson's privilege claim is meritless, because no such privilege exists and because the settlement agreement contained no confidentiality clause.

The mere assertion of a privilege is not sufficient to establish it. Instead, a party claiming a privilege must identify the privilege and has the burden of establishing it. *Sprader v. Mueller*, 121 N.W.2d 176, 180 (Minn. 1963). Defendants claim that Gregerson has failed to assert any specific privilege under Minnesota law and therefore has failed to establish that he is protected by one.

This Court agrees and therefore denies Plaintiff's motion for sanctions.