IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

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KIWI CONSTRUCTION, LLC, Plaintiff, v. PAUL PONO, LANNY ROBERTS, and BIG BEAR CONSTRUCTION, INC., Defendants.	Case No. ST-2013-CV-011 Action for Personal Injury, Negligence, and Damages
PAUL PONO AND LANNY ROBERTS, Third-party Plaintiffs, v. PHILIP HOLFORD, Third-party Defendant.	Action for Abuse of Process, and "Interference with Brusiness [sic] Practices"

MEMORANDUM OPINION

Before the Court is a Motion to Dismiss Third Party Complaint (the "Motion"), which was filed on June 10, 2013.[1] Defendants filed a response in opposition on July 11, 2013. No reply brief was filed. Plaintiff and alleged Third-party Defendant Philip Holford ("Holford") request that the Court dismiss the putative causes of action asserted by Defendants in their Answer because each cause of action fails to state a claim upon which relief can be granted. The Court agrees, and the Motion will therefore be granted.

BACKGROUND

On January 8, 2013, Plaintiff Kiwi Construction, LLC ("Kiwi") filed a multi-count complaint against Defendants. In its Complaint, Kiwi alleges that Defendants breached a contract to perform certain construction work on real property know as Parcel No. 5A, Estate Peter Bay, St. John, Virgin Islands.[2] Defendants moved to dismiss Kiwi's Complaint, but by Order dated April 14, 2014, the Court denied Defendants' motion as to all claims asserted by Kiwi against Defendants Paul Pono and Lanny Roberts, and stayed all claims asserted by Kiwi against Defendant Big Bear Construction, Inc. while certain claims were submitted to arbitration.

[1] The Motion was filed by Plaintiff's counsel, but the Motion does not identify on whose behalf it was filed.
[2] Compl. ¶ 6, Ex. 1 at 1.

Defendants then filed their Answer to Kiwi's Complaint. In their Answer, Defendants purport to state a "counter claim and third party claim" against both Kiwi and Holford. (These claims will hereinafter be referred to as Defendants' "Counterclaim" for the sake of clarity.) Defendants identify Holford as a "third party defendant,"[3] but do not list Kiwi as a counterclaim defendant. Regardless, Defendants' Counterclaim purports to state one claim for abuse of process against Kiwi, and one claim for "interference with brusiness [sic] practices" against both Kiwi and Holford. Plaintiff responded by filing the Motion now before the Court.

In response to Plaintiff's Motion, Defendants simultaneously filed a response in opposition and moved to amend their Counterclaim. In their response in opposition, Defendants clarify that their abuse-of-process claim was directed at Kiwi alone. Defendants also claim that their "interference with brusiness [sic] practices" claim is not "based upon false and disparaging statements" as alleged in the Counterclaim, but is rather based on the alleged "conversion of Defendants['] equipment and materials," which conversion allegedly precluded Defendants "from honoring their other contracts." The Counterclaim contains no allegations of conversion.

Defendants contend that their motion to amend the Counterclaim was filed to clarify the allegations in Defendants' Counterclaim. But Defendants never amended their Counterclaim. The motion to amend that was filed contemporaneously with Defendants' response in opposition was denied without prejudice by Court Order dated July 25, 2013 due to Defendants' failure to comply with the applicable rules of procedure. Defendants renewed their motion to amend on August 5, 2013, but withdrew said motion by filing dated December 18, 2013. Therefore, the only causes of action for this Court to analyze are those set forth in the Counterclaim, as originally propounded in Defendants' Answer.

LEGAL STANDARD

To survive a motion to dismiss for failure to state a claim upon which relief can be granted, "a [pleading] must contain sufficient factual matter, accepted as true, 'to state a claim for relief that is plausible on its face.'"[4] All material allegations in the [pleading] are taken as true, and the Court must construe all facts in a light most favorable to the non-moving party.[5] However, a plaintiff is obliged to provide "more than labels and conclusions."[6] Determining whether a [pleading] states "a plausible claim for relief" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[7] In making the plausibility determination, the Supreme Court of the Virgin Islands instructs that:

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[3] Defendants' characterization is incorrect. A third-party defendant is a defendant who may be liable to an original defendant for some or all of a judgment against the original defendant. Defendants' alleged right to relief against Holford is not contingent upon a finding of liability against Defendants. Therefore, Holford cannot properly be characterized as a third-party defendant.
[4] *Ashcroft v. Iqbal*, 559 U.S. 662, 677 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2002)).
[5] *L'Henri, Inc. v. Vulcan Materials Co.*, Civ. No. 206-170, 2010 WL 924259, at *1 (D.V.I. Mar. 11, 2010) (citing *Christopher v. Harbury*, 536 U.S. 403, 406 (2002)).
[6] *Twombly*, 550 U.S. at 555.
[7] *Iqbal*, 559 U.S. at 679.

> First, the Court must take note of the elements a plaintiff must plead to state a claim so that the court is aware of each item the plaintiff must sufficiently plead. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked assertions devoid of further factual enhancement. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief.[8]

If the remaining facts are sufficient enough for the court to draw a reasonable inference that the defendant is liable based on the elements the plaintiff must plead, then the claim is considered plausible, and survives a motion to dismiss.[9]

ANALYSIS

Defendants purport to state two claims: (I) abuse of process; and (II) "interference with brusiness [sic] practices."

I. ABUSE OF PROCESS

The tort of abuse of process has not been defined by the Supreme Court of the Virgin Islands. This Court must therefore determine the soundest rule of law for the Virgin Islands through application of the standard set forth in *Banks v. International Rental & Leasing Corp.*[10] and its progeny.[11]

a. Defining the tort of abuse of process

In the past, courts in this jurisdiction have defined an abuse of process as the use of process against another "primarily to accomplish a purpose for which it is not designed."[12] Such purposes include, for example, using process to compel a civil defendant's appearance in court by arrest rather than by service of a summons,[13] or causing an individual to be arrested in order to protect an employer from a false imprisonment lawsuit.[14] Prior to *Banks*, courts in this jurisdiction applied the principle summarized in the Restatement (Second) of Torts § 682, which states that "[o]ne who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of

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[8] *Brady v. Cintron*, 55 V.I. 802, 822–23 (2011) (citing *Joseph v. Bureau of Corrections*, 54 V.I. 644, 649–50 (2011)).
[9] *Id.*
[10] 55 V.I. 967 (V.I. 2011).
[11] *See, e.g., Malloy v. Reyes*, 61 V.I. 163, 176 (V.I. 2014) (citing *Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 757 (V.I. 2014) (explaining that, when confronted with a question of law not foreclosed by binding precedent, the Superior Court must evaluate past approaches taken by courts in the Virgin Islands, the approach of the majority of other jurisdictions—along with any competing minority rules—and most importantly, consider which rule represents the soundest rule of law for the Virgin Islands).
[12] *Deary v. Evans*, 570 F. Supp. 189, 200 (D.V.I. 1983) (quoting RESTATEMENT (SECOND) OF TORTS § 682).
[13] *Corkins v. Darrow*, 23 V.I. 359, 362 (V.I. Super. Ct. 1988).
[14] *Yeamans v. Snook*, 15 V.I. 129, 139 (D.V.I. 1979)

process."[15] Comment a to Section 682 is illustrative as to the scope of liability historically imposed in this jurisdiction: "[t]he gravamen of the misconduct for which the liability stated in this Section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings."[16] Thus, historically, liability for abuse of process only attached for actions taken after the initiation of a lawsuit.

Treatment of this tort is consistent across jurisdictions, and mirrors the past approach of this jurisdiction. Generally, an action for abuse of process "is concerned with the improper use of process after it has been issued."[17] When analyzing an alleged abuse of process, "[t]he purpose for which the process is used, once it is issued, is the only thing of importance."[18] "[B]asic to the tort . . . is the requirement that the defendant perform 'further acts' after issuance of process 'which represent the perversion or abuse of the legitimate purpose of that process."[19] Liability attaches to the "use of process as a club by which to extort something unrelated to the process from the other party."[20] Phrased differently, "[t]he wrong arises when a legal action initiated with sufficient factual and legal basis is used improperly as leverage, often in the form of a threat or extortion to obtain some collateral benefit not within the scope of the original action."[21] However, the tort of abuse of process has "the potential to impose an undue chilling effect on the ordinary citizen's willingness to . . . bring a civil dispute to court, and, as a consequence, the tort ha[s] traditionally been regarded as . . . disfavored[.]"[22] Therefore, the tort of abuse of process "should be construed narrowly in order to protect the right of access to the courts."[23]

Jurisdictions uniformly require proof of two elements: (1) that the defendant acted with an improper purpose or ulterior motive; and (2) used process in a manner that would not be proper in the normal prosecution of a case.[24] Regarding the first element, an improper purpose "usually takes the form of coersion [sic] to obtain a collateral advantage, not properly involved in the proceeding itself[.]"[25] Process has been used for an improper purpose when it is "used to accomplish some end which is without the regular purview of the process, or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be required to do."[26] Regarding the second element, a plaintiff must demonstrate that process was used "for a purpose other than that for which the process was designed[.]"[27] "[T]he gist of the

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[15] RESTATEMENT (SECOND) OF TORTS § 682.
[16] *Id.* cmt. a.
[17] *Jackson & Scherer, Inc. v. Washburn*, 496 P.2d 1358, 1366 (Kan. 1972).
[18] PROSSER & KEETON ON TORTS § 121, at 897 (5th ed. 1984).
[19] *Baglini v. Lauletta*, 768 A.2d 825, 831–32 (N.J. Super. Ct. App. Div. 2001) (citations omitted).
[20] *Pfandler v. Bruce*, 98 P.3d 1146, 1152–53 (Or. Ct. App. 2004) (citations omitted).
[21] Timothy P. Getzoff, Comment, *Dazed and Confused In Colorado: The Relationship Among Malicious Prosecution, Abuse Of Process, And The Noerr-Pennington Doctrine*, 67 U. COLO. L. REV. 675, 682–83 (1996).
[22] *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 59, 116 P.3d 323, 339 (quoting *Sheldon Appel Co. v. Albert & Oliker*, 765 P.2d 165, 501–02 (Cal. 1989)).
[23] *Durham v. Guest*, 145 N.M. 694, 701, 2009-NMSC-007, 29, 204 P.3d 19, 26.
[24] 1 AM. JUR. 2d *Abuse of Process* § 5. *See generally id.* nn. 1–4 (collecting cases).
[25] *Tulsa Radiology Assocs., Inc. v. Hickman*, 1984 OK CIV APP 11, ¶ 6, 683 P.2d 537 (quoting Prosser, HANDBOOK OF THE LAW OF TORTS, § 121, at 857 (4th Ed. 1971)). *Accord Wilson v. Hayes*, 464 N.W.2d 250, 266 (Iowa 1990).
[26] *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980) (citing 1 AM. JUR. 2d *Abuse of Process* § 4 (1962)).
[27] *McGee v. Feege*, 535 A.2d 1020, 1026 (Pa. 1987).

action lies in the improper use after issuance."[28] "[T]here is no abuse of process . . . when the process is used to accomplish the result for which it was created, regardless of an incidental or concurrent motive of spite or ulterior purpose."[29]

Given the uniform treatment of this tort across jurisdictions, the soundest rule of law for the Virgin Islands is that a plaintiff must plead two elements to state a claim for abuse of process: (1) while acting with an ulterior motive or an improper purpose, (2) the defendant used process in a manner that would not be proper in the normal prosecution of a case.

b. Defendants have not stated a claim for abuse of process.

Defendants have pleaded that Kiwi used process for an improper purpose. As discussed above, the use of process to secure some objective collateral to the proceeding itself is an improper purpose. Here, Defendants have alleged that Kiwi's Complaint "was . . . designed . . . to coerce Defendants into settling its . . . claim." The settlement of a lawsuit is not an object that is collateral to that suit. Indeed, parties frequently settle civil lawsuits instead of going to trial. If Kiwi's sole purpose behind filing its suit was to obtain a settlement of same, then Kiwi was not pursuing an improper purpose by filing its Complaint. However, Defendants have also pleaded that "Plaintiff . . . threatened [Defendants] with the destruction of their business,"[30] and that "Plaintiff['s]. . . tactics have been motivated by a desire to extort funds from Defendants . . . that [Plaintiff is] not entitled to."[31] Since "the improper purpose [requirement] relates to an extortion or coercion attempt by one person to do some other thing," Defendants have satisfied the first requirement for pleading an abuse of process claim.

But Defendants have not stated a claim for abuse of process because they have not pleaded that Kiwi used process in a manner that would not be proper in the normal prosecution of a case. "A regular and legitimate use of process, though with an ulterior motive or bad intention is not [an] abuse of process."[32] Defendants allege that Kiwi "wrongfully and intentionally filed its Complaint asserting claims knowing that there was no basis for the claims and further knowing that its pursuit of the claim was purposefully designed to improperly coerce Defendants into settling its baseless claim, as a form of extortion."[33] Based on this allegation, Defendants conclude that Kiwi's "act of filing the Complaint" renders it liable for abuse of process.[34]

By alleging that Kiwi "wrongfully and intentionally filed its Complaint," the only process implicated by Defendants' Counterclaim is a summons. However, "a summons and complaint are properly used for the institution of a civil suit."[35] Thus, "the filing of a lawsuit is a regular use of

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[28] *Morowitz*, 423 A.2d at 198 (citations omitted).
[29] *Bothmann v. Harrington*, 458 So. 2d 1163, 1169 (Fla. Dist. Ct. App. 1984) (citations omitted).
[30] Countercl. ¶ 14.
[31] *Id.* ¶ 9.
[32] *Comfax Corp. v. North American Van Liens*, 638 N.E.2d 476, 481 (Ind. Ct. App. 1994) (citing *Brown v. Robertson*, 92 N.E.2d 856, 858 (Ind. Ct. App. 1950)).
[33] Countercl. ¶ 12.
[34] *Id.*
[35] *Friedman v. Dozorc*, 312 N.W.2d 585, 588 (Mich. 1981).

process, and therefore may not on its own fulfill the requirement of an abusive act, even if the decision to sue was influenced by a wrongful motive, purpose or intent."[36] According to Defendants' allegations, Kiwi used a summons in the exact manner that it is meant to be used: to require a defendant to appear and answer.[37] Since Defendants have not alleged any misuse of process on Kiwi's part, Defendants have not stated a claim for abuse of process.

II. "INTERFERENCE WITH BRUSINESS [SIC] PRACTICES"

Allegations of interference with the business relationships of another are actionable in this jurisdiction as claims for intentional interference with existing contractual relations or intentional interference with prospective business relations.[38] To state a claim upon which relief can be granted for intentional interference with existing contractual relations, a party must plead the existence of a contract between itself and a third party.[39] To state a claim for intentional interference with prospective business relations, a party must plead the existence of "a professional or business relationship that is reasonably certain to produce an economic benefit for [itself]."[40]

Defendants have pleaded neither of these things in their Counterclaim. Defendants only allege that the "tactics" of Kiwi and Holford "have directly impacted Defendants' business opportunities in the territory."[41] Defendants have not stated a claim for intentional interference with existing contractual relations because they have not pleaded the existence of a contractual relationship with which Kiwi or Holford allegedly interfered. Defendants have not stated a claim

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[36] *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 1998 ME 70, ¶ 7, 708 A.2d 283, 286. The question of whether the filing of a summons and complaint, alone, can support a claim for abuse of process is a question of common law for which there is no binding precedent in this jurisdiction. However, an "overwhelming majority" of states hold that "the mere filing or maintenance of a lawsuit—even for an improper purpose—is not a proper basis for an abuse of process action." *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 728 P.2d 1202, 1209 (Cal. 1986). *See also id.* (collecting cases from other jurisdictions). The soundest rule of law for the Virgin Islands is to adopt this well-established principle of law. To conclude otherwise ignores the requirement that process be misused before an abuse of process action will lie. To permit an abuse-of-process action for the filing of a summons and complaint also has the undesirable effect of exposing every civil litigant to a countersuit for abuse of process, as only an allegation of improper motive would be necessary to sustain such a claim. This may disincentivize individuals from pursuing otherwise-legitimate claims, and therefore reduce access to the court.

[37] *See* BLACK'S LAW DICTIONARY 1574 (9th ed. 2009) (defining "summons").

[38] *See Donastorg v. Daily News Publ. Co.*, ST-2002-CV-117, 2015 V.I. LEXIS 105, *123–45 (V.I. Super. Ct. Aug. 19, 2015) (conducting *Banks* analyses on torts predicated upon alleged interference with the business affairs of another and defining the soundest rule of law for the Virgin Islands pertaining to claims for intentional interference with existing contractual relations and intentional interference with prospective business relations). Having reviewed the *Banks* analyses conducted in *Donastorg*, the Court is satisfied with the analysis and conclusions thereof, and hereby adopts same.

[39] *Id.* at *139. As set forth in *Donastorg* and adopted in this Memorandum Opinion, to state a claim of intentional interference with existing contractual relations, a plaintiff must plead (1) the existence of a contract between the plaintiff and a third party; (2) that the defendant knew of that contract (3) that the defendant interfered with the contract using improper means or with an improper motive; and (4) that the plaintiff was damaged as a result. *Id.* at *139–40.

[40] *Id.* at *145. As set forth in *Donastorg* and adopted in this Memorandum Opinion, to state a claim of intentional interference with prospective business relations, a plaintiff must plead (1) the existence of a professional or business relation that is reasonably certain to produce an economic benefit for the plaintiff; (2) intentional interference with that relationship by the defendant; (3) that was accomplished through improper means or for an improper purpose; and (4) that the defendant's interference damaged the plaintiff. *Id.*

[41] Countercl. ¶ 10.

for intentional interference with business relations because they have not pleaded the existence of a professional relationship that was reasonably certain to produce an economic benefit for Defendants but for Kiwi and Holford's alleged misconduct. Consequently, Defendants' claim for "interference with brusiness [sic] practices" does not state a claim upon which relief can be granted.

Without more, Defendants' allegation that Kiwi and Holford "impacted Defendants['] business opportunities" does not nudge Defendants' putative cause of action from conceivable to plausible because neither Kiwi nor Holford has been put on notice of the contract or prospective relationship with which they have allegedly interfered. Rather, such an allegation is a "naked assertion[] devoid of further factual enhancement" that is not entitled to the presumption of truth for the purposes of ruling on the Motion.[42] Defendants' response in opposition similarly states that the actions of Kiwi and Holford "preclude[ed] Defendants from honoring their other contracts[,]" but fails to specify which contracts Defendants were allegedly prohibited from honoring. Due to this lack of specificity, Kiwi and Holford are left to speculate as to the behavior they must defend. Such vague allegations cannot support a cause of action for either interference with existing contractual relations or interference with prospective business relations.[43]

CONCLUSION

Defendants have not stated a claim for abuse of process or "interferences with brusienss [sic] practices." The Motion will be granted, and each cause of action set forth in Defendants' putative Counterclaim will be dismissed without prejudice. An appropriate order will follow.

Dated: January 15, 2016

ATTEST:
Estrella H. George
Acting Clerk of the Court

By: 1/15/16
Donna D. Donovan
Court Clerk Supervisor ___/___/___

DENISE M. FRANCOIS
Judge of the Superior Court
of the Virgin Islands

[42] *Brady v. Cintron*, 55 V.I. 802, 823 (V.I. 2011) (quoting *Joseph v. Bureau of Corrections*, 54 V.I. 644, 649–50 (V.I. 2011)).

[43] It must also be observed that Defendants have alleged that Kiwi and Holford "injured [Defendants] reputations in the community, by disparaging their images and standing in the community and by making false statements to third parties." Countercl ¶ 6. However, because Defendants have taken the position that "[t]he actions by [Kiwi and Holford], which resulted in interference with business practices include conversion of Defendants['] equipment and materials" but do not include "false and disparaging statements," Defendants' allegations concerning alleged false statements to third parties do not factor into this Court's analysis. Defs.' Resp. to Mot. to Dismiss 3d Party Compl. 2. Therefore, Defendants have failed to plead another element of each interference tort: that the alleged interference occur through improper means or for an improper purpose. *See Donastorg*, 2015 V.I. LEXIS 105, at *140 (existing contractual relations; *id.* at *145 (prospective business relations). Such allegations are necessary to ensure that a party is not attempting to use a lawsuit to stymie otherwise-lawful competition.