

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

Case No. 50-2009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

v.

SCOTT ROTHSTEIN, individually, and
BRADLEY J. EDWARDS, individually,

Defendants/Counter-Plaintiff.

**PLAINTIFF JEFFREY EPSTEIN'S RESPONSE IN OPPOSITION TO DEFENDANT
SCOTT ROTHSTEIN'S MOTION TO DISMISS SECOND AMENDED COMPLAINT**

Plaintiff Jeffrey Epstein ("Epstein") opposes Defendant Scott Rothstein's ("Rothstein") April 11, 2018, Motion to Dismiss Second Amended Complaint With Prejudice, and states:

INTRODUCTION

Rothstein has moved to dismiss Epstein's Second Amended Complaint with prejudice arguing (1) that Epstein has failed to properly plead the elements of civil conspiracy, and (2) the absence of a viable underlying tort to support the conspiracy claim. Rothstein also argues that dismissal with prejudice is warranted because of Epstein's purportedly dilatory conduct in prosecuting his case against Rothstein. All of Rothstein's arguments are completely unfounded and have absolutely no merit, and his Motion to Dismiss should be denied.

ARGUMENT

A. The Complaint States a Claim for Conspiracy to Commit Abuse of Process

It is well settled that "[a] motion to dismiss . . . tests the legal sufficiency of a complaint to state a cause of action and is not intended to determine issues of ultimate fact." *Landmark Funding*,

Inc. on Behalf of Naples Syndications, LLC v. Chaluts, 213 So. 3d 1078, 1079 (Fla. 2d DCA 2017) (citation omitted). “To rule on a motion to dismiss, a court’s gaze is limited to the four corners of the complaint, including the attachments incorporated in it, and all well pleaded allegations are taken as true.” *U.S. Project Mgmt., Inc. v. Parc Royale E. Dev., Inc.*, 861 So. 2d 74, 76 (Fla. 4th DCA 2003) (citations and quotation marks omitted). All reasonable inferences must be construed in favor of the nonmoving party. *Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587, 593 (Fla. 2013).

After nearly *seven* years (2,422 days or six years and seven and a half months), Rothstein belatedly surfaces for the first time through a filing which was not made by Rothstein’s own counsel, but was made instead by Jack Scarola, counsel of record for former co-Defendant and current Counter-Plaintiff, Bradley J. Edwards. Notwithstanding who may have actually penned the Motion in Rothstein’s name, the Motion is premised on the specious argument that the operative complaint fails to properly plead the elements of civil conspiracy to commit abuse of process because Epstein does not allege with whom Rothstein entered into an agreement to commit the tort of abuse of process.¹ Rothstein also argues that Epstein has not adequately pled damages necessary to sustain a civil conspiracy claim. As is readily apparent from even a cursory review of the Second Amended Complaint, Rothstein’s arguments have absolutely no merit and should be summarily rejected.

The elements of a claim for civil conspiracy are: “(a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done

¹ Epstein filed the operative Second Amended Complaint on August 22, **2011**.

under the conspiracy.” *MP, LLC v. Sterling Holding, LLC*, 231 So. 3d 517, 521–22 (Fla. 3d DCA 2017) (emphasis added; citation omitted).

Rothstein does not argue that Epstein fails to allege the core elements for civil conspiracy. Rather, Rothstein frivolously advances dismissal on the grounds that the operative complaint fails to “identify the alleged other party to the ‘agreement.’” (Mot. at p. 2). But Rothstein fails to point to any case law — and despite an exhaustive review, the undersigned can find none — which requires a plaintiff to expressly identify the co-conspirator(s) by name. This is because Florida imposes no such requirement. Furthermore, even if the law requires an allegation that one or more parties other than Rothstein are involved, the operative complaint more than sufficiently alleges that Rothstein did not act alone in the conspiracy.

Nonetheless, Epstein **has** alleged all the required elements to adequately plead a cause of action for civil conspiracy. It is undisputed that Rothstein engaged (and had an agreement to engage) in a Ponzi scheme with others, and Epstein was damaged by the acts done by the conspiracy. For example, in the “Introduction” of the Second Amended Complaint, Epstein summarizes his allegations, in pertinent part:

Through the law firm of Rothstein, Rosenfeldt and Adler, P.A (“RRA”), Rothstein **and others in this criminal enterprise** conducted a \$1.2 billion Ponzi scheme which was perpetrated with fake agreements, forged signatures and a fundamental corruption of the many legal protections that the legal system has in place. By claiming to be engaged in what was essentially legal extortion, Rothstein persuaded investors, that he could pressure defendants, including Epstein, into paying astronomical settlements and further defrauded investors by convincing them to purchase fake interests in assignments of fictitious structured settlements, including those falsely claimed to have been reached by RRA for Edwards’ clients with claims against Epstein, to the detriment of the Plaintiff. . . . **The United States government has stated that Rothstein conspired with others to use RRA as a criminal enterprise to conduct a racketeering activity, including mail and wire fraud, money laundering and conspiracy.**

(Second Amended Complaint, pp. 1-2) (emphasis added).

The Second Amended Complaint also contains specific allegations of the conspiracy:

36. Rothstein conspired and entered into an express or implied agreement to engage in the tort of abuse of process as part of a plan to defraud investors and further the Ponzi scheme. Rothstein knew or should have known of Edwards' efforts to make illegal, improper, and perverted use of the civil process.
37. The actions described in paragraphs 10 through 24 and 30 through 32 constitute overt acts in furtherance of the conspiracy.

39. As a result of the conspiracy, Epstein has been damaged by incurring additional and unnecessary attorney's fees and costs and the cost of installing an enhanced security system and retention of security personnel for the safety of Epstein and to protect his property.

(Second Amended Complaint, ¶¶ 36, 37, 39.)

In its own Complaint, the Government alleged that others in Rothstein's firm were co-conspirators and it is an indisputable matter of public record and knowledge that Rothstein *had guilty* co-conspirators. In fact, there is easily ascertainable public news that at least four others pled guilty.² Epstein properly alleged there was a conspiracy to engage in a Ponzi scheme between Rothstein and others at his firm and nothing in Florida law requires Epstein to name any of these individuals – or anyone else - in order to civilly sue Rothstein for his criminal and destructive

² Public news sources reported that Howard Kusnick, 58, of Tamarac; Stephen Caputi, 53, of Lauderhill; William Corte, 38, of Plantation; and Curtis Renie, 38, of Fort Lauderdale, were expected to plead guilty to one count of conspiracy to commit wire fraud in 2011.

[dates-for-guilty-pleas-6452603.](#)

behavior. Epstein is not required to prove anything at the pleading stage. Nonetheless, Epstein *did* name others who were involved in the abusive litigation tactics:

11. RRA employed a team of investigators on the Epstein Actions, including Michael Fisten (“Fisten”) and former Broward County Sheriff and convicted felon Ken Jenne (“Jenne”).
12. Fisten and Jenne were the primary investigators assigned to Edwards, and routinely reported to Edwards and Rothstein regarding their investigations of Epstein.

15. In October, 2009, Rothstein directed Edwards’ investigative team to bring case files into a conference room at RRA to be examined by potential investors. Then, Fisten and Jenne brought in the case files for the Epstein Actions, which numbered as many as nineteen (19) boxes.

19. Although Edwards has given sworn deposition testimony that only a few attorneys employed at RRA were directly involved in the prosecution of the Epstein Actions, a privilege log prepared by Edwards, and other documents, clearly reflect that more than eighteen (18) RRA lawyers were involved in prosecuting the Epstein Actions. Additionally, four RRA investigators and several legal assistants and paralegals were involved in the Epstein Actions.
20. On multiple occasions, and in contrast to Edwards’ sworn testimony, many RRA attorneys conferred and were involved with the prosecution of the Epstein Actions [described in detail in Second Amended Complaint].

22. Beginning in October, 2009, the level of communications by and between Edwards and others, including Rothstein, described below, increased dramatically, as Rothstein was running out of money, and was in search of new victims in order to continue to perpetuate the Ponzi scheme, and coincided with Rothstein’s efforts to get the investments for

the Epstein actions concluded [described in detail in Second Amended Complaint].

(Second Amended Complaint, ¶¶ 11, 12, 15, 19, 20, 22.)

In addition, Epstein alleged that Rothstein “pled guilty and ultimately was sentenced to a 50-year prison sentence for fraud and racketeering, based on an alleged \$1.2 billion Ponzi scheme designed, among other things, to infuse funds into RRA, his own pockets, **and those of his cohorts.**” (Second Amended Complaint, ¶ 28.)

Based on the allegations in the Second Amended Complaint, taken as true, and together with the inferences drawn from them in favor of Epstein, a trier of fact could find that Rothstein and/or members of the Rothstein firm “conspired and entered into an express or implied agreement to engage in the tort of abuse of process as part of a plan to defraud investors and further the Ponzi scheme,”³ a finding that encompasses the first element of civil conspiracy which Rothstein challenges.

Rothstein also argues that Epstein has not adequately pled damages necessary to sustain a civil conspiracy claim. (Mot. at p. 3.) Epstein, however, *did* plead damages in paragraph 39, as quoted above, and in paragraph 34 as follows:

34. As a result of the above, the Plaintiff has suffered damages by incurring additional and unnecessary attorneys’ fees and costs to defend these abuses of process.

In any event, Epstein is not required to plead those damages and a general claim is enough. *Hutchison v. Tompkins*, 259 So. 2d 129, 132-33 (Fla. 1972) (“It is well established in Florida that where the allegations of a Complaint show the invasion of a legal right, the plaintiff on the basis thereof may recover at least nominal damages, and a motion to dismiss should be overruled. ... Petitioners’ failure to allege specific damages does not foreclose them from attempting to prove

³ See Second Amended Complaint at ¶ 36.

general damages at trial. General damages, that is, those damages which naturally and necessarily flow or result from the injuries alleged, need not be specifically pleaded” (citations omitted)). Therefore, it would be inappropriate for the Court to decide damages in the context of a Motion to Dismiss.

Importantly, when Edwards moved to dismiss Epstein’s Second Amended Complaint, this Court found that the damages alleged were sufficient to survive a Motion to Dismiss. Specifically, in August 2011, through the same counsel who filed the instant Motion, Edwards moved to dismiss claiming, among other things, that “the [Second] Amended Complaint fails to articulate a cognizable theory of damages proximately caused by any wrongdoing on the part of Bradley J. Edwards.” (Edwards’ Motion to Dismiss, ¶ 3, **Exhibit A**.) Those damages incurred by Epstein to defend against the abuse of process alleged in the Second Amended Complaint are the same damages pled by Epstein to have resulted from Rothstein’s civil conspiracy. This Court previously rejected the arguments that those damages were inadequately pled and denied Edwards’ Motion. (**Exhibit B**.) This Court should again reject the same arguments, which are no more persuasive now than they were when filed seven years ago on behalf of Edwards.

B. The Underlying Tort of Abuse of Process May be Discerned From the Operative Complaint

Epstein has stated a cause of action for civil conspiracy based upon an independent tort; specifically, the tort of abuse of process. In the operative Second Amended Complaint filed on August 22, 2011, Epstein alleged the underlying tort of abuse of process – both in general allegations *and* specific allegations against both Edwards and Rothstein.

The elements for abuse of process are: (1) that the defendant made an illegal, improper, or perverted use of process; (2) that the defendant had ulterior motives or purposes in exercising such illegal, improper, or perverted use of process; and (3) that, as a result of such action on the part of

the defendant, the plaintiff suffered damage. *S & I Investments v. Payless Flea Mkt., Inc.*, 36 So. 3d 909, 917 (Fla. 4th DCA 2010).

In the General Allegations of the Second Amended Complaint, Epstein alleged that in 2009, Rothstein pursued a criminal course of conduct which included a scheme to defraud investors into purchasing fake interests in assignments of fictitious structured settlements by showing them boxes of case files in the Edwards' cases against Epstein, which high dollar settlements were falsely claimed to have been reached by Rothstein's law firm on behalf of clients. (Second Amended Complaint, ¶ 6). The purpose of the fictitious investments was to enrich Rothstein "along with other members of RRA and others" to sustain the law firm and raise capital.... (Second Amended Complaint, ¶ 7). Epstein plainly alleged that "Rothstein and others in his firm, many of whom have pled guilty to federal crimes, were pursuing this Ponzi scheme...." *Id.* at ¶ 8.

In fact, one need only glance at the twenty-eight paragraphs of General Allegations of the Second Amended Complaint in order to glean the abuse of process by Rothstein and others. Rothstein employed a team of investigators, approved litigation costs of \$110,000 to \$200,000 on the Epstein actions to advance the "massive fraud" on investors, assembled "investor groups," including to review the Epstein case files in a conference room. *Id.* ¶ 11, *et seq.* In short, the "Epstein case files were being shown and touted to investors" for Rothstein to "close the deal with the investors, particularly here the magnitude of the potential settlements in the Epstein Actions was a key selling point." *Id.* at ¶ 25. Therefore, the elements of the tort of abuse of process can be perceived from the Second Amended Complaint.

Rothstein also appears to argue that his illegal Ponzi-scheme activities are protected by the litigation privilege because three cases that were part of his Ponzi scheme were *actual* pending

cases against Epstein. Such an argument is absurd on its face. The litigation privilege is not an absolute bar for any act occurring during the course of a judicial proceeding. Rather, acts that bear no relation to and are not in furtherance of the proceedings do not have immunity. *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So. 2d 606, 608 (Fla. 1994); *SCI Funeral Services of Florida, Inc. v. Henry*, 839 So. 2d 702, 710 n. 4 (Fla. 3d DCA 2002) (nothing that a cause of action for malicious prosecution is not barred by the litigation privilege). The Second Amended Complaint identifies numerous instances of conduct by Rothstein outside the parameters of the litigation privilege.

Edwards likewise raised these arguments in his Motion to Dismiss. (**Exhibit A.**) The Court, however, disregarded those arguments and found that the allegations in the Second Amended Complaint were sufficient to plead a cause of action for abuse of process against Edwards. (**Exhibit B.**) The Court should similarly find that the allegations are sufficient against Rothstein as well.

C. Dismissal with Prejudice is not Warranted

Lastly, even if for some reason this Court should find merit in the claim that the Second Amended Complaint fails to state a cause of action for civil conspiracy, dismissal with prejudice would improperly deny Epstein the opportunity to allege additional facts to support his cause of action, something which should be denied only where the privilege to amend has been abused. *See Gamma Dev. Corp. v. Steinberg*, 621 So. 2d 718, 719 (Fla. 4th DCA 1993) (“Leave to amend should be liberally given and a dismissal with prejudice is not proper unless the privilege to amend has been abused, or it is clear that the pleading cannot be amended to state a cause of action.”). Here, Epstein’s Second Amended Complaint was filed in response to the Court’s Order granting

Edwards' Motion to Dismiss the Amended Complaint and giving Epstein leave to amend.⁴ Rothstein argues that Epstein's "6 year delay in pursuing his purported claim against Rothstein" has resulted in unreasonable and undue prejudice. Rothstein, himself, however, delayed moving to dismiss or taking any action in this case during the more than six years the Second Amended Complaint was pending, although his counsel was copied on all court filings. Furthermore, Rothstein did not articulate what "undue prejudice" he has suffered.

This Court has now determined that Epstein's claims against Rothstein and Edwards' claims against Epstein will be tried separately. In a case such as this one, therefore, it can hardly be found that Epstein's request to file a Third Amended Complaint, should the Court grant Rothstein's Motion, would in any way be abusive. To the contrary, Rothstein's moving to dismiss more than six years after the Second Amended Complaint was filed -- through Edwards' counsel -- as a means to open issues so the claims could not be tried together, is the only "abuse" that has taken place. Rothstein and Edwards should not be "rewarded" for their own abusive tactics by dismissing the Second Amended Complaint with prejudice without leave to amend.

CONCLUSION

Based on the foregoing, Plaintiff Jeffrey Epstein respectfully requests that this Court deny Defendant Scott Rothstein's Motion to Dismiss.

⁴While the Court granted Edwards' Motion to Dismiss the Amended Complaint, it gave Epstein leave to amend to plead with more specificity. Epstein did just that and the Second Amended Complaint withstood Edwards' Motion to Dismiss directed to it.

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to the attorneys listed on the Service List below on July ___, 2018, through the Court's e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1).

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