

To commence the 30-day statutory time period for appeals as of right under CPLR 5513(a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MIDLAND AVENUE OWNERS CORP.,
Plaintiff,

-against-

PAUL GROMAN and MARIA BATISTA,
Defendants.

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Index No. 56808/2019
Mot. Seq. Nos. 1-4
Decision and Order

EVERETT, J.

The following papers were considered on the motions:

Notice of Motion/Affirmation/Exhibits/Affidavit/Memorandum/
Stipulations/Notice of Cross Motion/Affirmation/Affidavit/
Exhibits/Notice of Cross Motion/Memorandum/Exhibits/Stipulation/
Affirmation/Exhibits/Affidavit/Exhibits/Affidavit/Exhibits/
Affidavit/Exhibit/Affirmations/Exhibits/Affidavit/Exhibits/
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Affirmation/Memoranda/Notice of Motion/Affirmation/
Affidavit/Memorandum/Exhibit/Stipulation/Affirmation/
Exhibits/Affidavit/Exhibits/Affidavit/Exhibits/
Affidavit/Exhibits/Memorandum/Memorandum/Affirmation/Affidavit
(NYSCEF documents numbered 35-45, 48-49, 56-78, 80, 82-165, 167-
190, 192-194)

The plaintiff commenced this action to recover damages and for injunctive relief. The plaintiff alleges defamation against the defendants Paul Groman and Maria Batista, and breach of contract and breach of fiduciary duty against Groman. Each defendant answered and asserted affirmative defenses, a counterclaim, and a cross claim. In motion sequence number 1, the plaintiff moves, in effect, pursuant to CPLR 3211(b) and 3211(a)(7) to dismiss Batista's second, seventh, ninth, tenth, and eleventh affirmative defenses and counterclaim, and to dismiss Groman's second, sixth, ninth, tenth, and eleventh

affirmative defenses and counterclaim. In motion sequence number 2, Groman moves pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against him. In motion sequence number 3, Batista moves pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against her. In motion sequence number 4, Batista moves pursuant to CPLR 3211(a) and (g) to dismiss the complaint insofar as asserted against her and for costs and attorneys fees. For reasons explained below, the Court grants the plaintiff's motion only to the extent of granting that branch of it which is to dismiss each defendant's affirmative defense and counterclaim asserting malicious prosecution or abuse of process, and otherwise denies that motion; the Court denies the remaining motions.

The Court first addresses Batista's motion claiming that this action is a strategic lawsuit against public participation. In 1992, legislation was enacted to address "a rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings against proposed land use development and other activities requiring approval of public boards. Termed SLAPP suits—strategic lawsuits against public participation—such actions are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might

wish to speak out in the future" (*600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 137 n 1 [1992]; see L 1992, ch 767; Civil Rights Law §§ 70-a, 76-a). The legislation was specifically aimed at broadening the protection of citizens facing litigation arising from their public petition and participation (see L 1992, ch 767, § 1; *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d at 137 n 1).

While this action was pending, the Legislature amended the relevant statutes to broaden the scope of the law and afford greater protections to citizens facing litigation arising from their public petition and participation (see L 2020, ch 250). The new legislation became effective November 10, 2010 (see *Mable Assets, LLC v Rachmanov*, 192 AD3d 998, 1000 [2d Dept 2021]), roughly one week before Batista made her motion claiming that this is a SLAPP suit. Under the former statute, an action involving public petition and participation was defined in relevant part as an action "for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application" (former Civil Rights Law § 76-a[1][a]). In comparison, under the statute as amended, an action involving public petition and participation is defined in relevant part as a claim based on "any communication in a place open to the public or a public forum in connection with an issue

of public interest..." (Civil Rights Law § 76-a[1][a][1]), and public interest must be "construed broadly, and shall mean any subject other than a purely private matter" (Civil Rights Law § 76-a[1][d]).

Contrary to her contention, Batista cannot rely on the broader definition of an action involving public petition and participation. The Appellate Division, First Department, "has concluded that the 2020 amendments to the anti-SLAPP law do not apply retroactively to pending claims, such as the ones at issue here" (*Kurland & Assoc., P.C. v Glassdoor, Inc.*, _AD3d_ 2022 NY Slip Op 03323 *1 [1st Dept May 19, 2022]). Since this action is not an action involving public petition and participation under the former, more restrictive, definition, the Court denies Basista's motion (motion sequence number 4) claiming that this action is a strategic lawsuit against public participation.

The Court next addresses the separate motions of Batista and Groman pursuant to CPLR 3211(a). On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 849, 851 [2d Dept 2012]). Moreover, "[w]here evidentiary material is submitted and considered on a motion to

dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d at 851-852; see *Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 [1977]). Here, dismissal of the complaint pursuant to CPLR 3211(a) is not appropriate. Notably, it has not been established, as a matter of law, whether the plaintiff's Board of Directors needed to authorize this lawsuit and, if it needed to, whether it did. Thus, the Court denies the separate motions of Batista (motion sequence number 3) and Groman (motion sequence number 2) pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against each of them, respectively.

The Court turns to the plaintiff's motion. "CPLR 3211(b) provides that '[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.' When moving to dismiss, the plaintiff bears the burden of demonstrating that the affirmative defenses are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense" (*Shah v Mitra*, 171 AD3d 971, 974 [2d Dept 2019] [some

internal quotation marks omitted]). “On a motion pursuant to CPLR 3211(b), the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR 3211(a)(7), and the factual assertions of the defense will be accepted as true” (*Shah v Mitra*, 171 AD3d at 974 [internal quotation marks omitted]). “Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed” (*Shah v Mitra*, 171 AD3d at 974 [internal quotation marks omitted]). Here, the plaintiff seeks dismissal of each defendant’s affirmative defenses alleging lack of requisite particularity under CPLR 3016(b), statute of limitations, lack of necessary consent, lack of necessary authorization, as well as what is couched as an affirmative defense and a counterclaim asserting malicious prosecution or abuse of process. Applying the appropriate standards, only the affirmative defense and counterclaim is subject to dismissal. To the extent such affirmative defense and counterclaim alleges abuse of process, the institution of a civil action by summons and complaint is not legally considered process capable of being abused, and a malicious motive alone does not give rise to a claim to recover damages for abuse of process (see *Goldman v Citicore I, LLC*, 149 AD3d 1042, 1044-1045 [2d Dept 2017]; see also *Seidler v Knopf*, 186 AD3d 889, 891 [2d Dept 2020]). To the extent such affirmative defense and counterclaim alleges malicious prosecution, it “cannot be interposed as a counterclaim

in the very civil action that was allegedly instituted wrongfully" (*Sasso v Corniola*, 154 AD2d 362, 363 [2d Dept 1989]). Thus, the Court grants the plaintiff's motion (motion sequence number 1) only to the extent of granting that branch of it which is to dismiss each defendant's affirmative defense and counterclaim asserting malicious prosecution or abuse of process.

The remaining contentions do not warrant a different result. Accordingly, it is

ORDERED that the plaintiff's motion, in effect, pursuant to CPLR 3211(b) and 3211(a)(7) to dismiss Batista's second, seventh, ninth, tenth, and eleventh affirmative defenses and counterclaim, and to dismiss Groman's second, sixth, ninth, tenth, and eleventh affirmative defenses and counterclaim, is granted only to the extent that the Court grants that branch of it which is to dismiss each defendant's affirmative defense and counterclaim asserting malicious prosecution or abuse of process, and otherwise denied; and it is further,

ORDERED that Groman's motion pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against him is denied; and it is further,

ORDERED that Batista's motion pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against her is denied; and it is further,

ORDERED that Batista's motion pursuant to CPLR 3211(a) and (g) to dismiss the complaint insofar as asserted against her and for costs and attorneys fees is denied; and it is further,

ORDERED that the plaintiff must, within ten days of the date of entry, serve on the defendants a copy of this decision and order with notice of entry; and it is further,

ORDERED that the plaintiff must, within ten days after service of the notice of entry, file proof of that service.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
June 6, 2022

ENTER:



HON. DAVID F. EVERETT
Justice of the Supreme Court

Filed in NYSCEF