

IN THE COUNTY COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

MARK BUCK and,
YOLANDA TORICELLA BUCK,

CASE NO: 22-00603 CC 05 (02)

Plaintiffs,

v.

LAZARO SANTOS and
DIANELYS PEREZ LINARES,

Defendants. _____/

***DEFENDANTS' MOTION TO DISMISS AND TO STRIKE THE
PLAINTIFFS' COMPLAINT FOR MALICIOUS PROSECUTION
WITH PREJUDICE, AND INCORPORATED MEMORANDUM***

COMES NOW the Defendants, Lazaro Santos and Dianelys Perez Linares (hereinafter the "Defendants"), by and through their undersigned attorney, and file this his Motion to Dismiss and to /Strike the Plaintiffs Mark Buck and Yolanda Torricella Buck's (hereinafter the "Plaintiffs") Complaint with Prejudice and Incorporated Memorandum of Law, pursuant to *Rules 1.130, and 1.140 Fla.R.Civ.P.*, and as ground therefore, state as follows:

FACTS SURROUNDING THE MOTION TO STRIKE AND DISMISS

1. On January 10, 2022, the Plaintiffs filed a complaint for Malicious Prosecution alleging that the Plaintiffs suffered damages for Malicious Prosecution in two Domestic Violence cases in which the Defendants filed against them.

2. Plaintiffs append an Order of Dismissal of a Temporary Injunction without prejudice in Case No: 2020-000594 FC 04, copy appended as Exhibit "I", in which Defendant Lazaro Santos, was a named Petitioner not individually but as filing for OBO Yolanda Santos Perez and against the Plaintiff Yolanda Torricella Buck as the Respondent; and a second case where an Order of Dismissal of a Temporary Injunction without prejudice was entered in Case No:

2020-000577, copy appended as Exhibit "II", in which Defendant Lazaro Santos, was a named not individually but as a Petitioner for OBO Yolanda Santos Perez, and Plaintiff Mark (sic) Buck was the Respondent, and each dismissal was based on an agreement of the parties.

3. As is obvious from the forgoing, the Defendants were⁴ not parties and Defendant Dianelys Perez Linares, was not even mentioned nor a party to the settlement and agreement to the two prior prosecutions.

4. As was obvious from the pleadings contained in the Plaintiffs complaint, the Plaintiffs appended a document signed by the Plaintiffs and the Defendant Lazaro Santos OBO for Yolanda Santos Perez, which sets forth the agreement of the parties for the Injunctions to be voluntarily dismissed without prejudice. Copy of Agreement is appended as Exhibit "III".

5. At the time the matters above came before the Court, the cases were dismissed without prejudice since the parties announced to the Court their settlement, which the Court made mention in its Memo of Disposition appended as Exhibit "IV".

6. As is obvious from the pleadings and the attached settlement agreement, the current claims were released by agreement of the parties in settlement.

7. Additionally, in the continuing cavalcade of contrived allegations and documentation, the Plaintiffs do not allege in their complaint the necessary elements of malicious prosecution.

8. As is clear from the foregoing, the Plaintiffs improperly joined the Defendants who were not parties, and specifically Defendant Dianelys Perez Linares, who is not even inferentially identified, in any of the cases cited by the Plaintiffs.

9. Lastly, the facts fail to set forth a basis for relief since the required factual elements are wholly missing or the recited facts totally inapplicable.

MOTION TO DISMISS

Based on the facts alleged by the Plaintiffs as set forth in the Complaint along with the documents appended in each of the cases under which the Plaintiffs seek relief, it is clear and obvious that the that the allegations and the legal basis for the action filed by the Plaintiffs, fail to state a cause of action upon which relief may be granted.

I. The Complaint allegations should be stricken pursuant to Rule 1.140(f), Fla.R.Civ.P., in that they are patently improper impertinent, immaterial, irrelevant scandalous and malicious:

As is evident from the Plaintiffs Complaint, the Plaintiffs fail to set forth a basis for relief, and the claims should be stricken pursuant to *Rule 1.140(f), Fla.R.Civ.P.*, which expressly provides that “[a] party may move to strike, or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time.”

On review of the allegations made in the complaint, they are all without a basis as to any aspect of a claim for malicious prosecution, and allegations are impertinent, immaterial, irrelevant scandalous and malicious and all fabricated by the Plaintiffs. A motion to strike tests the sufficiency of a claim to determine if a bona fide issue of fact may be supported by the evidence. *Parrish & Yarnell, P.A. v. Spruce River Ventures, LLC*, 180 So.3d 1198 (Fla. 2nd DCA 2015). A motion to strike as redundant, immaterial or scandalous should be granted if the material allegations contained in the documents are wholly irrelevant, can have no bearing on the equities and no influence on the decision of the Court. *Rice-Lamar v. City of Fort Lauderdale*, 853 So. 1125 (Fla. 4th DCA 2003); *McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss*, 704 So.2d 214, 216 (Fla. 2d DCA 1998).

As the court will note from the instant memorandum as to the issue of the viability of the claim based on the facts of this case, the entire claim must be stricken since the essential elements are patently missing, and the allegations do not support a viable basis in order to obtain relief.

II. The Complaint fails to state a cause of action, since the claim fails to append the necessary documents upon which they are based:

The Plaintiffs make numerous facetious allegations concerning debts, claims, and factual allegations as to the dismissal of claims and action without appended any of the documents to the Complaint. No documents appended without identifying the nature of the transactions (written or verbal) or appending a document showing that the Plaintiffs have a right to the funds allegedly borrowed. When a party brings an action based upon a debt, contract, or other claim, but fails to attach necessary exhibits, the opposing party may properly attack the failure to attach necessary exhibits through a motion to dismiss which must be granted by the Court. *Samuels v. King Motor Company of Fort Lauderdale*, 782 So.2d 489 (Fla. 4th DCA 2001)

Under Florida law, a party is required to identify and to append the instrument or document upon which it is travelling. *Rule 1.130, Fla.R.Civ.P.*, the rule expressly states that a party is required to attach a copy of the cause of action and the exhibits upon which it is traveling "... [a]ll ... notes, bills of exchange, contracts, accounts, or documents on which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, must be incorporated in or attached to the pleading." If a party fails to attach a required document or incorporate the same in the material parts in his pleading, the proper objection is a motion to dismiss a pleading seeking affirmative relief for failure to state a cause of action or a motion to dismiss or to strike a defense as legally insufficient. Since the rule requires attaching or incorporation of the document, failure to do so leaves the pleading deficient in its statement of a

cause of action or defense, and a motion to require compliance with the rule and/or for a more definite statement are concurrent remedies.

But in this case, the Plaintiffs failure to append all of the documents relating to the claim of other matters made against the Defendants in this action, which alleges claims for matters previously adjudicated or for which no adjudication was made based on the debts alleged by the Plaintiffs, or the parties agreement as set forth in the record of both cases, would and should preclude the claim as a matter of law.

III. The Complaint fails to state a cause of action for which relief may be granted for malicious prosecution:

Actions for malicious prosecution are generally disfavored in Florida. *Cent. Florida Mach. Co. v. Williams*, 424 So. 2d 201, 202 (Fla. 2d DCA 1983). To bring a prima facie case for malicious prosecution, the following six elements must be established: (1) commencement of a judicial proceeding; (2) its legal causation by the present defendant against the plaintiff; (3) its bona fide termination in favor of plaintiff; (4) absence of probable cause; (5) malice; and (6) damages, and the failure to establish any one of those elements is fatal to a claim for malicious prosecution. *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352 (Fla. 1994); *Rivernider v. Meyer*, 174 So. 3d 602, 604 (Fla. 4th DCA 2015).

As a threshold matter, the element of probable cause is a question of law for the court when the facts relied on are undisputed as in this case. Probable cause has been defined as “[a] reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged.” *Fee, et. al. v. Sullivan*, 379 So. 2d 412, 417 (Fla. 4th DCA 1980). It is obvious that probable cause existed based on the statements and matters adduced from the minor involved in both case. dismissal of a charge is no evidence that probable cause was lacking, particularly in a

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civil action where “there is no preliminary determination of the sufficiency of the evidence to justify a suit.” *Id.* Further, some courts have at least considered that a plaintiff’s survival or success in trial motions, while not conclusively proving probable cause, can strongly indicate a substantial case. *Id.*; *Meyer*, 174 So. 3d at 605. In essence probable cause does not depend upon the actual state of the case in point of fact, but on the honest and reasonable belief of the party instituting the action. *Cohen v. Amerifirst Bank*, 537 So. 2d 1108, 1110 (Fla. 3d DCA 1989). As a result of the facts alleged, the first two elements of the claim do not exist and there is therefore no basis for the action.

However, in addition the third element of a “bona fide” termination in Plaintiffs favor is also none existent. The cases were concluded as alleged based on an agreement of the parties and additionally, the cases were not dismissed with prejudice. The Plaintiffs have failed to establish that there was a “bona fide termination” of the underlying suits (or “original proceeding”) in their favor. “The element that there be a bona fide termination of the underlying civil suit is satisfied by either a favorable decision on the merits or a bona fide termination of that lawsuit.” *Sharaka v. E & A, Inc, et al.*, 135 So.3d 428, 432 (Fla. 2d DCA 2014); *Rowen v. Holiday Pines Prop. Owners’ Ass’n*, 759 So.2d 13, 15-16 (Fla. 4th DCA 2000).

As is obvious, the cases were not terminated in the Plaintiffs favor and a “bona fide termination” means not only that the underlying suit was resolved favorably to the Plaintiffs in that action but also that it ended in a manner demonstrating that the underlying suit lacked merit. *Rowen v. Holiday Pines Prop. Owners’ Ass’n*, 759 So. 2d 13, 15-16 (Fla. 4th DCA 2000); *Cohen v. Corwin*, 980 So.2d 1153, 1155 (Fla. 4th DCA 2008); *Doss v. Bank of Am., N.A.*, 857 So. 2d 991 (Fla. 5th DCA 2003). (termination of the underlying suit on technical grounds, for procedural reasons, or any other reason not inconsistent with the guilt of the accused)

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[Emphasis Added].

Any matter that does not reflect resolution on the merits of the case, does not establish the element of "bona fide termination." *Jones v. State Farm Mutual Automobile Ins. Co.*, 578 So.2d 783 (Fla. 1st DCA 1991); *Della Donna v. Nova University, Inc.*, 512 So. 2d 1051, 1057 (Fla. 4th DCA 1987). As in *Williams v. Confidential Credit Corporation*, 114 So.2d 718 Fla. 1959), a resolution based on a bargained for settlement of a claim, does not provide a basis for a claim of malicious prosecution. In this case, the Petitioner in the Domestic Violence cases took a voluntary Dismissal based on the promises of the Plaintiffs in this case as outline in the appended settlement agreement as Exhibit "III".

Even though, as described above, there is a total lack of a basis under the facts that the first 4 elements are missing in this claim, the issue of malice, the 5th element is also missing in this case. The allegations of contrived basis for the filing of a Domestic Violence action by one of the Defendants, does not qualify as a basis to establish malice. Although a lack of probable cause can become a basis for the inference, in this case there was no evidence alleged or showing of the lack of probable cause, as set forth hereinabove. *Durkin v. Davis* 814 So.2d 1246 (Fla 2nd DCA 2002).

As a result, since only one of the missing elements of malicious prosecution is all that is required or is necessary for a Complaint and a claim for malicious prosecution to be dismissed with prejudice, in this case there appears that 4 of the 6 elements are nonexistent and as a matter of law, this Complaint is required to be dismissed with prejudice. *Alamo Rent-A-Car, Inc., supra*; *Meyer, supra*.

IV. The Complaint fails to state a cause of action for which relief may be granted since its appendages conflict with the allegations of the Complaint:

As in a situation where a specific instrument is appended to a Complaint that conflicts with the allegations contained therein, the allegations become a nullity and the terms and provisions of the written instrument, rather than the Complaint allegations, control. *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So.2d 490 (Fla. 3d DCA 1994); *Health Applications Systems, Inc. v. Hartford Life and Accident Insurance Company*, 381 So.2d 294 (Fla. 1st DCA 1988); and *Schweitzer v. Seaman*, 383 So.2d 1175 (Fla. 4th DCA 1980). The Florida Courts uniformly hold that where there is an inconsistency between the allegations of a claim and a written instrument related to a complaint are in conflict; they effectually neutralize the allegations and render the pleading a nullity. Since the "Agreement" appended as an Exhibit III and the Orders of Dismissal appended as Exhibits I and II, expressly show that the dismissal was based on an agreement of the parties and that the dismissals were without prejudice, they nullify the required elements of malicious prosecution, and the Complaint must be dismissed with prejudice.

V. Sanction must be imposed in this case against the Plaintiffs pursuant to § 57.105, Florida Statutes:

As is apparent from the foregoing, the Plaintiffs intentionally, knowingly and maliciously have filed numerous unsuccessful claims against the Defendants, and in this case they have joined a party without any basis of fact or law. and they filed a specious claim for malicious prosecution that on its face is improper and additionally totally without merit.

The provisions of § 57.105(1) *Florida Statutes (2001)* provide that upon the Court's initiative or by motion of any party, the court shall award a reasonable attorneys' fee to be paid to the prevailing party in equal amounts by the losing party or the losing party's attorney when the losing party or their counsel knew or should have known that a particular claim or defense was not supported by the

material facts necessary to establish the claim or defense; or would not be supported by the application of then-existing law to those material facts. As a result, the Defendants are entitled to an award of attorneys' fees, damages, and such other sanctions as the Court deems appropriate. *See, Forum v. Boca Burger*, 788 So. 2d 1055 (Fla. 4th DCA 2001) and §57.105(1), *Florida Statutes*.

In compliance with the parties agreement, Defendants are entitled to the taxation of attorney's fees and costs of this action pursuant to their agreement appended as Exhibit "III".

WHEREFORE, the Defendants pray this Honorable Court Strike the allegation of the Complaint, dismiss the complaint with prejudice, and/or find that the action filed herein was without foundation in fact or law when initially presented or thereafter, nor supported by material facts necessary for a claim; or the claim is not supported by the application of then existing law to those material facts, award attorney's fees and costs against the Plaintiffs.

Respectfully submitted,

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By: /S/ Harvey D. Rogers, Esq.
Harvey D. Rogers, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing was emailed through the Florida Courts E-filing Portal, this 17th day of Feb, 2022, and to: Mark Buck and Yolanda Torricella Buck, 2511 Washington Street Hollywood, Florida 33020.

/S/ Harvey D. Rogers, Esq.
Harvey D. Rogers, Esq.
FBN: 194330