

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, ss.

District Court Department
Palmer Division
Civil Action No.: 1143CV293

BRIAN JOHNSON)
)
 PLAINTIFF/)
 DEFENDANT-IN-COUNTERCLAIM)
)
 v.)
)
 PETER FREI)
)
 DEFENDANT/)
 PLAINTIFF-IN-COUNTERCLAIM)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION
FOR LEAVE TO REOPEN DISCOVERY
AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Now comes Brian Johnson, the Plaintiff/Defendant-in-Counterclaim, in the above-captioned cause of action ("Johnson") and hereby opposes the Motion for Leave to Reopen Discovery ("Motion") filed by Defendant/Plaintiff-In-Counterclaim, Peter Frei ("Frei"). For the reasons contained herein, Johnson respectfully requests that this Court deny the Motion.

I. PROCEDURAL HISTORY

In June, 2011 Johnson filed a complaint against Frei for violation of the state wiretapping statute, G.L. ch. 272, §99(Q). Frei filed an amended answer which included several counterclaims. One of the counterclaims was for abuse of process. The Trial Court (Poehler, J.) directed a verdict in favor of Johnson on the abuse of process claim. The Appellate Division affirmed this ruling. However, the Appeals Court reversed the decision and order on the abuse of process claim and remanded the abuse of process claim for further proceedings.

II. LEGAL ARGUMENT

Pursuant to the Substituted Answer and Counterclaims filed in this matter, the abuse of process claim was based upon Johnson's alleged false statements and accusations made to a police officer. A copy of the Substituted Answer and Counterclaims is attached hereto as Exhibit "A". The Substituted Answer and Counterclaims do not include any claims or allegations related to the payment of legal fees by the Town of Holland or any ethics investigation.

In his Motion, Frei concedes that the payment of legal fees was not known to Frei at the time of trial.¹ Frei also concedes that the State Ethics Commission concluded its investigation in November, 2015,² over two years after the trial.³ Therefore, the ethics investigation cannot constitute the basis for the abuse of process claim and any inquiry into said investigation is beyond the scope of discovery as articulated and defined by the relevant rules.

The relevant rule defines the scope of discovery as follows (M.R.Civ. P. 26(a):

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

¹ Nothing prevented Frei from engaging in discovery on this issue prior to the trial.

² The actual investigation and determination were made in March, 2015.

³ Johnson prevailed on the claim for violation of G.L. ch. 272, §99(Q). Judgment entered in July, 2013.

As the claim for abuse of process is not based upon the payment of legal fees nor the Ethics Commission investigation, the discovery sought by Frei is beyond the scope of discovery as it does not relate to the claims or defenses which are the subject matter of this cause of action. Therefore, the Motion should be denied.

WHEREFORE, for the foregoing reasons, Brian Johnson respectfully requests that the Motion for Leave to Reopen Discovery filed by Peter Frei be denied.

Respectfully submitted,
The Plaintiff,
Brian Johnson,
By his attorney,


Tani E. Sapirstein, Esq.
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Springfield, MA 01103
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tani@sandslaw.com

Dated: February 6, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was served upon the following via first class mail, postage prepaid, to: -

Mr. Peter Frei
101 Maybrook Road
Holland, MA 01521

Dated: February 6, 2019


Tani E. Sapirstein

EXHIBIT # A

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

Hampden, ss

Palmer District Court
Civil Action No: 11-

BRIAN JOHNSON
Plaintiff

v.

PETER FREI
Defendant

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DEFENDANT'S SUBSTITUTED
ANSWER, AFFIRMATIVE DEFENSES,
COUNTERCLAIMS AND JURY DEMAND

The defendant ANSWERS as follows:

1. The defendant admits the allegations of paragraph one of the Complaint.
2. The defendant admits the allegations of paragraph two of the Complaint.
Admitted.
3. The defendant is without sufficient knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph three of the Complaint.
4. The defendant is without sufficient knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph four of the Complaint.
5. The defendant is without sufficient knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph five of the Complaint.
6. The defendant denies the allegations of paragraph six of the Complaint.
7. The defendant denies the allegations of paragraph seven of the Complaint.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

This action was not commenced within the time required by laws made and provided therefor.

SECOND DEFENSE

The complaint fails to set forth a claim upon which relief can be granted.

THIRD DEFENSE

The complaint should be dismissed for improper and inadequate service of process.

FOURTH DEFENSE

Plaintiff is not an aggrieved person as defined by G.L. c. 272 § 99Q. A civil remedy

FIFTH DEFENSE

Having voluntarily made a statement in a public place in the presence of multiple witnesses and the public at large, Plaintiff lacked any reasonable expectation of privacy and therefore had neither suffered nor is able to prove damages as a matter of law.

SIXTH DEFENSE

Being in a public place and having knowingly and voluntarily shouted vulgar statements, profanities and threats toward the Plaintiff in the presence of witnesses and members of the public, Plaintiff is neither an aggrieved person within the meaning of G.L. c. 272 § 99Q nor had any reasonable expectation of privacy to his statements and actions.

SEVENTH DEFENSE

Being in a public place and having knowingly and voluntarily shouted vulgar statements, profanities and threats toward the Plaintiff in the presence of witnesses and members of the public, Plaintiff forfeited whatever standing or rights he may have had, if any, to pursue an action as an aggrieved person pursuant to G.L. c. 272 § 99Q.

EIGHTH DEFENSE

If Plaintiff suffered any damages, Plaintiff has failed to mitigate its alleged damages in whole or in part.

NINTH DEFENSE

There is no proximate causation between any alleged act, error or omission of the defendant and any damages alleged by the plaintiff.

TENTH DEFENSE

.Being in a public place and having knowingly and voluntarily shouted vulgar statements, profanities and threats toward the Plaintiff in the presence of witnesses and members of the public, the complaint should be dismissed based upon the doctrine of equitable estoppel.

ELEVENTH DEFENSE

The injuries or damages alleged were caused in whole or in part by the plaintiff's own negligent, wilful and intentional conduct.

TWELFTH DEFENSE

The contributory negligence of the plaintiff was greater than the negligence of the defendant, if any, wherefore, the plaintiff cannot recover.

THIRTEENTH DEFENSE

The negligence of the plaintiff contributed in some degree to the plaintiff's alleged damages, wherefore, the damages, if any, awarded the plaintiff should be diminished and reduced in proportion thereto.

FOURTEENTH DEFENSE

The acts or omissions to act, as alleged in the Complaint, were conducted in self defense and based upon the necessity created by the Plaintiff.

FIFTEENTH DEFENSE

Injuries and damages suffered by the Plaintiff, if any, were due to the act or neglect of another, which constitutes an intervening, superceding cause, wherefore the defendant is not liable.

SIXTEENTH DEFENSE

Plaintiff's claims are barred by the doctrines of waiver, estoppel and laches.

SEVENTEENTH DEFENSE

G.L. c. 272 § 99 is unconstitutional on its face.

EIGHTEENTH DEFENSE

As applied to the facts of this case the statute is unconstitutional in that it deprives the defendant of the ability to protect himself from false allegations and from threats of physical harm.

NINETEENTH DEFENSE

The defendant hereby give notice he intends to rely upon other and further defenses as may become available or apparent during the discovery proceedings and, thereby, reserves the right to amend this Answer to assert any such defenses

WHEREFORE, the complaint should be dismissed; sanctions be levied against the plaintiff for filing a frivolous suit not supported by facts or law in bad faith; and that damages be awarded to the defendant together with the costs of defending against the complaint, including applicable interest, reasonable attorney fees and such other costs and expense permitted by law.

COUNTER CLAIMS

By way of counter claim against the plaintiff, the defendant avers the following:

1. On February 19, 2011, the defendant-in-counter-claim, hereinafter referred to as Brian Johnson, did wilfully place in fear of immediate harm and thereby did assault the plaintiff in counter claim, hereinafter referred to as Peter Frei.
2. On February 19, 2011, Brian Johnson in joint concert with others, did assault and beat Peter Frei.
3. On February 19, 2011, Brian Johnson made knowingly, false, wilful and malicious, public statements about Peter Frei.

4. On February 19, 2011, Brian Johnson, knowingly, wilfully, maliciously, publically and falsely accused Peter Frei, of committing a criminal offense.
5. On February 19, 2011, at Holland, Massachusetts, Brian Johnson knowingly, wilfully, and maliciously made materially false and untrue reports to a member of the police department of the Town of Holland, Massachusetts, wherein he falsely accused Peter Frei of having committed a criminal offense, namely, Defendant in counter claim told the police he felt threatened by the plaintiff in counter claim and that plaintiff in counter claim threatened to kill him.
6. On or about July 28, 2011, Holland Police officer Jeffrey Forcier, testified under oath in a legal proceeding in a public court room and in the presence of one or members of the public, namely in the Palmer District Court, Palmer, Massachusetts.
7. During said testimony Officer Forcier, testified under oath to the effect that Brian Johnson reported to him in his capacity as a police officer that during an incident that occurred in Holland, Massachusetts on/about February 19, 2011, Brian Johnson felt threatened by said Peter Frei and that said Peter Frei had threatened to kill him.
8. Brian Johnson was present in the court room during the testimony of Officer Forcier described in the previous paragraph and failed to correct or retract the statement.
9. Brian Johnson knew or had reason to know Officer Forcier would write up an incident report wherein the knowingly false, malicious and untrue accusations made by Brian Johnson to Officer Forcier would be set forth therein in writing and then made available to others.
10. As the direct and proximate result of Brian Johnson's negligent and/or intentional conduct Peter Frei suffered emotional distress and physical injury.

COUNT I - ASSAULT

11. Plaintiff in counter claim restates the factual allegations set forth in paragraphs 1 - 10 of his counterclaims.
12. Without justification or excuse, said Brian Johnson did assault Peter Frei.

COUNT II - ASSAULT AND BATTERY

13. Plaintiff in counter claim restates the factual allegations set forth in paragraphs 1 - 10 of his counterclaims.

14. Without justification or excuse, said Brian Johnson did assault and beat Peter Frei.

COUNT III - DEFAMATION, LIBEL AND SLANDER

15. Plaintiff in counter claim restates the factual allegations set forth in paragraphs 1 - 14 of his counterclaims.
16. Brian Johnson published one or more false and defamatory, slanderous, and libelous statements of and concerning Peter Frei, which Brian Johnson knew to be false, thereby causing Peter Frei injury or economic harm.

COUNT IV - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

15. Plaintiff in counter claim restates the factual allegations set forth in paragraphs 1 - 16 of his counterclaims.
16. Brian Johnson either intended to inflict emotional distress upon Peter Frei or knew or should have known emotional distress was likely to result from his conduct.
17. Brian Johnson's conduct was extreme and outrageous, beyond all possible bounds of decency and was utterly intolerable in a civilized society.
18. As the direct and proximate result of Brian Johnson's conduct, Peter Frei suffered stress, private and public embarrassment, humiliation and emotional distress.
19. The emotional distress suffered by Peter Frei was severe and of a nature that no reasonable person could be expected to endure it.

COUNT V - NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

20. Plaintiff in counter claim restates the factual allegations set forth in paragraphs 1 - 19 of his counterclaims.
21. As the direct and proximate result of Brian Johnson's conduct, Peter Frei suffered stress, private and public embarrassment, humiliation and emotional distress and physical illness and injury.

COUNT VI - ABUSE OF PROCESS & OBSTRUCTION OF JUSTICE

22. Plaintiff in counter claim restates the factual allegations set forth in paragraphs 1 - 21 of his counterclaims.
23. Brian Johnson knew he knowingly, intentionally, wilfully and maliciously lied, defamed, falsely accused and falsely reported Peter Frei of having committed a criminal offense to a police officer investigating the incident that occurred in Holland, Massachusetts on or about February 19, 2011.
24. Brian Johnson knew or reasonably should have known Officer Forcier write down and record the false statements he made in an official police report prepared in the ordinary course of police business.
25. Brian Johnson knew or should have known that if called upon to testify in a judicial proceeding regarding the events of the February 19, 2011 incident, Officer Forcier would restate said false statements and false report of a crime.
26. On or about July 28, 2011, Officer Forcier in fact did testify under oath in a judicial proceeding in the Palmer District Court and did recount, repeat and state the false accusations made by Brian Johnson in a public court room.
25. Brian Johnson knowingly and intentionally failed to retract, clarify or correct said false accusations and false statements.
26. Brian Johnson did thereby victimize Officer Forcier who was himself unaware of the falsity of the Brian Johnson's accusations, did knowingly, wilfully and intentionally cause Officer Forcier to provide materially false and perjurious testimony in a judicial proceeding and did thereby suborn the perjury of Officer Forcier and did obstruct justice.
27. Fully aware of the above and knowing he had neither suffered nor is able to prove damages, Brian Johnson filed the instant law suit, caused legal process to be served upon Peter Frei for an ulterior or illegitimate purpose, including but not limited to a coercive effort to silence and deter Peter Frei from availing himself of his legal right to seek redress and to hold Brian Johnson accountable for his actions .
28. As the direct and proximate result of Brian Johnson's conduct, Peter Frei suffered economic loss, incurred legal fees, suffered emotional distress, physical injury, damage to his reputation and feelings, and other damages.

COUNT VII - VIOLATION OF MASSACHUSETTS CIVIL RIGHTS ACT
G.L. c. 12 §§ 11h and 11i

29. Plaintiff in counter claim restates the factual allegations set forth in paragraphs 1 - 28 of his counterclaims.
30. By said threats, intimidation or coercion, Brian John interfered with or attempted to interfere with the exercise and enjoyment of rights secured to Peter Frei by the Constitution or laws of either the United States or of the Commonwealth.
31. As the direct and proximate result of Brian Johnson's conduct, Peter Frei suffered economic loss, incurred legal fees, suffered emotional distress, physical injury, damage to his reputation and feelings, and other damages.

WHEREFORE, Peter Frei respectfully demands that judgment be entered in his favor and against that of the Brian Johnson; that Brian John be ordered to pay suitable damages, costs, interest, and - where applicable - punitive damages and reasonable attorney fees incurred in the defense of this action; and be ordered to pay and provide such other relief deemed appropriate and just by the Court.

JURY DEMAND

Plaintiff-in-counter-claim hereby requests trial by jury on all counts so triable.

Respectfully submitted by,
Peter Frei as Defendant and as
Plaintiff in counter claim

Peter Frei, pro se
101 Maybrook Road
Holland, MA 01521
(413) 245-4660

August 30, 2011

Certificate of Service

I certify a copy of the foregoing document was served by mailing a copy hereof, by first class mail, postage pre-paid, upon the attorney for the Plaintiff, namely, Tani E. Saperstein, c/o Saperstein & Saperstein, P.C., 1350 Main Street, 12th Floor, Springfield, MA 01103, this ____ day of August, 2011.

Peter Frei

Part IV CRIMES, PUNISHMENTS AND
PROCEEDINGS IN CRIMINAL
CASES

Title I CRIMES AND PUNISHMENTS

Chapter FINANCIAL DISCLOSURE BY
268B CERTAIN PUBLIC OFFICIALS AND
EMPLOYEES

Section INVESTIGATIONS BY THE
4 COMMISSION

Section 4. (a) Upon receipt of a sworn complaint signed under the penalties of perjury, or upon receipt of evidence which is deemed sufficient by the commission, the commission shall initiate a preliminary inquiry into any alleged violation of chapter 268A or 268B. At the commencement of a preliminary inquiry into any such alleged violation, the general counsel shall notify the attorney general in order to avoid overlapping civil and criminal investigations. All commission proceedings and records relating to a preliminary inquiry or initial staff review used to determine whether to initiate an inquiry shall be confidential, except that the general counsel may turn over to the attorney general, the United States Attorney or a district attorney of competent jurisdiction evidence which may be used in a criminal proceeding. The general counsel shall notify any person who is the subject of the preliminary inquiry of the existence of such inquiry and the general nature of the alleged violation within 30 days of the commencement of the inquiry.

(b) If a preliminary inquiry fails to indicate reasonable cause for belief that this chapter or said chapter two hundred and sixty-eight A has been violated, the commission shall immediately terminate the inquiry and so notify, in writing, the complainant, if any, and the person who had been the subject of the inquiry. All commission records and proceedings from any such preliminary inquiry, or from any initial staff review to determine whether to initiate an inquiry, shall be confidential.

(c) If a preliminary inquiry indicates reasonable cause for belief that this chapter or said chapter two hundred and sixty-eight A has been violated, the commission may, upon a majority vote, initiate an adjudicatory proceeding to determine whether there has been such a violation. The commission shall initiate such an adjudicatory proceeding within 5 years from the date the commission learns of the alleged violation, but not more than 6 years from the date of the last conduct relating to the alleged

violation.

(d) The commission may require by summons the attendance and testimony of witnesses and the production of books, papers and other records relating to any matter being investigated by it pursuant to this chapter or said chapter two hundred and sixty-eight A. Such summons may be issued by the commission only upon a majority vote of the commission and shall be served in the same manner as summonses for witnesses in civil cases, and all provisions of law relative to summonses issued in such cases, including the compensation of witnesses, shall apply to summonses issued by the commission. Such summonses shall have the same force, and be obeyed in the same manner, and under the same penalties in case of default, as if issued by order of a justice of the superior court and may be quashed only upon motion of the summonsed party and by order of a justice of the superior court.

(e) Any member of the commission may administer oaths and any member of the commission may hear testimony or receive other evidence in any proceeding before the commission.

(f) All testimony in a commission adjudicatory proceeding shall be under oath. All parties shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, to submit evidence, and to be represented by counsel. Before testifying, all witnesses shall be given a copy of the regulations governing commission proceedings. All witnesses shall be entitled to be represented by counsel.

(g) Any person whose name is mentioned during an adjudicatory proceeding of the commission and who may be adversely affected thereby may appear personally before the commission on his own behalf, with or without an attorney, to give a statement in opposition to such adverse mention or file a written statement of such opposition for incorporation into the record of the proceeding.

(h) All adjudicatory proceedings of the commission carried out pursuant to the provisions of this section shall be public, unless the members vote to go into executive session.

(i) Within thirty days after the end of an adjudicatory proceeding pursuant to the provisions of this section, the commission shall meet in executive session for the purpose of reviewing the evidence before it. Within thirty days after completion of deliberations, the commission shall publish a written report of its findings and conclusions.

(j) The commission, upon a finding pursuant to an adjudicatory proceeding that there has been a violation of said chapter two hundred and sixty-eight A or a violation of this chapter, may issue an order requiring the violator to:

(1) cease and desist such violation of said chapter two hundred and sixty-

eight A or this chapter;

(2) file any report, statement or other information as required by said chapter two hundred and sixty-eight A or this chapter; or

(3) pay a civil penalty of not more than \$10,000 for each violation of this chapter or chapter 268A, with the exception of a violation of section 2 of chapter 268A, which shall be subject to a civil penalty of not more than \$25,000.

The commission may file a civil action in superior court to enforce such order and any order issued by the commission in accordance with chapter 268A.

(k) Any final action by the commission made pursuant to chapter 268A or 268B shall be subject to review in superior court upon petition of any party in interest filed within thirty days after the action for which review is sought. The court shall enter a judgment enforcing, modifying or setting aside the order of the commission or it may remand the proceedings to the commission for such further action as the court may direct. If the court modifies or sets aside the commission order or remands the proceedings to the commission, the court shall determine whether such modification, set aside or remand is substantial. If the court does find such modification, set aside or remand to be substantial, the employee shall be entitled to be reimbursed from the treasury of the commonwealth for reasonable attorneys' fees and all court costs incurred by him in the defense of the charges contained in said proceedings. The amount of such reimbursement shall be awarded by the court, but shall not exceed \$30,000 per person, per case. Reimbursement of such costs shall be applicable to state, county or municipal employees whose conduct is so regulated by the provisions of chapter two hundred and sixty-eight A and this chapter.

(l) The superior court shall have concurrent jurisdiction to issue orders under paragraph (j) in a civil action brought by the attorney general. In any such action, an advisory opinion of the commission under clause (g) of section 3 shall be binding to the same extent as it is against the commission under that clause.