Chris DeRose, Clerk of Court
*** Electronically Filed ***
07/03/2018 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-011347 07/02/2018

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Mai
Deputy

MARK D GOLDMAN

DENNIS I WILENCHIK

v.

MARK KRISTOPHER SAHL, et al.

JOHN R CUNNINGHAM

JEFFERSON T COLLINS
MICHAEL A ROSSI
JAMES L CSONTOS
PAUL J VAPOREAN
JUDGE KILEY

MINUTE ENTRY

Among the claims asserted in this case by Plaintiff Mark Goldman was a claim for Abuse of Process. *See* Complaint at ¶¶ 139-145. This claim was based on the Plaintiff's allegation that the Defendants Mark Sahl *et al*. "participated in and conspired to file an ethics complaint with the Arizona State Bar Association ('Frivolous Bar Charge')" in an effort to initiate "an ethics investigation into" the Plaintiff that would "subject [him] to penalties" even though the Defendants "knew or should have known" that their allegations "did not rise to any level of attorney misconduct." *Id*. at ¶¶ 140, 142. The Plaintiff alleged that, even though "the Frivolous Bar Charge was summarily dismissed…during the screening process," he nonetheless suffered "reputational injury" and other damages "[a]s a result of [the] Frivolous Bar Charge," "particularly in light of publishing the referral to third parties." *Id*. at ¶¶ 141, 144.

The Plaintiff also asserted other claims against the Defendants, including, but not limited to, claims for Defamation, False Light, and Intentional Infliction of Emotional Distress, arising

out of letters exchanged between the parties in December 2016 and January 2017 that were later published to third parties. *See generally* Complaint.

After dispositive motions were briefed and argued, the Court held that the Plaintiff's Abuse of Process claim is barred by Rule 48(l) of the Rules of the Supreme Court of Arizona ("Rule 48"), and that the Plaintiff's pursuit of that claim warrants an award of fees and costs in the Defendants' favor pursuant to A.R.S. § 12-349. Minute Entry of May 30, 2018 at pp. 6-10. The Court further held that the absolute litigation privilege barred the Plaintiff's remaining claims. *Id*. at pp. 10-16.

The Court has reviewed and considered the Plaintiff's Motion for Reconsideration of (1) Under Advisement Ruleing [*sic*] Entered May 31, 2018 and (2) Minute Entry Order Entered June 13, 2018 ("Motion for Reconsideration"). In his Motion for Reconsideration, the Plaintiff argues that the Court erred in finding his Abuse of Process claim barred by Rule 48, asserting that "the record is clear that the Abuse of Process claim was not based on the mere act of filing a bar complaint or the content of it." Motion for Reconsideration at p. 3. He contends that, in responding to the Motion to Dismiss, he "lucidly pointed out and argued that Count Ten [of his Complaint, *i.e*., the Abuse of Process claim] was premised not on the content of the bar complaint, but on the abuse of the bar complaint process by Defendants." *Id*. The Plaintiff asserts that the Defendants' "abuse of the bar complaint process" included telling "lies about Plaintiff's alleged unethical conduct to the Arizona Bar Ethics Hotline" and "lies" in their January 6, 2017 letter to the Plaintiff "claiming they had an obligation to file a bar complaint." *Id*.

The Plaintiff's argument on this point is contrary to the plain words of his own Complaint. The factual allegations in the Complaint in support of the Abuse of Process claim are that the Defendants "conspired to file an ethics complaint with the Arizona State Bar Association ('Frivolous Bar Charge')," that "[t]he Frivolous Bar Charge was summarily dismissed by the State Bar of Arizona during the screening process," and that the Defendants "willfully used the Arizona State Bar Association's ethics committee to pursue an ethics investigation into Plaintiff to subject Plaintiff to penalties when they knew or should have known" that his conduct "did not rise to any level of attorney misconduct." Complaint at ¶¶ 140-42. The Complaint further alleges that the Plaintiff suffered damages "[a]s a result of [the] Frivolous Bar Charge." *Id*. at ¶ 144. These allegations plainly show that the Plaintiff's Abuse of Process claim was based on the bar complaint the Defendants filed, and not, as the Plaintiff now contends, on a phone call made to the "Ethics Hotline" or purportedly false statements in a letter the Defendants sent to the Plaintiff on January 6, 2017.

A review of the Plaintiff's March 2, 2018 Response to Defendants' [Motion for] Judgment on the Pleadings ("Response to Motion for Judgment of the Pleadings") confirms that, contrary to the position the Plaintiff now asserts, his Abuse of Process claim arose out of the

Defendants' filing of a bar complaint against him. In his Response to Motion for Judgment of the Pleadings, the Plaintiff argued that Rule 48 did not bar his Abuse of Process claim, asserting that, "by its plain language, Rule 48(l) protects the content of the communication with the Arizona Bar, *not the act of filing a bar complaint*." Response to Motion for Judgment on the Pleadings at p. 2 (emphasis in original). The Plaintiff went on to state,

> Rule 48(l) does not expressly state, as Defendants seem to assume, that *the act of filing a complaint* with the Bar is also granted absolute immunity.

Id. (emphasis added). In contending that Rule 48 does not bar his Abuse of Process claim, the Plaintiff argued that if the Arizona Supreme Court, in promulgating Rule 48, had "intended for there to be absolute immunity for the filing of a Bar Complaint," it would have phrased the language of the rule differently. *Id*. at p. 7. The Plaintiff distinguished a New York appellate case by noting that, unlike the situation addressed in the New York case, "the allegations in the bar complaint" the Defendants filed against him "are not confidential and were disseminated…to over one-hundred people." *Id*. at p. 5. The Plaintiff's repeated references, in his Response to Motion for Judgment on the Pleadings, to the Defendants' filing of a bar complaint against him, and the absence of any reference to a phone call to the Ethics Hotline or allegedly false statements in a January 6, 2017 letter, make clear that the Plaintiff's Abuse of Process claim was based on the filing of the bar complaint. His belated contention, in his Motion for Reconsideration, that his Abuse of Process claim did not arise out of the Defendants' filing of the bar complaint is directly contrary to the arguments he previously made to this Court.

In the Motion for Reconsideration, the Plaintiff argues that, in dismissing his Abuse of Process claim arising out of the filing of a bar complaint against him, the Court improperly "largely relied on non-court, pre-motion correspondence between counsel…while the Court ignored the Complaint and Plaintiff's arguments and record in the Responses actually filed with the Court." Motion for Reconsideration at p. 2. The "non-court, pre-motion correspondence" to which the Plaintiff refers is, presumably, his counsel's January 26, 2018 letter to the Defendants' counsel stating that

> Mr. Goldman is not suing Sahl for filing a bar complaint against him. If he were, that would likely be immune under Rule 48(l).

Minute Entry of May 30, 2018 at p. 9. The Plaintiff asserts that this statement in his counsel's January 26, 2018 letter was "a throw away comment" that could not properly be considered in determining the merits of his Abuse of Process claim because it was "not a memorandum of law," "an appellate brief," "or a dissertation on the nuances of every claim in the Complaint." Motion for Reconsideration at p. 2.

The Plaintiff is simply wrong in contending that, in dismissing his Abuse of Process claim, the Court "largely" relied on his counsel's January 26, 2018 letter while "ignor[ing]" the Complaint and the Plaintiff's Response to Motion for Judgment on the Pleadings. In holding that the Plaintiff's Abuse of Process claim is barred by Rule 48, the Court considered both the Complaint and the Response to Motion for Judgment on the Pleadings. Indeed, in its ruling, the Court quoted from both. *See* Minute Entry of May 30, 2018 at p. 6. The Court based its dismissal of the Abuse of Process claim on the allegations in the Complaint, on the written and oral arguments of the parties, and on controlling legal authority refuting the Plaintiff's contention that Rule 48 does not apply to the act of filing a bar complaint. *Id*. at pp. 6-7. *See also Sobol v. Marsh*, 212 Ariz. 301, 303, 130 P.3d 1000, 1002 *amended* 2006 WL 864292 (App. Div. 1, Apr. 5, 2006) ("As a matter of public policy and legal precedent, anyone who files a complaint with the State Bar alleging unethical conduct by an attorney is entitled to a common law absolute privilege from civil suit."). The Court considered counsel's January 26, 2018 letter only to the extent that it sheds light on the Plaintiff's state of mind in pursuing his Abuse of Process claim, *i.e*., his awareness that his Abuse of Process claim was "likely" barred by law. *Id*. at p. 9. A plaintiff's state of mind in asserting and/or maintaining a groundless claim is a factor that a court not only *may* consider, but *must* consider, in resolving a request for an award of attorney fees pursuant to A.R.S. § 12-349. *See, e.g*., *Phoenix Newspapers, Inc. v. Dep't of Corrs., State of Ariz*., 188 Ariz. 237, 245, 934 P.2d 801, 809 (App. 1997) (discussing "intent" element of A.R.S. § 12-349, and holding that sanctions cannot be imposed without "the requisite finding of intent to harass").

The Plaintiff further contends that public policy considerations warrant reconsidering the Court's dismissal of the Abuse of Process claim. Motion for Reconsideration at pp. 6-7. He argues that "abuse of the Bar Charge process…is an acknowledged reality," and urges the Court not to "embolden Defendants and similarly situated attorneys by granting free reign [*sic*] to abuse the attorney discipline process by using it as a sword against opposing counsel without any consequences." *Id*. at p. 7.

While it is true that bar complaints may be filed for improper reasons, the Court of Appeals long ago determined, after "weigh[ing] the possible harm to attorneys in the filing of a malicious complaint against the need to encourage the reporting of unethical conduct," that "public policy demands the free reporting of unethical conduct." *Drummond v. Stahl*, 127 Ariz. 122, 126, 618 P.2d 616, 620 (App. 1980). Because the Court in *Drummond* held that it was "compel[led]" by public policy "to adopt the position that there is an absolute privilege extended to anyone who files a complaint with the State Bar alleging unethical conduct by an attorney," *id*., this Court is not free to re-weigh the competing considerations in disregard of the determination already reached by the *Drummond* court.

The Plaintiff next turns, in his Motion for Reconsideration, to the Court's award to the Defendants of attorney fees and costs incurred in connection with his assertion of the Abuse of Process claim. *See* Minute Entry of May 30, 2018 at p. 10. In support of his request that the Court vacate the award of fees and costs, the Plaintiff notes that, in its May 30, 2018 ruling, "the Court commented [that] Plaintiff did not respond to the request for attorney fees, which is not accurate." Motion for Reconsideration at p. 5.

In its ruling, the Court noted, correctly, that nowhere in the Plaintiff's Response to Motion for Judgment on the Pleadings did the Plaintiff make any reference to the Defendants' request for an award of attorney fees incurred in defending against the Plaintiff's Abuse of Process claim. *See generally* Response to Motion for Judgment on the Pleadings. The Court's decision to grant the Defendants' request for an award of attorney fees was not, however, based on the Plaintiff's failure to respond to that request. On the contrary, the Court's decision to grant the Defendants' request for an award of attorney fees was based on the Court's finding that the record established that the elements of A.R.S. § 12-349 were met and that an award of attorney fees was therefore warranted. *See* Minute Entry of May 30, 2018 at pp. 8-9.

In granting the Defendants' fee request pursuant to A.R.S. § 12-349, the Court quoted a statement by a federal district court in Florida that "[i]n cases where courts found a claim to be pursued in bad faith and for the purpose of harassment, plaintiff's knowledge that a claim was meritless was proven by the plaintiff's own contradictory testimony or other evidence." Minute Entry of May 30, 2018 at p. 9, *quoting Gillis v. Deutsche Bank, et al.*, 2016 WL 551765 at *3 (M.D.Fla. 2016). In his Motion for Reconsideration, the Plaintiff asserts that *Gillis* and the cases cited therein are distinguishable. Motion for Reconsideration at pp. 5-6.

While the Plaintiff may be correct in asserting that the facts of *Gillis* and the cases cited therein are unlike those presented in this case, the proposition for which this Court cited *Gillis* - - *i.e*., that a plaintiff's own statements may be considered in determining the plaintiff's state of mind in pursuing a groundless claim - - remains true, as numerous other courts have also recognized. *See, e.g., Whitehead v. Food Max of Miss., Inc*., 332 F.3d 796, 800, 807 (5th Cir. 2003) (affirming imposition of sanctions on attorney who "attempted to execute [a] judgment" prior to expiration of ten-day stay on execution of judgments; in affirming trial court's determination that attorney acted with improper intent warranting sanctions, Court held that attorney's contemporaneous statements to the media constituted "arguably the best evidence of his improper purpose"). *See also Timoshenko v. Mullooly, Jeffrey, Rooney & Flynn, LLP*, 2018 WL 1582220 at *5 (E.D.N.Y., Mar. 30, 2018) (issuing order to plaintiff's counsel, Litvak, to show cause why Rule 11 sanctions should not be imposed based on his persistence in adhering to "frivolous" position; the court noted that, even after being informed, during conversation with opposing counsel, of controlling case law establishing that his position was "indefensible," Litvak nevertheless persisted in asserting "the same frivolous argument").

Finally, the Plaintiff turns, in his Motion for Reconsideration, to his request that the Court reconsider its determination that the absolute litigation privilege bars all of his remaining claims. Motion for Reconsideration at p. 7. He asserts that the threats of litigation contained in the letters exchanged between the parties in December 2016 and January 2017 were mere "posturing," and therefore that litigation was not truly "contemplated" as is required "for the 'prelitigation' extension of the litigation absolute privilege to apply." *Id.* at pp. 7, 8.

As the Court has previously noted, in the correspondence the parties exchanged in December 2016 and January 2017, each made explicit threats to initiate litigation against the other. *See* Minute Entry of May 30, 2018 at pp. 2-5. On January 16, 2017, for example, the Plaintiff himself sent a letter to third parties complaining that his client, CopperWynd Resort & Club, had been "threatened with lawsuits by" Defendant The Villas at CopperWynd Association.[1] The Court sees no basis on which it could conclude that, although the correspondence exchanged between the parties in December 2016 and January 2017 contains explicit threats of litigation, the absolute litigation privilege does not apply to those letters because the letter writers were only bluffing.

For these reasons, and the other reasons set forth in the Court's Minute Entry of May 30, 2018,

IT IS ORDERED denying the Motion for Reconsideration.

[1] Exhibit 13 to Defendants' Statement of Facts in Support of Motion for Summary Judgment filed February 8, 2018, at p. 6.