

STATE OF MAINE
WASHINGTON, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-09-57

RALPH NADER, CHRISTOPHER
DROZNICK, NANCY ODEN, J.
NOBLE SNOWDEAL AND ROSEMARY
WHITTAKER,

Plaintiffs

V.

THE MAINE DEMOCRATIC PARTY,
THE DEMOCRATIC NATIONAL COMMITTEE,
KERY-EDWARDS 2004, INC., THE
BALLOT PROJECT, INC., DOROTHY MELANSON,
TERRY MCALULIFFE AND TOBY MOFFETT,

Defendants.

ORDER ON
MOTIONS TO DISMISS

This matter was before the Court on July 31, 2012, for argument on the pending Motions to Dismiss filed on behalf of the Defendants.

ANTI-SLAPP MOTIONS¹

Counsel for all Defendants filed Motions to Dismiss under 14 M.R.S. § 556 (2011). This statute, on its face, contemplates that a "special motion to dismiss" would be filed by the defendant within sixty days of the service of

¹ Litigation intended to harass or silence critics or activists has become known as strategic lawsuits against public participation and identified by the acronym "SLAPP."

the complaint, discovery would be stayed or limited and that the Motion would be heard and decided promptly. The Complaint here was filed on November 30, 2009, and the special motions were timely filed. Following briefing and argument, the Motions were granted by this Court's Order of November 15, 2010. That Order was appealed and by decision dated April 19, 2012,² this Court's Order to dismiss was vacated and the matter remanded to this Court for further action. Following additional briefing and argument by counsel, this matter is again before this Court in light of the Law Court's analysis and interpretation of 14 M.R.S. § 556.

In terms of guidance in deciding whether to grant a special motion to dismiss, the statute provides in pertinent part:

The Court shall grant the special motion, unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party.

14 M.R.S. § 556.

In its opinion, the Law Court acknowledged the competing rights under the Federal and Maine Constitutions that this case presents on behalf of both Plaintiffs and

² Nader. v. Me. Democratic Party, 2012 ME 57, 41 A.3d 551.

defendants, given the positions of the parties in this litigation. The Law Court reaffirmed the two-step analysis required under 14 M.R.S. § 556. The Law Court affirmed defendants' position on step one of that analysis. It advised that on the facts presented in this special motion to dismiss, "Nader's claims against them are based on MDP's and Moffett's exercise of the right of petition" and that the defendants had carried their burden as to the first step of this analysis. *Nader*, 2012 ME 57, ¶ 28.

As to the second step in the anti-SLAPP analysis, the Law Court changed the burden on plaintiff Nader in several ways.

Initially, the Law Court directed that "section 556 must be construed, consistent with usual motion-to-dismiss practice, to permit courts to infer that the allegations in a plaintiff's complaint and factual statements in any affidavits responding to a special motion to dismiss are true." *Id.* ¶ 33, 41 A3d at 562.

Secondly, the Law Court advised that a plaintiff can meet this second-step burden "if, through 'the pleading and supporting and opposing affidavits,' 14 M.R.S. § 556, the plaintiff presents 'some evidence' that the defendant's petitioning activity was devoid of factual or legal support and caused actual injury." *Id.* ¶ 35, 41 A3d at 562.

Thirdly, the Law Court announced a change in the plaintiff's burden in opposing a special motion to dismiss. As to this second step, the Law Court announced that the plaintiff should be allowed to proceed with his or her claim "unless the nonmoving party, here Nader, by pleading or affidavits, fails to make a prima facie showing that any, rather than all, of the petitioning activities by the moving parties, here MDP and Moffett, necessarily including here MDP's and Moffett's actions in Maine, were devoid of any reasonable factual support or arguable basis in law." *Id.* ¶ 36, 41 A3d at 563. The Law Court reaffirmed its definition of prima facie evidence as being "proof only of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." *Id.* ¶ 34, 41 A3d at 562 (quoting *Cookson v. State* 2011 ME 53, ¶ 8, 17 A.3d 1208).

The revised burden on the plaintiff as interpreted by the Law Court was intended to create a "low standard" which, if met would allow the plaintiff at this early stage of the litigation to avoid dismissal of his claim. *Id.* ¶ 35, 41 A3d at 562.

Discussion

A review of the Plaintiffs' complaint, the allegations of which are taken as true at this stage of the

proceedings, demonstrate that the Plaintiffs have carried their burden at stage two of this analysis. That is, the plaintiffs have demonstrated "some evidence" that the Defendants' petitioning activity in Maine was devoid of factual and legal support and caused actual injury. *Id.* ¶ 35, 41 A3d at 562. In particular, this Court references paragraphs 5, 8 and 59-66 of the complaint. These allegations are supplemented by the affidavit of Mr. Nader, which provides "some evidence" of actual injury.

This Court understands Plaintiffs' complaint to allege a theory of civil conspiracy. The thrust of the allegation is that Defendants engaged in a plan, concert of action, or conspiracy to challenge Plaintiffs' candidacy for President and Vice President of the United States by using methods or means that were illegal and constituted one or more independently recognize torts. *Cohen v. Bowdoin*, 288 A.2d 106, 109-10 (Me. 1972). In Maine, the complaint and supporting affidavits of Mr. Nader and Ms. Amato provide prima facie evidence, not only of the multistate plan participated in by named Defendants and unnamed co-conspirators, but of actions taken in Maine in furtherance of that conspiracy by some of the named Defendants. For the purpose of withstanding the special motion to dismiss, Plaintiffs have provided in the pleadings and affidavits

"some evidence" of the actions taken in Maine (i.e. paragraphs 5, 8 and 59-66 of the complaint with the affidavits of Mr. Nader and Ms. Amato). As indicated, to effectively plead civil conspiracy, Plaintiffs must make a prima facie showing of an independent tort, in this instance abuse of process. The elements necessary to be alleged and proven include: (1) the use of process in a manner improper in the regular conduct of the proceeding, and (2) the existence of an ulterior motive. *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 1998 ME 70, ¶ 7, 708 A.2d 283, 286. For the purpose of evaluating whether plaintiffs' have met the lower standard of proof regarding this special motion to dismiss, the pleadings are taken as true. The Court is satisfied in reviewing the allegations in the complaint, particularly paragraph 5 and the referenced affidavits, that Plaintiffs have made a prima facie showing of both a civil conspiracy, including an ulterior motive, and the improper use of discovery and subpoenas to establish an abuse of process claim for the purpose of this Motion to Dismiss. *Id.*

The Special Motions to Dismiss filed pursuant to 14 M.R.S. § 556 by all Defendants are hereby denied.

RULE 12 MOTIONS TO DISMISS

Each of the Defendants has filed a Motion to Dismiss pursuant to M.R. Civ. P. 12. It is helpful at the outset to identify the claims in the complaint in order to put the Rule 12 Motions to Dismiss in context.

The complaint alleges 140 factual paragraphs that are incorporated by reference in the actual counts or legal theories on which recovery is sought. Count 1 alleges conspiracy. Count 2 alleges conspiracy to commit abuse of process and malicious prosecution. Count 3 alleges abuse of process in Maine. Count 4 alleges malicious prosecution in Maine. Count 5 alleges abuse of process in seventeen other states and the District of Columbia. Count 6 alleges malicious prosecution in seventeen other states and the District of Columbia.

Lack of Personal Jurisdiction

Defendants Moffett and Ballot Project, Inc., move to dismiss pursuant to M.R. Civ. P. 12(b)(2) for lack of personal jurisdiction (and also under M.R. Civ. P. 12(b)(4) and (5) for failure of service of process).

(a) Ballot Project

Defendants Moffett and Ballot Project argue that the Ballot Project was formed under the laws of Washington, D.C., and its status was revoked in September of 2005.

Plaintiffs do not contest this point. Likewise, Plaintiffs do not contest that under D.C. statutes, a revoked corporation is given three years of additional viability to defend lawsuits against it. D.C. Code § 29-301.86.³ Defendants Moffett and Ballot Project point out that the Ballot Project no longer existed in November 2009, when this suit was filed.

Plaintiffs respond by pointing out that their suit in Washington, D.C., was dismissed on June 9, 2009, and also point out that the dismissal was exclusively on statute of limitation grounds. *Nader v. Democratic Nat'l Comm.*, 567 F.3d 692 (D.C. Cir. 2009). Plaintiffs argue that the viability of Ballot Project, Inc. is maintained by the Maine savings statute found at 14 M.R.S. § 855 (2011).

The issue here is whether the Ballot Project, Inc. legally existed in November 2009, such that it could be sued let alone served with process? While the Maine savings statute might have some applicability in dealing with prior Maine litigation that had been terminated due to a matter of form or failure of service, the law in Maine is clear that, with respect to the existence of a foreign corporation, one must look to the law of its domicile. *Willey v. Brown*, 390 A.2d 1039, 1042 (Me. 1978). Under the

³ This statute was subsequently repealed.

law of the District of Columbia, as of November of 2009, Ballot Project, Inc. did not exist as either an entity to be sued or served with process.

The Motion to Dismiss the Ballot Project, Inc., as a defendant pursuant to Rule 12(b)(2), (4) and (5) is granted.

(b) Anthony J. (Toby) Moffett
and other Defendants

Under date of February 22, 2010, Defendant Moffett filed an affidavit with the Court in this case disavowing any connection with the State of Maine. Defendant Moffett argues that by filing the affidavit and raising the issue of personal jurisdiction, Plaintiffs had the burden to assert more information to defeat the uncontested allegations that Mr. Moffett had no connection with Maine and therefore Maine courts had no jurisdiction over him. *Dorf v. Complastik Corp.*, 1999 ME 133, ¶ 13, 735 A.2d 984, 988. In this case, however, the factual context of the pleadings clearly implicates facts and events that occurred outside of Maine, which are not part of Mr. Moffett's affidavit and are not addressed elsewhere with any specificity by Plaintiffs or Defendants.

Throughout these preliminary proceedings there has been an inability or unwillingness of all Defendants to

recognize Plaintiffs' complaint to allege a multistate conspiracy partially executed in Maine. The Federal Court recognized this, *Nader*, 567 F.3d 692, and the Law Court recognized this in the recently concluded appeal (albeit, requiring a prima facie showing of a tort in Maine), *Nader*, 2012 ME 57. The Defendants have not recognized Plaintiffs alleged theory in terms of its impact on the issue of personal jurisdiction of Maine courts over all the defendants. In a narrow sense, Plaintiffs and Defendants seem to recognize that the long-arm statute, 14 M.R.S. § 704-A(2)(b) (2011), allows this Court to assert jurisdiction over nonresident persons who themselves or through agents cause a tortious act to be done in Maine.

In the context of long arm jurisdiction our court has affirmed the need to establish three things. *Dorf*, 1999 ME 133, ¶10, 735 A2d at 988. First that Maine has a legitimate interest in the subject matter of the litigation. *Id.* Second, that the defendant by his conduct, reasonably could have anticipated litigation in Maine. *Id.* Third, that exercise of Maine jurisdiction comports with traditional notions of fair play and substantial justice. *Id.*

While these concepts are easily articulated they are not easily evaluated at this stage of the proceedings given

the lack of discovery in this case to date. The focus of this analysis must of necessity be whether it is determined by discovery that any or all of the named Defendants, acting for themselves or through agents as part of the complex web which the pleadings identify as a civil conspiracy, caused a tortious act or acts to be done in Maine. While the burden is on the Plaintiffs to prove jurisdiction, in the context of the pleadings in this case and lack of discovery, this Court believes it would be appropriate to defer decision on the issue of personal jurisdiction until trial. See *Dorf* 1999 ME 133, ¶¶ 11 -15 & nn. 4-6, 735 A.2d at 988-89.

Accordingly, pursuant to M.R. Civ. P. Rule 12(d), this Court will allow discovery to take place and make a determination as to jurisdiction over the defendants, corporate and individual, when the issue is raised again at trial. In this Court's view this is a case where "the facts relating to personal jurisdiction are so intertwined with the facts relating to the merits of the case, that it would be difficult to decide jurisdiction prior to a full trial on the merits..." See *Dorf*, 1999 ME 133, ¶¶ 12, 15, 735 A.2d at 988-89.

Failure to State a Claim

And *Res Judicata*

Defendants Ballot Project and Moffett also move to dismiss this matter for failure to state a claim pursuant to M.R. Civ. P. 12(b)(6). They argue that prior litigation of these same issues raised in this litigation precludes relitigating these claims under the theory of *res judicata*.

At the outset, a review of the D.C. litigation, *Nader*, 567 F.3d 692, confirms that that case was resolved exclusively based on a statute of limitations defense. There was no decision on the underlying issues that appear to have been similar if not identical to the issues presented in this Court. Clearly, while Maine is in favor of a final judgment and bringing litigation to repose, that is so with respect to claims that have been fully litigated or have had the opportunity to be fully litigated. When that is not the case, a statute of limitations resolution, particularly in a non-Maine forum, will not preclude litigation of the prior claims alleged but not explored at trial. This Court is satisfied that the claims raised here have not been fully litigated and, accordingly, the *res judicata* defense does not bar proceeding with this litigation.

Counts 5 and 6

Failure to State a Claim

Plaintiffs allege tort theories of recovery in Count 5 (abuse of process) and Count 6 (malicious prosecution) with respect to the alleged torts taking place in these jurisdictions and violating the laws of the District of Columbia and 17 different states other than Maine. While the allegations in the complaint suggest that the breadth of the conspiracy involved some actions in each of these 18 jurisdictions, these counts ask Maine Courts to adjudicate separate torts that allegedly took place in each of these other jurisdictions under the law of each of those jurisdictions.

At its most basic, jurisdiction is (1) power to inquire into the facts, (2) application of the law and (3) declaration of an applicable resolution in the regular course of a judicial proceeding. *Rockland v Hurricane Isle*, 106 Me. 169, 173 (Me. 1909). The authority of this Court is defined and limited by the laws of the State of Maine and the Maine Constitution. At its most expansive, that jurisdiction/power is reflected in the long arm statute, 14 M.R.S. §704-A. As it relates to responsibility for torts, the long arm statute only allows jurisdiction when those torts are committed in Maine (14 M.R.S. §704-A (2)(B)). Neither the pleadings nor the supplementary filings with regard to the Rule 12(b)(6) Motions to Dismiss

establish in any way jurisdiction/power of this Court over any of the Defendants who it is claimed committed torts in other jurisdictions. Likewise there is no authority allowing this Court the power to adjudicate those alleged torts that took place in other states based on the law of other states. This Court distinguishes the potential for jurisdiction over non-resident conspirators with respect to actions in Maine done in furtherance of that conspiracy, from jurisdiction over actions/torts done in other states. In the latter situation there is no Maine jurisdiction.

By their Motions to Dismiss Counts 5 and 6 of the complaint pursuant to Rule 12(b)(6), all of the Defendants implicitly and explicitly challenge whether Counts 5 and 6 state claims over which Maine Courts have jurisdiction. This Court grants the Motions to Dismiss for failure to state a claim upon which relief can be granted by this Court as they relate to Counts 5 and 6 of Plaintiffs' complaint.

Order

The Court Orders as follows:

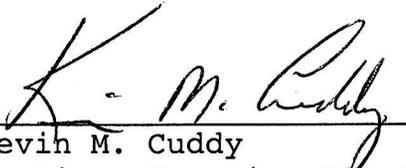
1. The Motions of all Defendants to Dismiss based on the ANTI-SLAP Statute are DENIED.

2. The Motion to Dismiss Defendant The Ballot Project, Inc. is GRANTED.
3. The Motions to Dismiss by all other Defendants based on lack of jurisdiction as to Counts 1,2,3 and 4 are deferred until trial.
4. The Motion to Dismiss by all Defendants as to Counts 5 and 6 of plaintiffs' complaint are GRANTED.

At the direction of the Court, this Order shall be incorporated into the docket by reference. Rule 79(a) M.R.Civ.P.

It is Ordered that the Clerk promptly issue a Scheduling Order that will govern the progress of this litigation.

September 20, 2012



Kevin M. Cuddy
Justice, Superior Court

FILED

SEP 20 2012