

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JOSE C. LISBOA, JR.

Plaintiff

v.

ROGER KLEINMAN, *et al.*

Defendants

JUDGE EILEEN T. GALLAGHER

CASE NO. CV 11 753481

**JOURNAL ENTRY
AND OPINION**

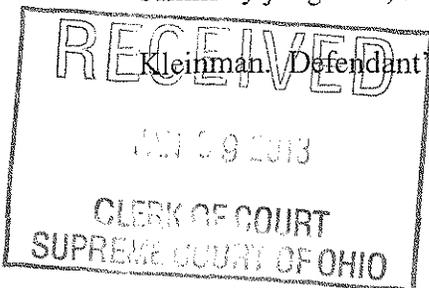


This matter is before the Court on Defendant Kimberly Lisboa's Amended Motion for Judgment on the Pleadings. After careful consideration of the brief and authority cited therein, and based on the following, Defendant's motion is unopposed and granted for good cause shown.

I. STATEMENT OF THE CASE:

Plaintiff Jose C. Lisboa, Jr. ("Plaintiff") filed the instant action against his former wife, Kimberly Lisboa ("Defendant") and her divorce attorney Roger L. Kleinman ("Kleinman") alleging legal malpractice, fraud, conspiracy, civil aiding and abetting, intentional infliction of emotional distress, and negligent infliction of emotional distress. Defendant filed a Counterclaim against Plaintiff seeking to have Plaintiff declared a vexatious litigator pursuant to R.C. 2323.52.

On 5/9/2012 this Court granted Defendant's and Kleinman's separate motions for summary judgment, and Plaintiff's claims were dismissed, with prejudice, as to Defendant and Kleinman. Defendant's Counterclaim remained pending.



This matter was called for a hearing on 10/18/2012 as to Defendant's Motion for Judgment on the Pleadings. Present in Court were Defendant and Kleinman; Plaintiff failed to appear. The Court noted on the record that Plaintiff was served with a copy of Defendant's motion and notice of the hearing date and time, and at the address provided to the Clerk of Courts by Plaintiff. Defendant moved the Court to continue the hearing date to provide her newly-retained counsel an opportunity to review Defendant's motion, and, if necessary, amend said motion and prepare for the hearing. For good cause shown, this Court granted Defendant's motion.

The Docket reflects on 11/13/2012 Defendant filed an Amended Motion for Judgment on the Pleadings. This matter was then called for a hearing on 12/11/2012 as to Defendant's amended motion. Present in Court were Defendant, Kleinman, and Holly Armstrong, Esq.; Plaintiff failed to appear. The Court noted on the record that Plaintiff was served with a copy of Defendant's Amended Motion for Judgment on the Pleadings and notice of the hearing date and time, and at the address provided to the Clerk of Courts by Plaintiff. Defendant submitted testimony in support of her motion.

II. LAW AND ARGUMENT:

Defendant's Counterclaim requests this Court to declare Plaintiff to be a vexatious litigator pursuant to R.C. 2323.52. Defendant, by and through her amended motion, moves this Court to enter judgment on the pleadings in her favor and against Plaintiff as to her Counterclaim. In support, Defendant argues the pleadings and exhibits attached therein clearly show Plaintiff has habitually, persistently, and unreasonably engaged in vexatious conduct. Based on the following, the Court finds Defendant's amended motion well taken.

A. Standard of Review for Judgment on the Pleadings

Civ.R. 12(C) provides a party may move for judgment on the pleadings after the pleadings are closed but within such time as not to delay the trial. A motion for judgment on the pleadings raises only question of law. *See Maloof v. Benesch, Friedlander, Coplan & Aronoff*, 8th Dist. No. 84006, 2004-Ohio -6285, P15 (a motion for judgment on the pleadings is the same as a motion to dismiss filed after the pleadings and raised only questions of law.)

When considering a Civ.R. 12(C) motion for judgment on the pleadings, the court may consider only the allegations in the complaint and any written instrument attached thereto.

Bryant v. Cuyahoga County Bd. of Comm'rs, 8th Dist. No. 85436, 2005-Ohio-3848, 4-5, citing *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 165, 297 N.E.2d 113.

Judgment on the pleadings may be granted where no material factual issue exists and the moving party is entitled to judgment as a matter of law. Determination of the motion is restricted to the allegations of the pleadings with all reasonable inferences construed in the nonmovant's favor. *Schweizer v. Riverside Methodist Hosps.*, 108 Ohio App. 3d 539, 541 (10 Dist.1996), citing *Bennett v. Ohio Dept. of Rehab. & Corr.* (1991), 60 Ohio St. 3d 107, 108, 573 N.E.2d 633.

In the instant matter, the pleadings consist of Plaintiff's Complaint, Kleinman's Answer, Defendant's Answer and Counterclaim, and Plaintiff's Answer to Defendant's Counterclaim. Defendant has attached exhibits to her Counterclaim. This Court, then, and when considering Defendant's motion, may only consider the aforementioned pleadings, which includes the attached exhibits to Defendant's Counterclaim.

B. R.C. 2323.52 Vexatious Litigator Statute

R.C. 2323.52 provides the definition of vexatious litigator and reads, in pertinent part:

(A)(2) "Vexatious conduct" means conduct of a party in a civil action that satisfies any of the following:

(a) The conduct obviously serves merely to harass or maliciously injure another party to the civil action.

(b) The conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

(c) The conduct is imposed solely for delay.

(3) "Vexatious litigator" means any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil action or actions * * *

Conduct, in turn, is defined as "the filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action." R.C. 2323.51(A)(1)(a).

A person may be declared a vexatious litigator as long as the person uses the courts to engage in vexatious conduct. *Borger v. McErlane*, 1st Dist. No. C-010262, 2001-Ohio-4030, at *11. "It is the nature of the conduct, not the number of actions, that determines whether a person is a vexatious litigator." *Id.* The purpose of the vexatious litigator statute is to prevent abuse of the system by those persons who persistently and habitually file lawsuits without reasonable grounds for doing so. *Mayer v. Bristow*, 91 Ohio St.3d 4, 13, 740 N.E.2d 656 (2000).

C. The Court Finds Plaintiff Has Engaged in Vexatious Conduct

In support of her Counterclaim to have Plaintiff declared to be a vexatious litigator, Defendant has attached numerous exhibits of separate actions filed by Plaintiff against

Defendant. Plaintiff has filed fifty-eight motions in Domestic Relations court after his divorce from Defendant; eight civil actions in Common Pleas Court against Defendant, her family, and attorneys; four complaints in the Eight District Court of Appeals against several judges; and sixteen appeals to the Eight District. See Defendant's Amended Motion; Counterclaim at ¶¶ 4-13.

Defendant argues Plaintiff's purpose of said filings was and is to merely harass and/or maliciously injure Defendant and her family. In support of her contention, Defendant has attached as an exhibit to her Counterclaim an email from Plaintiff whereby Plaintiff states, *inter alia*, "there will be more complaints filed in the upcoming weeks * * * I [sic] am going to pounce on you folks in court to prove the truth * * * and wont stop till I [sic] do!" See exhibit Q attached to Counterclaim; Amended Motion, at 10. In further support, Defendant has attached as an exhibit to her Counterclaim an email from Plaintiff whereby Plaintiff threatens Kleinman, stating, *inter alia*, "ps * * * in this new lawsuit * * * you are denoted as a MATERIAL WITNESS * * * so I would suggest you get [sic] a new lawyer for Kim [sic] (McDonald Hopkins [sic] will be called as well) * * *" See exhibit R attached to Counterclaim. Plaintiff's conduct was so extreme, Defendant argues, the Court in Case No. DR 03 295186 found "Plaintiff has engaged in a vendetta and reign of terror against Defendant that is unparalleled in the Court's experience." See exhibit A attached to Counterclaim, at 5.

Defendant argues Plaintiff's conduct, specifically the filing of the abovementioned actions and motions, was not warranted under law and could not be supported by a good faith argument for an extension, modification, or reversal of existing law. In support, Defendant has attached as exhibits to her Counterclaim Plaintiff's repeated filings arising out of the same alleged conspiracy and which were dismissed for not being warranted under existing law. See

exhibit E attached to Counterclaim (Case no.: 1:07 CV 707) (dismissed as being barred by the doctrine of *res judicata* because the facts and issues underlying the Complaint could not be relitigated in a civil proceeding); *accord* exhibit G attached to Counterclaim (Case no. CV-09-694524) (action dismissed with court noting “[t]he instant matter is one of many initiated by Plaintiff against [Defendant] and other alleging fraud and other claims related to the outcome of the Lisboas’ divorce proceedings.); exhibit J attached to Counterclaim (Plaintiff has filed 21 separate actions in the Eight District Court of Appeals).

Numerous courts have found parties engaging in conduct far less extreme than Plaintiff’s conduct constituted vexatious conduct. *See, e.g., Hull v. Sawchyn*, 145 Ohio App. 3d 193, 195-196 (8th Dist.2001) (reversing the trial court and finding as a matter of law that litigant was a vexatious litigator where he filed three additional lawsuits on the same claim against the same party after the initial court ruled he did not have an actionable claim); *Gains v. Harman*, 148 Ohio App. 3d 357, 2002-Ohio-2793, 773 N.E.2d 583 (7th Dist.) (summary judgment affirmed on plaintiff’s vexatious litigator claim where the defendant previously had filed nine meritless civil suits raising different allegations against different defendants); *Castrataro v. Urban*, 155 Ohio App. 3d 597, 2003-Ohio-6953, 802 N.E.2d 689 (5th Dist.) (affirming summary judgment on doctor’s counterclaim and labeling plaintiff a vexatious litigator where she filed four separate civil actions – three in state court and one in federal court – arising out of the same alleged malpractice); *Borger v. McErlane*, 1st Dist. No. C-010262, 2001 Ohio App. LEXIS 5544 (Dec. 14, 2001) (plaintiff constituted a vexatious litigator where she filed nearly identical state and federal civil actions and engaged in vexatious conduct in prosecuting those actions).

In the instant matter, Plaintiff has repeatedly filed separate actions arising out of the same alleged conspiracy involving Defendant. The pleadings – specifically, the attached exhibits to

Defendant's Counterclaim -- show these matters have routinely been dismissed for not being warranted under existing law. Furthermore, the pleadings clearly show a distinct animus directed by Plaintiff at Defendant, and accomplished through the legal process, which can only serve to harass and/or maliciously injure Defendant. As such, and based on the foregoing, the Court finds Plaintiff has repeatedly filed baseless matters against Defendant that obviously served to merely harass or maliciously injure Defendant and that these matters were not warranted under existing law and did not support a good faith argument for an extension, modification, or reversal of existing law.

D. The Court Further Finds Plaintiff Has Engaged in Vexatious Conduct Habitually, Persistently, and Without Reasonable Grounds Engaged in Vexatious Conduct

As noted, Plaintiff has filed fifty-eight motions in Domestic Relations court after his divorce from Defendant; eight civil actions in Common Pleas Court against Defendant, her family, and attorneys; four complaints in the Eight District Court of Appeals against several judges; and sixteen appeals to the Eight District. See Defendant's Amended Motion; Counterclaim at ¶¶ 4-13.

As noted, this Court has found that Plaintiff has engaged in vexatious conduct as defined per the statute. *See* R.C. 2323.52(A)(2). The pleadings have shown that Plaintiff has engaged in said vexatious conduct – to wit: filing numerous meritless actions arising out of the same claim of conspiracy – without reasonable grounds.

As such, and based on the foregoing, this Court further finds, as a matter of law, Plaintiff has engaged in vexatious conduct habitually, persistently, and without reasonable grounds. *See Helfrich v. Madison*, 5th Dist. No. 11 CA 26, 2012-Ohio-551 (finding habitually filing unnecessary, inappropriate, or supernumerary pleadings and motions, which serve to re-raise

arguments that have been repeatedly rejected by the trial court as well as other courts engaging in vexatious conduct habitually, persistently, and without reasonable grounds.)

E. The Court Hereby Declares Plaintiff to be a Vexatious Litigator Pursuant to R.C. 2323.52

Plaintiff has engaged in vexatious conduct habitually, persistently, and without reasonable grounds. As such, and based on the foregoing, and when only considering the allegations in the Counterclaim and exhibits attached thereto, and when construing all reasonable inferences in Plaintiff's favor, and when considering the purpose of the vexatious litigator statute is to prevent abuse of the system by those persons who persistently and habitually file lawsuits without reasonable grounds for doing so, the Court finds Plaintiff to be a vexatious litigator pursuant to R.C. 2323.52.

III. CONCLUSION:

This Court has found that Plaintiff has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in the instant matter as well as other civil actions filed by Plaintiff against Defendant. As such, and based on the foregoing, and when only considering the pleadings, and when construing all reasonable inferences in Plaintiff's favor, the Court hereby grants Defendant's Amended Motion for Judgment on the Pleadings.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Jose C. Lisboa, Jr. be declared a vexatious litigator pursuant to R.C. 2323.52.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to R.C. 2323.52 (D)(a) Jose C. Lisboa, Jr. is prohibited from instituting legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court without first obtaining the leave of this court to proceed.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to R.C. 2323.52(D)(b) Jose C. Lisboa, Jr. is prohibited from continuing any legal proceedings that he had instituted in the court of claims or in a court of common pleas, municipal court, or county court without first obtaining the leave of this court to proceed.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to R.C. 2323.52(D)(c) Jose C. Lisboa, Jr. is prohibited from making any application, other than an application for leave to proceed under division (F)(1) of R.C. 2323.52, in any legal proceedings instituted by Jose C. Lisboa, Jr. or another person in the court of claims or in a court of common pleas, municipal court, or county court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Jose C. Lisboa, Jr. is prohibited from instituting or continuing any legal proceedings in the court of appeals without first obtaining leave from the court of appeals pursuant to R.C. 2323.52(F)(2).

This Court's Journal Entry and Opinion does not affect Plaintiff's right to appeal his classification as a vexatious litigator.

As this Court pursuant to its 05/09/2012 order previously disposed of all other claims in the instant matter, this order constitutes a final judgment in this action.

THERE IS NO JUST CAUSE FOR DELAY.

RECEIVED FOR FILING

JAN 04 2013

CUYAHOGA COUNTY
CLERK OF COURTS
By [Signature] Deputy

IT IS SO ORDERED,

[Signature] 12-28-12

Judge Eileen T. Gallagher

THE STATE OF OHIO }
Cuyahoga County } SS. I, THE CLERK OF THE COURT
OF COMMON PLEAS WITHIN
AND FOR SAID COUNTY.

HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY
TAKEN AND COPIED FROM THE ORIGINAL JE

dated 1-4-13
NOW ON FILE IN MY OFFICE.

WITNESS MY HAND AND SEAL OF SAID COURT THIS 7
DAY OF Jan A.D. 20 13

CUYAHOGA COUNTY CLERK OF COURTS

By [Signature], Deputy