

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-092936

07/30/2021

HONORABLE RODRICK COFFEY

CLERK OF THE COURT
K. Tiero
Deputy

SILVERTON DEER VILLAGE HOMEOWNERS ASSOCIATION INC MARK W WALDRON

v.

JANET DEFINE

MICHAEL S DEFINE

HAVEN LEE DOVE
CHAD M GALLACHER
SCOTT B HUMBLE
JUDGE COFFEY

MINUTE ENTRY

The Court has considered Third-Party Defendant, Maxwell & Morgan, P.C.'s ("M&M") Motion to Dismiss Third Party Complaint Against Defendant Maxwell & Morgan, P.C.; Third-Party Plaintiff, Janet DeFine's Response to that Motion and M&M's Reply in support of its Motion.

Motions to dismiss for failure to state a claim upon which relief can be granted are not favored. *Archer v. CSO Cehvira*, 188 Ariz. 252, 934 P.2d 816 (App. 1997). When considering such motions the Court must: 1) limit its consideration to the factual allegations that have been pled; 2) assume the truth of those allegations while considering all reasonable inferences therefrom; and 3) dismiss only if the non-moving party is entitled to no relief as a matter of law on any interpretation of the alleged facts. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 189 P.3d 344 (2008). Moreover, all material allegations are taken as true and read in the light most favorable to the non-moving party. *Logan v. Forever Living Products Int'l, Inc.*, 203 Ariz. 191, 52 P.3d 760 (2002). When considering motions to dismiss, the Court does not weigh the evidence or dismiss

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claims simply because it seems unlikely that the party asserting the claim will prevail at an eventual trial on the merits.

M&M first argues that the claims against it should be dismissed because the Third-Party Complaint was not timely served. Rule 4(i) of the Arizona Rules of Civil Procedure provides:

If a defendant is not served with process within 90 days after the complaint is filed, the court--on motion, or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

M&M was served more than 90 days after the Third-Party Complaint was filed. However, “under Rule 4(i), a trial court has the authority to extend the period for service without a showing of good cause.” *Sholem v. Gass in & for Cty. of Maricopa*, 248 Ariz. 281, 287, 460 P.3d 273, 279 (2020). “In determining whether to grant a discretionary extension, courts have considered several factors, including whether: (1) the applicable statute of limitations bars the plaintiff from re-filing the action; (2) the defendant evaded service; and (3) the defendant would be prejudiced if the court grants the extension.” *Id.* at 290, 460 P.3d at 282. Nothing in the record indicates that: 1) any applicable statutes of limitations would bar the re-filing of any of the pending claims; 2) M&M evaded service; or 3) M&M would be prejudiced if the Court extends the deadline for serving M&M. Indeed, M&M received a copy of the Third-Party Complaint months before M&M was formally served with it. At the same time, Third-Party Plaintiff has not shown good cause for her failure to timely serve M&M. After considering all of those factors, the Court will exercise its discretion to extend the deadline for serving M&M to the date on which M&M was actually served. As a result, M&M cannot prevail on its request for dismissal on the grounds that the claims against it are time barred under Rule 4(i).

M&M also argues that Third-Party Plaintiff’s claims against it, which arise out of the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.* are time barred by the one year statute of limitations provision of that statute. M&M acknowledges that the discovery rule applies to claims arising under the FDCPA. It is unclear to the Court precisely when Third-Party Plaintiff knew of the filing of the lawsuit that gives rise to her claims. Because that issue remains unresolved and because the Court cannot determine whether any events alleged in the Third-Party Complaint arose less than one year after the Third-Party Complaint was filed, the Court declines to dismiss the FDCPA claim against M&M under the applicable statute of limitations. M&M’s argument that the FDCPA does not apply because Third-Party Plaintiff was a landlord also fails because there is nothing in the Third-Party Complaint establishing that as a fact.

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“[T]o establish a claim for abuse of process there must be a showing that the defendant has (1) used a legal process against the plaintiff; (2) primarily to accomplish a purpose for which the process was not designed; and, (3) harm has been caused to the plaintiff by such misuse of process.” *Nienstedt v. Wetzel*, 133 Ariz. 348, 353, 651 P.2d 876, 881 (App. 1982). “It is immaterial that the process may have been properly obtained or issued as a normal incident of the litigation involved. It is the subsequent misuse which constitutes the misconduct for which liability is imposed.” *Id.* The Third-Party Complaint alleges sufficient facts, which, if proven true, could warrant a judgment in favor of Third-Party Plaintiff. Whether M&M used the legal process primarily to accomplish a purpose for which the process was not designed is a factual issue that cannot be resolved through a motion to dismiss.

“Slander of title requires proof of ‘the uttering and publication of the slanderous words by the defendant, the falsity of the words, malice and special damages.’ Malice, a required element of the claim, means acting ‘from improper motives or without reasonable belief in the efficacy of the claim.’” *SWC Baseline & Crismon Invs., L.L.C. v. Augusta Ranch Ltd. P’ship*, 228 Ariz. 271, 287, 265 P.3d 1070, 1086 (App. 2011) (internal citations omitted). Like the abuse of process claim, this claim involves disputes issues of fact. The Court agrees that the purpose of a *lis pendens* is to give notice that a party is disputing title in real property. But, if a *lis pendens* is recorded for an improper purpose, that can give rise to a claim against the party who recorded it.

For all of those reasons,

IT IS ORDERED denying M&M’s Motion to Dismiss Third Party Complaint Against Defendant Maxwell & Morgan, P.C.