

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 502011CA001121XXXXMB AI

DAVID R. JOHNSON and
JANE JOHNSON,

Plaintiffs,

vs.

ALLEN H. LIBOW, ESQ.
MELISSA T. LIBOW, and
LIBOW & SHAHEEN, LLP,
a Florida Limited Liability
Partnership,

Defendants.

PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Plaintiffs, David R. Johnson and Jane Johnson, pursuant to Rule 1.190, Florida Rules of Civil Procedure, move for leave to file an Amended Complaint and state:

1. On January 24, 2011, plaintiffs filed the Complaint *pro se*.
2. On June 14, 2011, undersigned counsel served a notice of appearance on behalf of plaintiffs.
3. On July 19, 2011, defendants served motions for summary judgment.
4. Plaintiffs seek to file an Amended Complaint, a copy of which is attached as Exhibit 1.
5. In the Amended Complaint, plaintiffs seek to amend existing allegations to clarify the sequence of events and actions by all parties.

6. "Under rule 1.190(a) of the Florida Rules of Civil Procedure a party may amend a pleading with leave of court and 'leave of court shall be freely when justice so requires.'" See Scott v. Trevett, 751 So. 2d 616, 618 (Fla. 4th DCA 1999) (quoting Life Gen. Sec. Ins. Co. v. Horal, 667 So. 2d 967, 969 (Fla. 4th DCA 1996)); see also Dimick v. Ray, 774 So. 2d 830, 833 (Fla. 4th DCA 2000) (holding that Rule 1.190 provides that leave of court to permit amendments shall be freely given, as Florida public policy favors resolution of disputes on their merits); Sun Valley Homeowners, Inc. v. American Land Lease, Inc., 927 So. 2d 259, 262 (Fla. 2d DCA 2006) (explaining public policy favors the liberal amendment of pleadings).

7. In accordance with Fla. R. Civ. P. 1.190, leave to amend is freely given and not refused absent abuse, prejudice and futility. See Cousins Rest. Assocs. v. TGI Friday's, Inc., 843 So. 2d 980, 982 (Fla. 4th DCA 2003); see also Howell F. Davis & Assocs., Inc. v. Laabs, 389 So. 2d 1249, 1251 (Fla. 2d DCA 1980) (holding that Rule 1.190 provides for free amendment of pleadings absent prejudice).

8. The Court should freely allow amendments especially "when leave to amend is sought at or before a summary judgment hearing." See Craig v. East Pasco Med. Ctr., Inc., 650 So. 2d 179, 180 (Fla. 2d DCA 1995) (finding an abuse of discretion where the trial court did not allow the plaintiff to file her first amended complaint after defendant moved for summary judgment).

9. Further, "any doubts should be resolved in favor of the amendment." See Overnight Success Constr., Inc. v. Pavarini Constr. Co., Inc., 955 So. 2d 658, 659 (Fla. 3d DCA 2007) (citing Thompson v. Jared Kane Co., 872 So. 2d 356, 360 (Fla. 2d DCA 2004)).

10. Plaintiffs' request for leave to amend is sought in good faith, and motion is not made for the purpose of delay.

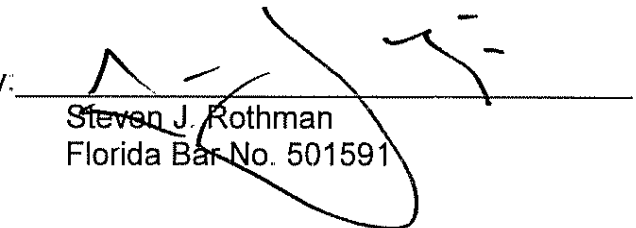
11. Moreover, the granting of this motion will in no way prejudice defendants, and granting of the motion to amend would not be futile.

WHEREFORE, plaintiffs request this Court enter an Order: (1) granting Plaintiff's Motion for Leave to File the Amended Complaint, (2) deeming the Amended Complaint filed as of the date of the entry of the Order, (3) providing defendants with 10 days from the date of the Order to serve a responsive pleading to the Amended Complaint and (4) granting such other and further relief the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: Bruce L. Udolf, Esq., Udolf Libow, Attorneys for defendant, Melissa T. Libow, 3351 N.W. Boca Raton Boulevard, Boca Raton, Florida 33431; and to Arthur W. Tifford, Esq., Arthur W. Tifford, P.A., Attorneys for defendants, Allen H. Libow, Esq. and Libow & Shaheen, LLP, 1385 N.W. 15th Street, Miami, Florida 33125, by U.S. Mail, on this 13th of September 2011.

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By: 
Steven J. Rothman
Florida Bar No. 501591

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a Florida Limited Liability
Partnership,

Defendants.

AMENDED COMPLAINT

Plaintiffs, David R. Johnson and Jane Johnson, sue defendants, Allen H. Libow, Melissa T. Libow, and Libow & Shaheen, LLP (collectively referred to as "defendants"), and state:

General Allegations

1. This is an action for damages in excess of \$15,000.
2. Plaintiffs, David R. Johnson and Jane Johnson (collectively referred to as "plaintiffs"), are residents of Duval County, Florida.
3. At all material times, defendants, David R. Johnson and Jane Johnson, were lawfully married.
4. Defendants, Allen H. Libow, Esq. and Melissa T. Libow, are residents of Palm Beach County, Florida.

EXHIBIT "1"

5. At all material times, defendants, Allen H. Libow, Esq. and Melissa T. Libow, were lawfully married.

6. Defendant, Allen H. Libow, is a partner in the law firm of Libow & Shaheen, LLP.

7. Defendant, Libow & Shaheen, LLP, is a Florida limited liability partnership with its principal place of business in Palm Beach County, Florida.

8. All actions described in this amended complaint by defendant, Allen H. Libow, were performed within the course and scope of his employment, agency and/or partnership with defendant, Libow & Shaheen, LLP.

9. Venue is proper pursuant to sections 47.011 and 47.051, Florida Statutes, because the actions alleged in this complaint accrued in Palm Beach County, Florida.

10. In 2003, plaintiffs retained Libow & Muskat, LLP (Libow & Shaheen, LLP's predecessor) as their counsel in a real estate dispute.

11. In 2004, the attorney at Libow & Muskat, LLP who had been handling plaintiffs' case departed the firm. Plaintiffs elected to have that attorney continue representing them and submitted notice that they would no longer use Libow & Muskat, LLP as their counsel.

12. After plaintiffs' decision to discontinue use of Libow & Muskat, LLP, defendant, Allen H. Libow, began to harass and threaten plaintiffs to continue using his firm and to collect amounts charged that plaintiffs did not believe were due.

13. Defendant, Allen H. Libow, harassed plaintiffs in written and verbal communications. The conduct included the threat and actual filing of false police reports and threatening phone calls to plaintiffs.

14. On August, 4, 2004, following David R. Johnson's refusal to continue use of Libow & Muskat, LLP, the firm followed through with Allen H. Libow's threats to commence an action to collect \$1,622 that plaintiffs disputed owing.

15. On August 16, 2004, plaintiff, David R. Johnson, filed a complaint/grievance with The Florida Bar concerning the actions of defendant, Allen H. Libow.

16. After receiving notice of the Bar complaint/grievance, defendant, Allen H. Libow, demanded that plaintiffs pay \$100,000 to resolve claims of purported defamation in the Bar Grievance.

17. Plaintiffs filed counterclaims, but they later withdrew them to keep the action in County Court to stay under Small Claims rules for ease as pro se litigants.

18. Defendants, Allen H. Libow, Melissa Libow, and Libow & Shaheen, LLP, sought three times to invoke the rules of civil procedure against plaintiffs, pursuant to Florida Small Claims Rule 7.020(c). All three motions were denied.

19. In January 2005, defendants responded to denials of motions to invoke rules by moving to amend their complaint and transfer venue to the Circuit Court.

20. Defendants amended to add claims that Mr. Johnson's Bar complaint constituted and contained defamation.

21. Despite concerns by the court that the defamation claims were added as an abuse of the process to move the case to Circuit Court, the case was transferred and

became the action titled Libow v. Johnson, Case Number 502005CA003299XXXXMB (the "Underlying Lawsuit").

22. Defendants served their Fifth Amended Complaint in the Underlying Lawsuit in February 2006.

23. The Underlying Lawsuit contained claims for defamation against plaintiffs based on plaintiff, David R. Johnson's complaint/grievance to The Florida Bar.

24. The Underlying Lawsuit was caused and continued by defendants, Allen H. Libow and Melissa T. Libow.

25. The presiding circuit court judge severed the collection claims of defendant law firm, Libow & Muskat, LLP, from the defamation claims of defendants, Allen H. Libow and Melissa T. Libow.

26. In severing the claims, the collection claims were transferred back to county court and assigned Case No. 2006SC6215 on May 2, 2006.

27. Defendants moved to dismiss the fifth amended complaint in the Underlying Lawsuit.

28. The presiding circuit court dismissed all but three of the defamation claims in the Underlying Lawsuit, with prejudice.

29. In June 2006, defendants, Allen H. Libow and Melissa T. Libow, appealed the final order dismissing the 38 allegations of defamation.

30. In January 2007, the Fourth District Court of Appeal per curiam affirmed the trial court's dismissal of 38 allegations of defamation. See Libow v. Johnson, 947 So. 2d 1181 (Fla. 4th DCA 2007).

31. Mr. Johnson asserted a Motion for Summary Judgment as to the remaining defamation claims.

32. In December 2008, the trial court entered Final Summary Judgment in favor of plaintiffs on all remaining claims of defamation in the Underlying Lawsuit.

33. On March 13, 2008, defendants, Allen H. Libow and Libow & Shaheen, LLP, appealed the trial court's entry of final summary judgment. See Libow & Shaheen, LLP v. Johnson and Johnson, 05-3299 CAA1, 502005CA003299 XXXXMB.

34. The Firm appealed the grant of summary judgment on the remaining defamation claims; again, the Fourth District Court of Appeal *per curiam* affirmed the lower court's decision. Attached as Exhibit "E" is a copy of the affirmance,

35. In July 2009, the Fourth District Court of Appeal *per curiam* affirmed the lower court's grant of summary judgment in favor of plaintiffs. See Libow & Shaheen, LLP v. Johnson, 12 So. 3d 235 (Fla. 4th DCA 2009).

36. There was an absence of probable cause for defendants' initiation and continuation of defamation claims against plaintiffs, and such absence was at all times known or should have been known to defendants.

37. Malice on the part of defendants was present and is inferred from the lack of probable cause to institute the proceedings, and the continuation of such proceedings.

38. As a result of defendants' unjust prosecution, plaintiffs were forced to expend hundreds of thousands of dollars in legal fees and suffered additional economic damages.

39. Plaintiffs also sustained non-economic damages, including mental pain and suffering, from defendants' actions.

40. All conditions precedent to this action have been met, satisfied, or waived.

Count I — Malicious Prosecution

41. Plaintiffs reallege paragraphs 1 through 40.

42. Defendants instigated and continued a legal proceeding against plaintiffs for defamation by filing a Complaint in Palm Beach County, Florida.

43. The Underlying Lawsuit concluded with a bona fide termination in favor of plaintiffs.

44. Defendants were without probable cause to file the original proceeding for these and other reasons:

- a. There is an absolute privilege on the part of a citizen to make a complaint/grievance against a member of the bar;
- b. A reasonable lawyer would not have regarded the claims against plaintiffs to be tenable;
- c. Defendant, Allen H. Libow, unreasonably neglected to investigate the law and the facts before deciding to proceed;
- d. Neither defendants, Allen H. Libow, nor Libow & Shaheen LLP, had any reasonable or honest belief that defendant, Melissa T. Libow, had a tenable claim against plaintiffs for defamation; and
- e. Defendant, Melissa T. Libow, had no legitimate basis to bring claims against plaintiffs for defamation.

45. Each of the defendants acted with actual and/or implied malice in filing and continuing the Underlying Lawsuit.

46. Defendants' initiation and continuation of the civil proceeding for defamation resulted in damage to plaintiffs.

47. Plaintiffs' joint and individual reputations have been injured by the unlawful actions of defendants.

48. As a further result of defendants' actions, plaintiffs have been damaged by having to pay money to defend themselves in the Underlying Lawsuit, loss of reputation, lost business opportunities, lost profits, and mental pain and suffering, due to wanton and reckless conduct.

WHEREFORE, plaintiffs demand judgment for damages against defendants, interest, costs, and such further relief the court deems proper.

Count II — Conspiracy To Commit Malicious Prosecution

49. Plaintiffs reallege paragraphs 1 through 40.

50. Defendants, Allen Libow, Libow and Shaheen, LLP, and Melissa Libow, shared the common purpose to illegally and unjustifiably engage in malicious prosecution of plaintiffs.

51. Defendants joined together and used their power to maliciously prosecute plaintiffs by intentional and unjustifiable means.

52. Defendants took these actions against plaintiffs for the purpose of accomplishing the underlying tort of malicious prosecution.

53. Defendants' conspiracy resulted in the malicious prosecution of plaintiffs by the commencement and continuation of the Underlying Lawsuit.

54. Defendants' initiation and continuation of the Underlying Lawsuit has damaged plaintiffs.

55. Plaintiffs' joint and individual reputations have been injured by the unlawful actions of defendants.

56. As a further result of defendants' actions, plaintiffs have been damaged by having to pay money to defend themselves in the Underlying Lawsuit, loss of reputation, lost business opportunities and lost profits, and mental pain and suffering.

WHEREFORE, plaintiffs demand judgment for damages, costs, and such further relief the court deems proper.

Count III – Abuse of Process

57. Plaintiffs reallege paragraphs 1-40.

58. Defendants instigated and continued the Underlying Lawsuit in bad faith and for purposes of extorting or coercing payment of money from plaintiffs to which defendants were not entitled, to extort or coerce other concessions from plaintiffs, and to damage plaintiffs' reputations.

59. After the proceedings were instigated, defendants threatened to file and filed false police reports, manufactured evidence, and otherwise carried on a pattern of wrongful, harassing, and threatening misconduct.

60. Defendants' use of civil court proceedings for purposes of extorting or coercing payment of money and damaging plaintiffs' reputations was an illegal, improper, and perverted use of the judicial process.

61. Defendants' initiation and continuation of the civil proceeding for defamation has damaged plaintiffs.

62. Plaintiffs' joint and individual reputations have been injured by the unlawful actions of defendants.

63. As a further result of defendants' actions, plaintiffs have been damaged by having to pay money to defend themselves in the Underlying Law, loss of reputation, lost business opportunities and lost profits, and mental pain and suffering.

WHEREFORE, plaintiffs demand judgment against defendants for damages, costs, and such further relief the court deems proper.

Demand for Jury Trial

Plaintiffs demand a trial by jury.

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Steven J. Rothman