UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JUAN S. GALICIA, individually and in behalf of all other persons similarly situated,

Plaintiff,

-against-

Decision & Order
16-cv-4074(ADS)(SIL)

TOBIKO RESTAURANT, INC.; and JIMMY H. LIN, jointly and severally,

Defendant.

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APPEARANCES:

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SPATT, District Judge:

Presently before the Court in this putative wage-and-hour class action are two motions.

First, the Plaintiff Juan S. Galicia moves under Federal Rule of Civil Procedure ("FED. R. CIV. P.") 12(b)(6) to dismiss the counterclaims asserted by the Defendant Tobiko Restaurant, Inc. ("Tobiko") and its principal Jimmy H. Lin ("Lin," together with Tobiko, the "Defendants") on the ground that they fail to state plausible claims for relief.

Second, the Defendants move under FED. R. CIV. P. 11(c) for an award of sanctions against the Plaintiff on the ground that the complaint is frivolous and intended solely to harass the Defendants.

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For the reasons that follow, the Plaintiff's motion to dismiss the Defendants' counterclaims is granted, and the Defendants' motion for sanctions is denied.

I. BACKGROUND

On July 22, 2016, the Plaintiff filed a complaint alleging that, from January 2016 to March 2016, he worked approximately 73 hours a week as a dishwasher in the Defendants' restaurant, but was not paid the minimum wage, overtime wages, so-called "spread of hours" pay, and was not provided with certain required documentation, including wage statements, in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, and the New York Labor Law ("NYLL").

On October 18, 2016, the Defendants filed an answer, substantially denying the Plaintiff's allegations and asserting counterclaims against the Plaintiff sounding in malicious prosecution and injurious falsehood. In particular, the Defendants alleged that the Plaintiff never worked for the Defendants; that the statements in his complaint are materially false; and that the Defendants have suffered a loss of business and other harm as a result of the Plaintiff's claims.

These motions followed.

II. DISCUSSION

A. The Plaintiff's Motion to Dismiss the Counterclaims

On November 7, 2016, the Plaintiff filed a motion to dismiss the counterclaims. Pursuant to Local Civil Rule 6.1(b), the time for the Defendants to respond to this motion expired on November 21, 2016. However, to date, more than six months have elapsed and the Defendants have yet to respond in any way.

1. The Standard of Review

"A motion to dismiss a counterclaim is evaluated under the same standard as a motion to dismiss a complaint." *Capitelli v. Riverhouse Grill, Inc.*, No. 15-cv-2638, 2015 U.S. Dist. LEXIS 170156, at *2 (E.D.N.Y. Dec. 21, 2015) (Spatt, *J.*) (citation omitted). Namely, to survive a motion to dismiss under Rule 12(b)(6), a counterclaim must be supported by " 'enough facts to state a claim to relief

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that is plausible on its face,' *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and 'allow[ ] the court to draw the reasonable inference that the [plaintiff] is liable for the misconduct alleged,' *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)." *Otis-Wisher v. Medtronic, Inc.*, No. 14-cv-3491, 2015 U.S. App. LEXIS 9565, at *2 (2d Cir. June 9, 2015).

Of importance, even where a motion to dismiss stands unopposed, as it does here, the movant is required to establish his entitlement to relief. *See McCall v. Pataki*, 232 F.3d 321, 323 (2d Cir. 2000) ("If a complaint is sufficient to state a claim on which relief can be granted, the plaintiff's failure to respond to a Rule 12(b)(6) motion does not warrant dismissal"); *Lichtenstein v. Reassure Am. Life Ins. Co.*, No. 07-cv-1653, 2009 U.S. Dist. LEXIS 23656, at *18 (E.D.N.Y. May 23, 2009) ("The court typically applies the same Rule 12(b)(6) standard to unopposed motions to dismiss").

2. As to the Sufficiency of the Counterclaims

As noted above, the Defendants assert counterclaims against the Plaintiff sounding in malicious prosecution and injurious falsehood, both of which stem from the allegedly groundless nature of the complaint in this case. However, the Defendants' answer fails to set forth enough non-conclusory facts to state a plausible claim for relief under either theory.

a. Malicious Civil Prosecution

To state a claim for malicious prosecution of a civil action, the Defendants are required to plausibly allege that the Plaintiff initiated an action against them, without probable cause to believe it could succeed, and that the case terminated in the Defendants' favor. *See Engel v. CBS*, 145 F.3d 499, 502 (2d Cir. 1998). Thus, to the extent that an essential element of this cause of action is a resolution favoring the Defendants, they must necessarily await completion of the action before bringing their claim. *See Secard v. Wells Fargo Bank, N.A.*, No. 15-cv-499, 2015 U.S. Dist. LEXIS 144412, at*12-*13 (E.D.N.Y. Sept. 9, 2015) (Report and Recommendation) (dismissing claim for malicious prosecution where the underlying lawsuit was still pending), *adopted*, 2015 U.S. Dist. LEXIS 144378

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(E.D.N.Y. Oct. 23, 2015); *Zeltser v. Joint Stock Inkombank*, No. 95-cv-796, 1998 U.S. Dist. LEXIS 8200, at *9-*10 (S.D.N.Y. 1998) (finding that the merits of a malicious prosecution claim can only be assessed after the completion of the challenged action); *cf. Bentley v. McNamara*, 2017 U.S. Dist. LEXIS 62532, at *8-*9 (N.D.N.Y. Apr. 24, 2017) (dismissing a malicious prosecution claim as premature where the underlying criminal action was ongoing).

Therefore, to the extent that the Defendants attempt to predicate a malicious prosecution claim on the present litigation, they do not state a plausible claim for relief. Accordingly, the Plaintiff's motion to dismiss this counterclaim is granted, without prejudice to refiling at an appropriate time.

b. Injurious Falsehood

"The tort of injurious falsehood 'consists of the knowing publication of false matter derogatory to the plaintiff's business of a kind calculated to prevent others from dealing with the business or otherwise interfering with its relations with others, to its detriment.' " *Korova Milk Bar of White Plains, Inc. v. PRE Props., LLC*, No. 11-cv-3327, 2013 U.S. Dist. LEXIS 14937, at *53 (S.D.N.Y. Feb. 4, 2013) (quoting *Kasada, Inc. v. Access Capital, Inc.*, No. 01-cv-8893, 2004 U.S. Dist. LEXIS 25257, at *50 (S.D.N.Y. Dec. 14, 2007)).

Unlike the tort of defamation, which may be actionable where the challenged statements impugn the basic integrity or creditworthiness of a business, " 'an injurious falsehood is confined to denigrating the quality of the plaintiff's business's good or services.' " *Id.* at *54 (quoting *Berwick v. New World Network Int'l, Ltd.*, No. 06-cv-2641, 2007 U.S. Dist. LEXIS 22995, at *48 (S.D.N.Y. Mar. 28, 2007), *aff'd*, 639 F. App'x 43 (2d Cir. 2016)). For this reason, the tort of injurious falsehood is also commonly referred to as "trade libel" and "product disparagement." *See Henneberry v. Sumitomo Corp. of Am.*, 415 F. Supp. 2d 423, 470, 472 (S.D.N.Y. 2006) (noting that the relevant caselaw "elucidates the difference between, on the one hand, statements concerning a party's integrity or business methods,

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and, on the other hand, statements denigrating the quality of a party's goods or services, with the former providing a basis for a claim of defamation and the latter providing a basis for an injurious falsehood claim") (internal quotation marks and citations omitted).

Applying these standards, the Court finds that the Defendants' counterclaim is unsupported by any plausible allegations that the complaint in this action denigrates the goods or services they offer. On the contrary, accepting the Defendants' factual premise, the Plaintiff's complaint falsely attributes to Tobiko and its individual owner a willful failure to comply with the applicable state and federal labor laws. While certainly derogatory, there simply is no plausible nexus between these charges and the quality of the Defendants' goods and services so as to support an injurious falsehood claim.

Further, even if there was such a connection, the Plaintiff is correct in asserting that the harm allegedly suffered by the Defendants as a result of the commencement of this action is not pled with the specificity required to state a claim based on injurious falsehood. *See Murphy-Higgs v. Yum Yum Tree, Inc.*, 112 F. App'x 796, 797 (2d Cir. 2004) (noting that "[u]nder New York tort law, special damages are an essential element of the tort of injurious falsehood" and "claimants must provide proof of itemized damages"); *Kasada, Inc.*, 2004 U.S. Dist. LEXIS 25257, at *51 (noting that "[t]he requirement of pleading and proving special damages is applied strictly," and therefore, "a motion to dismiss a claim of injurious falsehood may be granted for failure to allege special damages with the requisite specificity") (citations omitted).

In particular, the Defendants allege that the Plaintiff's false accusations have led to a "loss of business by 15-20%"; difficulty selling the restaurant; and "attorneys' fees and costs in defending the action and tremble [*sic*] damages" to be established at trial. In the Court's view, these allegations fall well short of properly pleading special damages. *See Murphy-Higgs*, 112 F. App'x at 797 (overturning a jury verdict in favor of counterclaiming defendants where "vague testimony as to lost sales" was

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