

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2024-CP-10-04891

JANET L. FRISCO

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS**

Plaintiff,

vs.

FUTERAL AND NELSON, LLC,
Defendant.

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SC Court of Appeals

In opposition to the Defendant's Motion to Dismiss Complaint, the Plaintiff responds as follows:

The Defendant alleges that service was insufficient according to Rule 12(b)(5), SCRCF, but service was completed on October 7, 2024 by the Charleston County Sheriff's Office of Civil Process on Stephan V. Futeral who is the registered agent for the Defendant, Futeral and Nelson, LLC. (See EXHIBIT A). Due to a scrivener's error on the part of the Plaintiff when filling out the Civil Process Information Sheet the term "as registered agent" was omitted after Stephan V. Futeral's name, but prior to the service Plaintiff did request that the error be corrected on the affidavit, but the sheriff's office refused to correct the error (See EXHIBIT B). If Stephan V. Futeral was not the registered agent for his law firm, that would have constituted insufficient service, but Mr. Futeral was served and he is the registered agent of Futeral and Nelson, LLC (See EXHIBIT C).

The Defendant alleges that Plaintiff did not state a cause of action according to Rule 12(b)(6), SCRCF. The Plaintiff's cause of action is twofold, related and both were stated in the complaint. Firstly, the Defendant made a false statement about the Plaintiff in writing on his complaint in Case No 2021-CP-10-2682 alleging that

the Plaintiff had trespassed on his client's property which defamed the Plaintiff. Due to the false accusatory statement of the Defendant, Plaintiff was subjected to restraining orders and other punitive actions granted by the Court as requested by the Defendant causing harm to the Plaintiff's reputation and emotional well-being. The Defendant acted with absolute malice in not determining the truth of his statement and did so with the intention of aiding and abetting his clients in criminal fraud. In addition, there is an existence of a legal possessory right in the Plaintiff over the matter. The possessory rights, in this case, mean that the Plaintiff's legal right exists not to be libeled or defamed and the Defendant's act affected that right.

The second cause of action and the reason that the Defendant made false statements, accused the Plaintiff of libel and slander and implemented the lawsuit was to aid and abet his clients, Pet Helpers, Inc., after they committed criminal fraud in the staged adoption of Plaintiff's surrendered dog, Toby.

The Defendant states as grounds for dismissal, No. 2 that "an attorney is immune from liability to third persons arising from the performance of professional duties as an attorney..." There is an exception that limits the immunity afforded to attorneys if the attorney helps his client perpetuate fraudulent or unlawful activity which applies to the Plaintiff's current complaint against Futeral and Nelson, LLC stated in Plaintiff's second cause of action.

The Defendant states as grounds for dismissal, No. 3 that "the Plaintiff's complaint fails to state any independent duty owed to the Plaintiff". This is rendered moot by the fact that third-parties have the right to seek remedy in the case of malicious or fraudulent conduct by an attorney that committed a

malicious act against them in a lawsuit.

Mr. Futeral manufactured evidence in the form of an adoption contract he submitted to the court at a hearing for a summary judgment on April 22, 2022. If it was authentic, he would have submitted some form of identification with it to prove it was not counterfeit. The fact that he didn't, supports that he knew the document was not legitimate so he had "actual knowledge" that he was aiding his client in concealing their crime. In *Oster v. Kirschner* (77 AD3d 51, 55, 905 N.Y.S.2d 69 (1st Dept 2010)), the Appellate Division-First Department broadly construed the "actual knowledge" element of an aiding-and-abetting cause of action against lawyers, holding that plaintiffs may be able to sufficiently allege actual knowledge by inferring it from surrounding circumstances, such as the nature of the objectionable client known to the lawyer at the time legal services are rendered and the nature of legal services rendered.(Id). On June 5, 2021 Pet Helpers executive director, Melissa Susko, attempted to entrap the Plaintiff by trying to lure me on to the property using one of her employees as bait and a second to take photographs and then wanted to press charges against me for violating her No Trespass Notice. Mr. Futeral then falsely stated in writing I had trespassed when he filed his complaint so he had discussed this incident with Ms. Susko.

In a fraud context, actual knowledge need only be pleaded generally cognizant that a plaintiff lacks access to the very discovery materials that would illuminate a defendant's state of mind at the pre-discovery states. Participants in a fraud do not affirmatively declare that they are engaged in the perpetration of fraud, just as misrepresenters do not keep elaborate diaries of their fraud for the use of the defrauded in court. (*Oster v. Kirschner*, 77 A.D. 3d 51, 52 J(N.Y. App. Div.

1st. Dep't 2010) While the knowledge element of an aiding and abetting fraud claim requires actual knowledge of the underlying fraud, such knowledge does not have to be based on defendant's explicit acknowledgement of such fraud. (Syncora Guar. Inc. v. Alinda Capital Partner, LLC, 2013 Misc. LEXIS 2943, *41-42 (N.Y. Sup. Ct. July 1, 2013) This is particularly apt, given that guilty knowledge is often particularly within the defendant's possession and is not susceptible to direct proof, but must instead be inferred from the circumstantial evidence. (Id)

The third element of attorney aiding and abetting fraud, "substantial assistance" in furtherance of the fraud exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately cause the harm on which the primary liability is predicted. (Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co., 64 A.D.3d 472, 925 N.Y.S.2d 439 (1st Dept 2011). Under New York law, substantial assistance occurs when a defendant affirmatively assists, helps conceal, or fails to act when required to do so, thereby enabling the fraud to occur. The aider/abettor's actions must also proximately cause the harm on which the primary liability is predicted which was the damage caused by the Defendant's law suit against the Plaintiff.

The material facts alleged in the Complaint permit a reasonable inference of the alleged conduct in light of surrounding circumstances that the Defendant had knowledge of and participated in concealing the fraudulent scheme of his clients. (Kirchner v. Bennett, 648 F. Supp. 2d 525, 540 (SDNY 2009)

Plaintiff previously directed legal action against Defendant's client, Pet Helpers, Inc. filing a complaint Case No. 2021-CP-10-2848 against them on June

17, 2021 and a counterclaim for Malicious Prosecution on June 16, 2021. Plaintiff's complaint was ordered consolidated on January 6, 2022 and counterclaim was dismissed by the court. Plaintiff filed a notice of appeal to the South Carolina Court of Appeals on June 21, 2022 that is currently pending decision.

The Plaintiff requests, based on the aforementioned arguments which support that Plaintiff stated a cause of action, service was sufficient, and an exception to Defendant's attorney immunity exists, that this Honorable Court deny the Defendant's Motion for Dismissal.

Respectfully submitted,

Dated: November 4, 2024

Janet L. Frisco, Pro Se