

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

Cissy Thunderhawk, Waste'Win Young)	Civil No. 1:18-cv-00212-CSM
Young, and Reverend John Floberg,)	
on behalf of themselves and all)	TIGERSWAN MEMORANDUM
similarly-situated persons,)	IN OPPOSITION TO
)	PLAINTIFFS' MOTION TO
Plaintiffs,)	DISMISS TIGERSWAN'S
)	COUNTERCLAIM
vs.)	
)	
County of Morton, North Dakota;)	
Sheriff Kyle Kirchmeier; Governor)	
Doug Burgum; Former Governor Jack)	
Dalrymple; Director Grant Levi;)	
Superintendent Michael Gerhardt, Jr.;)	
TigerSwan LLC, Does 1 to 100,)	
)	
Defendants.)	

COMES NOW the Defendant TigerSwan, LLC (hereinafter TigerSwan), for its Brief in Opposition to the Plaintiffs' Motion to Dismiss TigerSwan's Counterclaim.

¶1 TigerSwan has made a Counterclaim based on the legal claim that by suing TigerSwan the Plaintiffs are committing the tort of abuse of process and have improperly brought an action against TigerSwan and that such action is frivolous. Any claim for sanctions under Rule 11 will be done later, separately and independently of the claim made in our Counterclaim. The Plaintiffs' attempt to

argue that the Counterclaim is singly based on Rule 11 is incorrect and a red herring.

Discussion

¶2 TigerSwan, in support of such a viable legal claim, has asserted the following facts in support of its Counterclaim:

1. TigerSwan did not act under color of state law.
2. TigerSwan provided only consultation to the owners of the pipeline Energy Transfer Partners (ETP) who made all decisions relating to security matters.
3. TigerSwan did not provide security; ETP hired others to perform security functions.
4. TigerSwan was not hired by or acting in concert with any of the Defendants listed and only provided consultation to ETP.
5. Any reports prepared by TigerSwan were prepared for the owner Energy Transfer Partners and any decisions made relating to all issues raised in the Complaint were made by ETP or the authorized law enforcement authorities on site and as such TigerSwan was not responsible for any of the actions alleged in the Complaint.
6. TigerSwan had nothing to do with the decision to close 1806 as that decision was made by proper lawful authorities.
7. As to the bridge, TigerSwan had nothing to do with the closing of the bridge as that decision was made by proper lawful authorities.
8. The bridge was closed initially not by the lawful authorities but by the protesters by ignited fires on the bridge; the bridge was thereafter considered unstable by the proper legal authorities.
9. When the bridge was closed by the proper legal authorities, those authorities made that decision; TigerSwan had nothing to do with that decision.
10. TigerSwan did not “coordinate” the activities of the security companies, law enforcement, or state or federal persons and provided only consultation to the owners of the pipeline Energy Transfer Partners (ETP) who made all decisions relating to security matters.
11. TigerSwan did not provide security; ETP hired others to perform security functions.
12. TigerSwan had nothing to do with public property or public roads; TigerSwan only assisted ETP as to private property, generally owned by ETP.

13. As to “intelligence” operations, TigerSwan merely took information from third persons and placed such information into daily reports in an organized manner; the only “intelligence” operations “conducted” by TigerSwan was the monitoring of open source information from its headquarters in North Carolina.
14. Any recommendations or reports prepared by TigerSwan were provided to its client ETP, who made its own independent decisions as to what to do and what to task others to do; TigerSwan’s reports were given to ETP and distributed by ETP, which dealt directly with any security hired to be on site or law enforcement, state, or federal persons.
15. TigerSwan was not hired by or acting in concert with any of the Defendants listed and only provided consultation to ETP.
16. TigerSwan was not part of or “intertwined” with the other defendants; ETP worked directly with the other defendants, including law enforcement and state and federal authority; the liaison officer “liaisoned” with ETP and not the other defendants.
17. TigerSwan did not have any aircraft and did not “direct” any aircraft; ETP or the other defendants might have employed aircraft, but TigerSwan did not employ any aircraft. Any reference by anyone to a “DAPL air asset” does not relate to TigerSwan. DAPL is synonymous with ETP. TigerSwan did not conduct any surveillance by helicopter, or arrange any live feed or surveillance done by such means.
18. TigerSwan did not create “folders” on any persons but merely provided lists of persons who were on site and trespassing or had been arrested, all of which was derived from open source information that indicated proposed illegal action.
19. Any reports prepared by TigerSwan were prepared for the owner Energy Transfer Partners and any decisions made relating to all issues raised in the Complaint were made by ETP or the authorized law enforcement authorities on site and as such TigerSwan was not responsible for any of the actions alleged in the Complaint.
20. TigerSwan did not provide any “evidence” or other information to prosecutors; all recommendations and any information was provided to ETP and it had the right to provide whatever it wanted to provide to prosecutors.
21. Any reference in a report (one time) of an “Islamic” individual does not relate to any misconduct or discriminatory act by TigerSwan; TigerSwan merely took the information provided by third parties (including law enforcement) and placed it in a report and provided that report to ETP which distributed it. Such reference to such a person was not a discriminatory act.

To the best of our knowledge, the reference to “company Intel” does not refer to TigerSwan but some other “company.”

22. TigerSwan did not provide misinformation or misleading information; third persons provided information and TigerSwan merely placed it in a report that was provided to ETP. Any reference of the actions or proclivities of the protesters was gathered and submitted by third persons and not TigerSwan. The only information gathered by TigerSwan was the observation and collection of social media postings made by the protesters, which are public record and not a discriminatory act. TigerSwan did not conduct surveillance or “infiltrate” the camps.
23. TigerSwan has no idea what “coding techniques” is.
24. TigerSwan had nothing to do with the decision to close 1806 as that decision was made by proper lawful authorities.
25. As to the bridge, TigerSwan had nothing to do with the closing of the bridge as that decision was made by proper lawful authorities.
26. The bridge was closed initially not by the lawful authorities but by the protesters by ignited fires on the bridge; the bridge was thereafter considered unstable by the proper legal authorities.
27. When the bridge was closed by the proper legal authorities, those authorities made that decision; TigerSwan had nothing to do with that decision.

Counterclaim at ¶36, Docket No. 56.

¶3 For purposes of responding to a motion to dismiss, the Plaintiffs admit that the facts listed above are taken as true for the purpose of the Plaintiffs’ motion to dismiss. Plaintiffs’ Memorandum Document 45-1 at page 4.

¶4 The Plaintiffs’ argue that the Counterclaim should be dismissed in that the Motion is made under Rule 11. This is incorrect. Although our claim for relief includes as a *second* eventual basis for an award of attorney fees and costs for the violation of Rule 11, a Rule 11 motion is made separately from any Counterclaim and is made at a later time and that is not the basis of the Counterclaim. See Rule 11 (requires motion to be served on person violating Rule 11 before filing same). A

Counterclaim is not a motion for Rule 11 sanctions. The remedy portion of the Counterclaim merely puts the Plaintiffs on notice that one of the things that TigerSwan intends to do is make a proper Rule 11 motion. The Counterclaim is therefore proper even in regards to mentioning that one claim for relief will be found under Rule 11.

¶5 The Counterclaim asserts certain facts and then claims that bringing this action in light of these facts – which are taken as true for the purposes of the motion made by the Plaintiffs – was improper and indeed constitutes a tort of abuse of process. That is why there is a reference to the Plaintiffs’ actions in including TigerSwan in this action as a proximate cause to the harm (fees and costs) to TigerSwan.

¶6 The facts listed provide a sufficient basis for the elements of the tort of abuse of process and application of state law (if it may be applied to this federal action) as to costs awarded for a frivolous action. Under North Dakota law, abuse of process is a recognized cause of action:

[¶26] Abuse of process is described as "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." Wachter v. Gratech Co., Ltd., 2000 ND 62, ¶ 33, 608 N.W.2d 279 (quoting Stoner v. Nash Finch, Inc., 446 N.W.2d 747, 751 (N.D. 1989)). The essential elements are: "first, an ulterior purpose, 919 N.W.2d 741 and second, a willful act in the use of the process not proper in the regular conduct of the proceeding." Wachter, at ¶ 33 (quoting Stoner, at 751). The plaintiff also must show actual damages suffered as a result of the abuse of process. Wachter, at ¶ 34.

Johnston Law Office, P.C. v. Brakke, 2018 ND 247, 919 N.W.2d 733, 741-42 (2018).

¶7 Under North Dakota law, attorney fees and cost may also be awarded under Section 28-26-01:

28-26-01. Attorney's fees by agreement - Exceptions - Awarding of costs and attorney's fees to prevailing party.

1. Except as provided in subsection 2, the amount of fees of attorneys in civil actions must be left to the agreement, express or implied, of the parties.

2. In civil actions the court shall, upon a finding that a claim for relief was frivolous, award reasonable actual and statutory costs, including reasonable attorney's fees to the prevailing party. Such costs must be awarded regardless of the good faith of the attorney or party making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in that person's favor, providing the prevailing party has in responsive pleading alleged the frivolous nature of the claim. This subsection does not require the award of costs or fees against an attorney or party advancing a claim unwarranted under existing law, if it is supported by a good-faith argument for an extension, modification, or reversal of the existing law.

N.D.C.C. Section 28-26-01.

¶8 The Plaintiffs assert that TigerSwan has merely provided a threadbare recitals of the elements of the cause of action. This is not correct. TigerSwan has listed specific facts that clearly indicate 1) that TigerSwan had no authority to close the road, and 2) only the state and county entities and persons had any legal authority to close the road. As such, the claim against TigerSwan is an abuse of process and frivolous. In addition, TigerSwan clearly lists facts demonstrating that

TigerSwan was hired by ETP to provide recommendations to ETP and did so, and that ETP had all control over any entities or persons conducting security operations and that ETP handled the interaction with law enforcement, state, county, and federal entities and persons. Simply put, the facts listed in the Counterclaim are taken as true and if proven at trial to be true, TigerSwan deserves to have its attorney fees and costs reimbursed by the Plaintiffs. (If Rule 11 applies, such reimbursement may be the obligation of counsel of record for the Plaintiffs.)

Conclusion

¶9 TigerSwan asserts that there are sufficient facts alleged that support a proper claim for relief and a potential remedy that would apply to that claim. As such, the Counterclaim should not be dismissed.

¶10 Dated this 21st day of February, 2019.

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on February 21st, 2019, a true and correct copy of the foregoing document was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the Following:

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