

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

NORTHERN STAR HOSPITALITY INC.
D/B/A SPARX RESTAURANT;
NORTHERN STAR PROPERTIES, LLC; and
NORTH BROADWAY HOLDINGS, INC.,

Defendants.

OPINION AND ORDER

12-cv-214-bbc

In this civil action for monetary relief, plaintiff Equal Employment Opportunity Commission contends that defendants Northern Star Hospitality Inc., d/b/a Sparx Restaurant, Northern Star Properties, LLC, and North Broadway Holdings, Inc., violated Title VII by discriminating against a former employee on the basis of his race. Defendants filed a counterclaim, contending that plaintiff had abused the legal process by (1) asserting a claim without a legal basis and without conducting an adequate investigation and (2) issuing a press release for the purpose of “obtain[ing] some ulterior advantage.” Dfts.’ Ans., dkt # 26, ¶ 6.

Now before the court is plaintiff’s motion under Fed. R. Civ. P. 12(b)(6) to dismiss the counterclaim for failure to state a claim upon which relief may be granted. Plaintiff

contends that defendants' counterclaim is barred by the doctrine of sovereign immunity. Additionally, plaintiff contends that its actions do not constituted "abuse of process" under the law. Defendants concede in their opposition brief that the doctrine of sovereign immunity bars their challenge to plaintiff's investigation and decision to file a lawsuit. However, defendants contend that they may proceed on their counterclaim that the act of issuing the press release constituted abuse of process.

After reviewing the parties' arguments, I conclude that the doctrine of sovereign immunity bars defendant's abuse of process counterclaim. Therefore, I am granting plaintiff's motion to dismiss.

OPINION

To assert a counterclaim against the United States or one of its agencies in federal court, defendants must show that they have are suing under a law that waives the sovereign immunity of the United States to the cause of action. United States Postal Service v. Flamingo Industries (USA) Ltd., 540 U.S. 736, 744 (2004); United States v. Sherwood, 312 U.S. 584, 586 (1941); Clark v. United States, 326 F.3d 911, 912 (7th Cir. 2003). Defendants do not point to any statute that waives sovereign immunity for abuse of process claims and they do not why the doctrine does not bar their counterclaim. Instead, they simply cite several Wisconsin state law cases concerning abuse of process. However, the fact that Wisconsin recognizes this claim does not mean that defendants may sue an agency of the United States for abuse of process.

Defendants may believe that the Federal Tort Claims Act waives plaintiff's sovereign immunity for their counterclaim. 28 U.S.C. §§ 2671-2680. That statute waives the United State's sovereign immunity for a wide range of tort claims. In particular, the Act authorizes tort claims against the government "for injury or loss of property, or personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." §1346(b)(1). However, the Act does not waive immunity for all tort claims against the United States, LM ex rel. KM v. United States, 344 F.3d 695, 698 (7th Cir. 2003), and in particular, it provides exceptions for claims "arising out of . . . abuse of process" Id. § 2680(h). See also EEOC v. First Nat'l Bank of Jackson, 614 F.2d 1004, 1007 (5th Cir. 1980) (holding that Federal Tort Claims Act did not waive EEOC's sovereign immunity from employer's malicious prosecution counterclaim).

In sum, defendants' counterclaim is barred by the doctrine of sovereign immunity and must be dismissed.

ORDER

IT IS ORDERED that plaintiff Equal Employment Opportunity Commission's motion to dismiss the counterclaim filed by defendants Northern Star Hospitality Inc. d/b/a Sparx Restaurant, Northern Star Properties, LLC, and North Broadway Holdings, Inc., dkt.

33, is GRANTED.

Entered this 8th day of February, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge