

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

MALCOLM G. CHAPMAN and PHOENIX BARGE CORP.,	:	MARCH TERM, 2006
	:	NO. 4257
Plaintiffs,	:	COMMERCE PROGRAM
v.	:	Control Nos.: 071535, 072017
OCEANEERING INTERNATIONAL, INC., BAKER BOTTS, LLP, PAUL F. ENZINNA, ESQ., MICHAEL L. CALHOON, ESQ., and CONRAD, O'BRIEN GELLMAN & ROHN, P.C.,	:	
Defendants.	:	

**ORDER**

**AND NOW**, this 30<sup>th</sup> day of November 2006, upon consideration of defendants' Preliminary Objections to the Second Amended Complaint, the responses in opposition, the briefs in support and opposition, all other matters of record, and in accord with the Opinion issued contemporaneously, it is **ORDERED** that said Preliminary Objections are **Sustained, in part**, and Counts II and III of plaintiff's Complaint are **Dismissed**.

The remainder of the Preliminary Objections are **Overruled**. Defendants shall file Answer(s) to the remaining count of the Second Amended Complaint within twenty-two (22) days of the date of entry of this Order.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**

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	:	
Defendants.	:	

.....  
**OPINION**

**Albert W. Sheppard, Jr., J. .... November 30, 2006**

Plaintiffs Malcolm G. Chapman and Phoenix Barge Corporation (collectively “Phoenix”) brought this action for Wrongful Use of Civil Proceedings, Abuse of Process, and Intentional Infliction of Emotional Distress against Oceaneering International Inc. (“Oceaneering”), and Baker Botts, LLP, Paul F. Enzinna, Esq., Michael L. Calhoon, Esq. and Conrad, O’Brien, Gellman & Rohn (collectively the “Attorney Defendants”). In addition to compensatory damages, Phoenix demands punitive damages and attorneys’ fees. Oceaneering and the Attorney Defendants have filed Preliminary Objections which are presently before the court.

This case arises out of an earlier civil action brought by the Delaware River Port Authority (the “DRPA”) against Oceaneering (the “Underlying Action”) in which the

Attorney Defendants served as Oceaneering’s counsel. Oceaneering was hired by the DRPA to design barges for a fireworks show on the Delaware River. Oceaneering chose Phoenix to build the barges based on Oceaneering’s designs. After Phoenix built twenty-eight barges, the parties discovered that the barges that Oceaneering had designed and that Phoenix had built did not meet the DRPA’s standards.<sup>1</sup> There was inadequate time to remedy the mistake and the fireworks show was cancelled by the DRPA.

The DRPA sued Oceaneering for breach of contract and negligence alleging that the barges were “improperly and inadequately designed.” Oceaneering joined Phoenix as an additional defendant, claiming indemnity and contribution, and alleged that Phoenix made tortious misrepresentations and violated the Connecticut Unfair Trade Practices Act. The day before the trial of the Underlying Action, Oceaneering withdrew its claims against Phoenix. Oceaneering was subsequently found liable to the DRPA in the Underlying Action for \$4 million in damages.

**I. Plaintiffs’ Claim for Wrongful Use of Civil Proceedings is Sufficiently Pled.**

Under the ‘Dragonetti Act’, a person who initiates or continues legal proceedings will be liable to the other party for Wrongful Use of Civil Proceedings, if:

1. He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
2. The proceedings have terminated in favor of the person against whom they are brought.

42 Pa.C.S. § 8351. The requisite probable cause is present if the person who initiates or continues the lawsuit reasonably believes that the facts upon which his/her claim is based exist and either:

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<sup>1</sup> The DRPA required barges that could carry forty eight to fifty three tons. The ones that Oceaneering specified could only carry up to ten tons.

1. Reasonably believes that under those facts the claim may be valid under the existing or developing law;
2. Believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or
3. Believes as an attorney of record, in good faith that his procurement, initiation or continuation of a civil cause is not intended to merely harass or maliciously injure the opposite party.

42 Pa.C.S. § 8352.

Phoenix alleges that Oceaneering and the Attorney Defendants were told by high level Oceaneering employees that Phoenix bore no fault for the inadequate barges, but Oceaneering and its counsel asserted and continued to litigate the claims against Phoenix in the Underlying Action. *See* Second Amended Complaint ¶¶ 21, 36. This allegation satisfies the lack of probable cause requirement of the Dragonetti Act.

Phoenix has also sufficiently pled that the proceedings terminated in its favor. Phoenix alleges that on January 12, 2004, Phoenix was dismissed from the Underlying Action. *See* Second Amended Complaint ¶ 31. Since dismissal is a termination in favor of Phoenix, the second requirement of the Dragonetti Act has been satisfied. Therefore, Phoenix has sufficiently pled its claim for Wrongful Use of Civil Proceedings against both Oceaneering and the Attorney Defendants, and their Preliminary Objections to this claim must be overruled.

## **II. Plaintiffs' Claim For Abuse of Process Must Be Dismissed.**

To establish a claim for Abuse of Process, a plaintiff must allege that the defendant: “(1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff.” Rosen v. American Bank, 426 Pa. Super. 376, 382, 627 A.2d 190, 192 (1993). In bringing such an action, “[i]t is not enough that the defendant had bad or malicious

intentions or that the defendant acted from spite or with an ulterior motive.” Al Hamilton Contracting v. Cowder, 434 Pa. Super. 491, 499, 644 A.2d 188, 192 (1994).

Furthermore, “there is no liability [for abuse of process] where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions;” instead, there must be a “perversion” of the process. Shaffer v. Stewart, 326 Pa. Super. 135, 138-9, 473 A.2d 1017, 1019 (1984).

Phoenix has pled that Oceaneering and the Attorney Defendants filed the Third Party Complaint in the Underlying Action for the purpose of shifting the blame to Phoenix for the events underlying the DRPA litigation, even though Oceaneering and its counsel knew that Oceaneering was solely liable. Shifting blame or responsibility for damages to another defendant is not a “purpose for which the process is not designed.” The purpose of joining an additional defendant is to assert that it is either solely liable, or jointly liable with the defendant, for the damages claimed by the plaintiff.

By filing a Third Party Complaint against Phoenix in the Underlying Action, Oceaneering and the Attorney Defendants did not use civil process for a purpose for which it was not designed, and their acts, as pled by Phoenix, did not amount to a “perversion” of the process. Because Phoenix has failed to allege any additional facts showing that Oceaneering and the Attorney Defendants used legal process for a purpose other than the one for which it was intended, Phoenix’s Abuse of Process Claim must be dismissed.

### **III. Plaintiffs’ Claim for Intentional Infliction of Emotional Distress Must Be Dismissed.**

“When the essential elements of an action [for wrongful use of civil proceedings] have been established . . . the plaintiff is entitled to recover [damages] for . . . any

emotional distress that is caused by the proceedings.” 42 Pa. C. S. § 8353(5). Since Phoenix may recover its alleged emotional distress damages under its claim for Wrongful Use of Civil Proceedings, there is no need for it to assert a separate, redundant, claim for Intentional Infliction of Emotional Distress, and the latter claim will be dismissed.

**IV. Plaintiffs’ Demand for Attorneys Fees is Limited to Those They Incurred Prior to Representing Themselves in the Underlying Action.**

In connection with a claim for Wrongful Use of Civil Proceedings, a plaintiff is entitled to collect attorneys’ fees, “that plaintiff has reasonably incurred in defending himself against the underlying action.” 42 Pa.C.S. § 8353(3). A plaintiff may not, however, receive attorneys’ fees if the party appeared *pro se* in the underlying litigation. See Westmoreland County Indus. Dev. Auth. v. Allegheny County Bd. of Prop. Assessment, Appeals & Review, 723 A.2d 1084, 1086-1087 (Pa. Commw.1999) (“an award of counsel fees is intended to reimburse an innocent litigant for expenses made necessary by the conduct of his opponent. During the relevant period of this litigation, [plaintiff] proceeded *pro se*. We conclude that the statute does not provide authority for an award of a *pro se* equivalent of counsel fees to a *pro se* litigant.”)

Phoenix asserts in its response to the Preliminary Objections that it is seeking to collect attorneys’ fees that it incurred prior to representing itself *pro se*. *See* Phoenix’ Response to Oceanering’s Preliminary Objections, ¶ 41. These attorneys’ fees were not specifically alleged in the Second Amended Complaint. Instead, Phoenix alleged that it was “unable to afford to pay the expected costs of counsel to defend [itself in the Underlying Action],” and, therefore, was compelled to represent itself *pro se*. Second Amended Complaint ¶ 19. Since Phoenix may have incurred some initial attorneys’ fees in connection with the Underlying Action, its claim for reimbursement of such fees will

not be dismissed at this juncture. However, Phoenix's demand for attorneys' fees is limited to those fees, if any, that it paid counsel prior to representing itself.

**V. Plaintiff's Demand for Punitive Damages Is Proper.**

"When the essential elements of an action [for Wrongful Use of Civil Proceedings] have been established . . . the plaintiff is entitled to recover . . . punitive damages according to law in appropriate cases." 42 Pa.C.S. § 8353(6). Since Phoenix has properly pled a claim for Wrongful Use of Civil Proceedings, it may demand punitive damages in connection with that claim.

**CONCLUSION**

For these reasons, Oceaneering's and the Attorney Defendants' Preliminary Objections to Phoenix's Second Amended Complaint are sustained, in part and overruled, in part. An Order consistent with this Opinion will be issued.

**BY THE COURT:**

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**ALBERT W. SHEPPARD, JR., J.**