

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

IAMA, INC. and LOUISE MILANESE	:	September Term, 2002
	:	
Plaintiffs,	:	No. 04141
v.	:	
	:	Commerce Program
LAW OFFICES OF PETER E. MELTZER, et. al.	:	
	:	Control No. 112062
	:	
Defendants.	:	

ORDER and MEMORANDUM

AND NOW, this 14th day of March 2003, upon consideration of the Preliminary Objections of Defendants Peter E. Meltzer & Assoc., Peter E. Meltzer, Esquire and Hasbrook Associates, L.P., all responses in opposition, the respective memoranda, all matters of record, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it hereby is **ORDERED** and **DECREED** that said Preliminary Objections are **SUSTAINED** and Plaintiffs' Complaint **DISMISSED**.

BY THE COURT:

C. DARNELL JONES, J.

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MEMORANDUM OPINION

C. DARNELL JONES, J.

Before the Court are the Preliminary Objections of Defendants Peter E. Meltzer & Associates, Peter E. Meltzer, Esquire and Hasbrook Associates, L.P. (“Hasbrook”). For the reasons fully set forth below, Defendants’ Preliminary Objections are **sustained**.

BACKGROUND

Plaintiffs in this case include IAMA, Inc. (“IAMA”) and Louise Milanese (“Milanese”), President and CEO of IAMA. Compl. ¶ 3. Plaintiffs instituted this action by the filing of a civil action complaint on September 27, 2002 (the “Complaint”). In the Complaint, Plaintiffs assert claims against Defendants for both wrongful use of civil proceedings and abuse of process, arising out of an underlying landlord/tenant action brought by Hasbrook against its tenant, IAMA (the “Underlying Action”). Pl. Resp. ¶ 2.

In the Underlying Action, Hasbrook was represented by Peter E. Meltzer, Esquire of Peter E. Meltzer & Associates (collectively “Meltzer”). *Id.* at ¶ 4. On August 21, 2002, following a non-jury trial in the Court of Common Pleas, Philadelphia County, Hasbrook was awarded

judgment in its favor and against IAMA in the amount of \$127,412.82 (the “Judgment”). Id. at ¶ 5. IAMA filed post-trial motions on or about August 28, 2002. Id. at ¶ 6.

On September 16, 2002, Meltzer filed a Praecipe for Entry of the Judgment and a Praecipe for Writ of Execution on behalf of Hasbrook (the “Praecipies”). Compl. ¶ 22-6. It is undisputed that the filing of the Praecipies was premature under the Pennsylvania Rules of Civil Procedure. As a result of Meltzer’s filings, a Writ of Execution was issued by the Prothonotary’s office (the “Writ”), directing the Sheriff of Philadelphia County to, *inter alia*, levy upon the property of IAMA and to attach certain property of IAMA which was in the possession of Polonia Savings Bank (“Polonia”) and Wachovia Bank (collectively, the “Garnishees”). Pl. Resp. at ¶ 7. The Writ further directed the Sheriff to serve the Garnishees with the notice of attachment (the “Garnishment”). Id. Melzer sent a copy of the Writ, along with a letter explaining its contents, to Polonia. Id. at ¶ 8. Shortly thereafter, Melzer instructed Polonia to release the Garnishment, which it did. Id. at ¶ 9-10. Plaintiffs admit that no banking transactions were hindered by the brief period of the Garnishment. Id. at ¶ 11.

On September 26, 2002, the court denied IAMA’s post-trial motions in the Underlying Acton and affirmed the Judgment in favor of Hasbrook. Id. at ¶ 12. Thereafter, a new writ was issued by the Prothonotary’s office.

DISCUSSION

A. Wrongful Use of Civil Proceedings vs. Abuse of Process

In the instant matter, Plaintiffs have brought causes of action against all Defendants for both abuse of process and wrongful use of civil proceedings (also referred to as malicious prosecution). The torts of malicious prosecution and abuse of process are separate and distinct,

but often confused. Werner v. J. Plater-Zyberk, 2002 Pa. Super. 42 (2002); Hart v. O'Malley, 781 A.2d 1211, 1219 (Pa. Super. 2001); Al Hamilton Contracting Co. v. Cowder, 434 Pa. Super. 491, 644 A.2d 188, 191 (1994).

Wrongful use of civil proceedings arises when a party *institutes* a lawsuit with a malicious motive and without probable cause. Id. (emphasis added). Abuse of process, on the other hand, is concerned with a perversion of the process *after it has issued* and occurs when the legal process is utilized to accomplish some unlawful purpose for which it was not designed. Id. (emphasis added). Another essential difference between these two causes of action are their geneses. Abuse of process is a state common law claim. However, allegations of malicious prosecution invoke Pennsylvania's statutory law in the form of the wrongful use of civil proceedings statute, also known as the "Dragonetti Act," 42 Pa.C.S.A. §§ 8351-8355.

The Dragonetti Act states, in pertinent part:

Wrongful use of civil proceedings

- (a) Elements of action.--A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other 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.A. § 8351. Thus, in an action for wrongful use of civil proceedings, plaintiff first must demonstrate that the person taking part in the initiation, procurement or continuation of civil proceedings either acted in a grossly negligent manner or lacked probable cause.

Broadwater v. Sentner, 725 A.2d 779, 782, 1999 Pa. Super. 24 (1999). The plaintiff must also prove that the prior proceedings terminated in its favor and against the Dragonetti action defendant. Id.

Conversely, “abuse of process is, in essence, the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process.” McGee v. Feege, 517 Pa. 247, 259, 535 A.2d 1020, 1026 (1987); Shiner v. Moriarty, 706 A.2d 1228, 1236 (Pa. Super. 1998); Rosen v. Am. Bank of Rolla, 426 Pa. Super. 376, 627 A.2d 190, 192 (1993). To establish a claim for abuse of process, plaintiff must demonstrate that defendant: (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed; and that (3) harm has been caused to the plaintiff. Id. This tort differs from that of wrongful use of civil proceedings insofar as the gravamen of an abuse of process claim is the “perversion of legal process” in order to achieve a purpose which is not an authorized goal of the procedure in question. Werner, 2002 Pa. Super. at 42; Rosen, 627 A.2d at 192.

The inquiry at bar is whether Plaintiffs have set forth material, relevant, well-pleaded facts which, if true, state claims against Defendants, or any of them, for wrongful use of civil proceedings and/or abuse of process. However, Plaintiffs have failed to state a cause of action with respect to either claim. Each will be addressed in turn.

B. Plaintiffs Have Failed to State A Claim for Wrongful Use of Civil Proceedings

A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. Bailey v. Storlazzi, 1999 Pa. Super. 97, 729 A.2d 1206, 1211 (1999). For the purposes of reviewing preliminary objections asserting legal insufficiency, “all well-

pleaded material, factual averments and all inferences fairly deducible therefrom” are presumed to be true. Tucker v. Philadelphia Daily News, 2000 Pa. Super. 183, 757 A.2d 938, 941-42 (2000). However, the pleader's conclusions or averments of law are not considered to be admitted as true. County of Allegheny v. Commw., 507 Pa. 360, 372, 490 A.2d 402, 408 (1985). Based upon a review of the Complaint and accompanying exhibits, this court finds that Plaintiffs have failed to satisfy their burden.

1. Milanese Lacks Standing

As a preliminary matter, because Milanese was not a party to the underlying action, she lacks standing to assert a wrongful use of civil proceedings claim against Defendants. Rosenfield v. Pennsylvania Automobile Ins. Plan, 431 Pa. Super. 383, 636 A.2d 1138, 1142 (1994). "An action under 42 Pa.C.S.A. § 8351 for wrongful use of civil proceedings cannot be maintained by one who is not an original party to the underlying action." Rosen, 436 Pa. Super. at 165, 647 A.2d at 549. Mere adversity of interest relative to the initiator of the underlying action is insufficient to establish standing. Id.

The Complaint, and exhibits attached thereto, clearly demonstrate that the Underlying Action was brought against IAMA as a corporate entity, and not against Milanese as an individual. Nor has it been alleged that Milanese was a party to the Garnishment. Plaintiffs argue that because Milanese is the President and CEO of IAMA, that she was “personally involved” in the Underlying Action. Pl. Resp. ¶ 15. However, this fact alone is insufficient to confer standing upon Milanese for purposes of a wrongful use of civil proceedings claim. While the Superior Court recognized a limited exception to this rule in Hart v. O’Malley, 544 Pa. 315, 676 A.2d 222 (1996), this exception was expressly limited to the facts of that case, which are

inapplicable to and distinguishable from the matter at bar.¹ Id. Accordingly, Count I is dismissed as to Milanese.

2. Plaintiffs' Wrongful Use of Civil Proceedings Claim Is Legally Insufficient

The issue of standing aside, both Plaintiffs have failed to meet the threshold requirements necessary to sustain a cause of action for wrongful use of civil proceedings. As previously stated, in order to recover under § 8351, plaintiff must demonstrate that: 1) the underlying proceeding terminated in their favor; 2) the defendant caused those proceedings to be instituted without probable cause; and 3) malice. Rosenfield, 431 Pa. Super. at 383, 636 A.2d at 1142; Rosen, 426 Pa. Super. at 378, 627 A.2d at 191-2 (1993).

IAMA's claim fails because it has failed to demonstrate that it obtained a favorable termination in a wrongfully instituted action. For purposes of this wrongful use of civil proceedings claim, the "proceeding" at issue is the Underlying Action. The filing of the Praecipis by Meltzer and resultant Writ, while untimely, was related to and done in furtherance of the Underlying Action. *See e.g.*, Deitrich Indus., Inc. v. Abrams, 309 Pa. Super. 202, 210, 455 A.2d 119, 123 (1982). IAMA has made no assertion that the Underlying Action was "procured, initiated or continued" for a wrongful purpose. Rather, Plaintiffs' instant claims are based on the contention that Melzer caused the Prothonotary to issue the Writ before the timely entry of

¹In Hart, the court held that certain landowners could pursue a wrongful use of civil proceedings action against their neighbor, even though landowners were not parties to underlying equity action. However, the landowners had filed a petition to intervene in the equity action and were determined to be indispensable parties to the underlying lawsuit, as they were the owners of the property affected by the request for injunction. Hart, 544 Pa. at 315, 676 A.2d at 222.

judgment was permitted. Compl. ¶ 25.²

Moreover, the Underlying Action was not terminated in IAMA's favor. Pl. Resp. at ¶ 12. Plaintiffs admit that on or about September 26, 2002, the court denied IAMA's post-trial motions in the Underlying Action and ordered that the Judgment be entered in favor of Hasbrook. Pl. Resp. at ¶ 12. Plaintiffs' assertion that "the proceedings terminated favorably for Plaintiffs when the 'freeze on the account' was removed", is unpersuasive and is both a misstatement and misinterpretation of the applicable law. Accordingly, Count I is dismissed.

C. Plaintiffs Have Failed To State A Claim For Abuse of Processes

² Although Plaintiffs assert both claims, it is readily apparent based on the facts alleged in the Complaint that, if they have a cause of action at all, it would be for abuse of process, rather than wrongful use of civil proceedings.

A cause of action for abuse of process³ requires "[s]ome definite act or threat not authorized by the process...or used for an illegitimate aim, such as extortion, blackmail, or to coerce or compel the plaintiff to take some collateral action." Al Hamilton, 644 A.2d at 191. There can be no liability where the defendant has done nothing more than "carry out the process to its authorized conclusion, even though with bad intentions." Shaffer v. Stewart, 326 Pa. Super. 135, 137, 473 A.2d 1017, 1018 (1984); Di Sante v. Russ Financial Co., 251 Pa. Super. 184, 189, 380 A.2d 439, 441 (1977).

Plaintiffs contend that Meltzer "caused the issuance of the Writ of Execution for the sole purpose of injuring and harassing IAMA" and that he "knew or should have know that he had no legal right to do so." Compl. ¶ 34-5. However, plaintiffs have failed to plead facts which, if taken as true, would demonstrate that Meltzer used the process "primarily for an improper purpose." Rather, the language of the Complaint unequivocally lends itself to the interpretation that Meltzer was trying to enforce a judgment which had been awarded to his client, albeit overzealously and in an untimely fashion.

Proof of abuse of process based on the allegations of the Complaint would require a demonstration that the Praecipis and resulting Writs were was not used for the purpose for which such filings are intended, *i.e.*, that Defendants' ultimate objective was something other than to collect on a judgment. Hart v. O'Malley, 436 Pa. Super. 151, 647 A.2d 542. *aff'd* 544 Pa. 315, 676 A.2d 222 (1996); Egnal v. Freidman, 47 Pa. D. & C.2d 751 (Pa. Com. Pl. 1969). Plaintiffs have plead no such facts. At best, the facts of the Complaint demonstrate that Meltzer was

³ The word "process" as used in the tort of abuse of process has been interpreted broadly to encompass the entire range of procedures incident to the litigation process, which would include filing of a Praeipis and the execution of a judgment. Rosen, 426 Pa. Super. at 378; 627 A.2d 192.

merely negligent. Plaintiffs conclusory assertion that the acts at issue were “taken without a proper purpose, specifically to harass, oppress and annoy IAMA and Milanese, in an effort to bring pressure to bear upon them to force a resolution of the Underlying Action” is belied by the Complaint itself, which clearly demonstrates that Hasbrook had obtained judgment in its favor prior to the events at issue.

Even accepting as true all well-pleaded facts in the complaint, as well as all inferences reasonably deducible therefrom, Plaintiffs have failed to plead facts sufficient to support an abuse of process against any of the Defendants. Accordingly, Count II is dismissed in its entirety.

CONCLUSION

For the above-stated reasons, Defendants’ Preliminary Objections are **sustained** and Plaintiffs’ Complaint hereby is **dismissed**.

This Court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

C. DARNELL JONES, J.

Dated: March 14, 2003