

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

DOCKETED

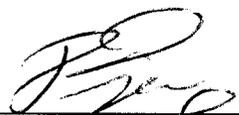
CHESCO CORING & CUTTING, INC., : March Term 2013
And TODD A. CLIGGETT, :
 :
 : Plaintiffs, : No. 3283
 :
 : v. :
 : MEGA CONCRETE, INC., MEGA SITEWORK, :
 : LLC, CAPPOINI ENTERPRISIES, INC., and : Commerce Program
 : JOHN F. CAPPONI, :
 : Defendants. : Control Number 15061726
 :
 :

R. POSTELL
COMMERCE PROGRAM

ORDER

AND NOW, this 4th day of March 2016, upon consideration of Defendants Mega Concrete, Inc., Mega Sitework, LLC, Capponi Enterprises, Inc. and John F. Capponi's Motion for Summary Judgment, Plaintiffs' response in opposition, and in accord with the Memorandum Opinion issued simultaneously with this order, it hereby is **ORDERED** that the Motion for Summary Judgment is **GRANTED** and Plaintiffs' Complaint is dismissed.

BY THE COURT



RAMY I. DJERASSI, J.

Chesco Coring & Cutting-ORDOP



13030328300083

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

CHESCO CORING & CUTTING, INC.,	:	March Term 2013
And TODD A. CLIGGETT,	:	
	:	
Plaintiffs,	:	No. 3283
v.	:	
MEGA CONCRETE, INC., MEGA SITEWORK,	:	
LLC, CAPPONI ENTERPRSES, INC., and	:	Commerce Program
JOHN F. CAPPONI,	:	
	:	
Defendants.	:	Control Number 15061726
	:	

MEMORANDUM OPINION

This action for wrongful use of civil process and abuse of process was filed by Chesco Coring & Cutting, Inc. and Todd A. Cliggett (“Chesco”) ¹ against defendants Mega Concrete, Inc., Mega Sitework LLC, Capponi Enterprises, Inc. (“Mega”) and John F. Capponi (“Capponi”)(collectively referred to as “Mega”)². Presently before the court is defendant Mega’s motion for summary judgment. For the reasons discussed below, the motion for summary judgment is granted.

A. Federal Court Action

On September 17, 2009, Mega filed a complaint in the United States District Court for the Eastern District of Pennsylvania against Chesco and twelve other named defendants. (“Federal Action”). On October 26, 2009, Mega filed an amended complaint alleging claims for violations of the RICO Act and the Lanham Act, as well as claims for fraud, civil conspiracy, conversion, tortious interference with existing and prospective contractual relations, unjust

¹ The Chesco Defendants were defendants in the underlying Federal Action and State Court Action which is the basis for the instant wrongful use of civil process claim.

² Mega was the plaintiff in the underlying Federal Action and State Action. Capponi was not a party to the Federal Action or State Action. Mega and Capponi are defendants in the instant action.

enrichment and aiding and abetting breach of fiduciary duty. The amended complaint alleged that Michael Smith, the former Chief Operating Officer of Mega Concrete, conspired with other individuals and contractors including Chesco to defraud Mega. The scheme allegedly diverted business earned by Mega to Smith, in his individual capacity, to Chesco and to other persons. The amended complaint averred this was accomplished through deceit on numerous construction projects. The specific allegations against Chesco involved two projects, the construction of a Barnes & Noble bookstore in Cherry Hill, New Jersey and the Mod 7 Project in Philadelphia. Mega accused Smith of diverting funds from its Barnes and Noble project to another company known as Paramount. Mega's amended complaint in the Federal Action also stated that Chesco conspired with Smith and Paramount to manipulate an invoice on the Mod 7 project, resulting in fraudulent conversion of business income belonging to Mega. On March 23, 2011, the District Court issued an order dismissing federal statutory counts under RICO and the Lanham Act. Thereafter, on April 6, 2011, the District Court granted motions by Mega, Chesco and the other defendants to dismissed Mega's state law claims without prejudice to Mega's right to transfer them to state court.

B. State Court Action

Within a few weeks in April 2011, Mega refiled these claims in the Court of Common Pleas, Philadelphia County, in a case captioned *Mega Concrete, Inc. v. Shoemaker Construction Co., et al.*, No. 997, April Term 2011 (C.C.P.) ("State Court Action"). The lawsuit was filed against Chesco and cited its involvement in both the Barnes & Noble and Mod 7 projects. On June 28, 2011, Mega amended its complaint and alleged claims in fraud, civil conspiracy, conversion, tortious interference with existing contractual relations, aiding and abetting breach of fiduciary

duty, and unjust enrichment. On July 18, 2011, Chesco filed preliminary objections which were sustained on tortious interference but not on any other counts.

On September 16, 2013, Chesco filed a motion for summary judgment with regard to Mega's remaining claims in the State Court Action. Chesco argued that after extensive discovery there was no factual basis to support Mega's remaining tort claims and no legal basis for unjust enrichment. But Chesco did not move for summary judgment on Mega's aiding and abetting breach of fiduciary duty claim.

On February 6, 2014, summary judgment was granted in part and denied in part. The court dismissed certain parts of Mega's fraud claim and some parts of its conversion claim. The court denied the rest of Chesco's summary judgment motion.

On September 19, 2014, before commencement of the bench trial, Mega filed a praecipe to withdraw without prejudice counts I (fraud), V (conversion), and VII (unjust enrichment) in its second amended complaint.

The remaining claims, civil conspiracy (count IV) and aiding and abetting breach of fiduciary duty (count VI), were then tried in a bench trial before the Honorable Pamela Dembe on September 22 and 23, 2014. On September 22, 2014, the first day of trial, Chesco made an oral motion to dismiss Mega's remaining claims which Judge Dembe denied...

On September 23, 2014, after Mega closed its case in chief, Chesco moved for a compulsory non-suit on the remaining claims. This was denied by Judge Dembe who at the end of trial found against Mega on two counts, IV (civil conspiracy) and VI (aiding and abetting breach of fiduciary duty).

C. This Case

On March 22, 2013, Chesco filed the instant Complaint against Mega alleging wrongful use of civil proceedings and abuse of civil process.³ Chesco contends that Mega had no probable cause for either the Federal Action or the State Court Action. Chesco argues Mega failed to conduct appropriate investigation before bringing suit and filed out of whole cloth.

On August 23, 2013, Mega filed a motion for judgment on the pleadings in this case, claiming Chesco's claims fail as a matter of law. Alternatively, Chesco moved to stay this case until the State Court Action is ended. On September 24, 2013, the court denied Mega's motion for judgment on the pleadings but stayed this case until the completion of the State Court Action or until further court order. On March 2, 2015, after the State Court Action was completed and upon Chesco's request, this court lifted the stay and Mega filed this summary judgment motion.

DISCUSSION

I. The Wrongful Use of Civil Process claim fails as a matter of law.

Wrongful use of civil proceedings is a tort which arises when a party institutes a lawsuit with a malicious motive and lacking probable cause. The elements that must be established for a viable cause of action pursuant to the Dragonetti Act are as follows:

- (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.⁴

³ Chesco filed the Complaint after the court ruled on Chesco's preliminary objections in the State Court Action, but before Chesco filed its motion for summary judgment in that case.

⁴ 42 Pa. C.S. § 8351.

Thus, in an action for wrongful use of civil proceedings, the Act requires Chesco to establish that (1) Mega procured, initiated or continued the underlying federal and state cases against them, (2) the proceedings were terminated in Chesco's favor, (3) Mega did not have probable cause for the underlying actions, (4) the primary purpose for which the proceedings were brought was not to secure proper discovery, joinder of parties or adjudication of the claim in which the proceedings were originally based and (5) that Chesco has damages.

The key legal dispute is whether Mega had probable cause to bring the underlying federal and state lawsuits. The Act defines probable cause as follows:⁵

A person who takes part in the procurement, initiation, or continuation of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either:

- (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 case is not intended to merely harass or maliciously injure the opposite party.⁶

Mega argues here that probable cause existed to support its filing of the two lawsuits. We agree because a Dragonetti action requires proof that no probable cause exists for the entire proceedings at issue and not for only one or more claims of relief.⁷ As stated in *Bobrick*, a

⁵ *Gentzler v. Atlee*, 443 Pa. Super. 128, 660 A.2d 1378 (1995).

⁶ 42 Pa. C. S. § 8352.

⁷ *Bobrick Corp. v. Santana Products, Inc.*, 698 F. Supp. 2d 479 (2010) citing *Rosen v. Tabby*, 1997 WL 667147 (E.D. Pa. 1997). *Laventhol & Horwath v. First Pennsylvania Bank*, N.A. et. al., 18 Phila. Co. Rptr. 580, 1988 WL 679860 (Phila. Com. Pl. 1988), aff'd., 398 Pa. Super. 652, 573 A.2d 626 (1990), app. denied, 527 Pa. 648, 593 A.2d 420.

plaintiff's burden is to demonstrate that the proceedings themselves were initiated without probable cause.⁸ "Proceedings" is the applicable term. 42 Pa.C.S.A. § 8352 which defines probable cause under the Dragonetti Act refers to the "procurement, initiation, or continuation of civil proceedings". A proceeding such as the initiation of a lawsuit means more than a claim. As expressed by the late Judge Clifford Scott Green, "it is *clear and certain* that the probable cause to bring the underlying litigation relates to the entirety of the lawsuit, and not some specific claim or claims within the lawsuit".⁹ Based on the forgoing, we find that although the RICO and Lanham Act claims were dismissed by the federal courts, the state actions that were refiled were based on probable cause. The State Court Action went to trial before Judge Dembe on Count IV (civil conspiracy), and Count VI (aiding and abetting breach of fiduciary duty). Both counts survived non-suit motions and were dismissed upon Judge Dembe's final findings by preponderance of evidence.

Substantively, the existence of probable cause in this case depends on whether there was a legitimate dispute of fact in the prior action. This has already been decided because Chesco's motions for summary judgment and compulsory non-suits in the State Court Action were denied. Accordingly, wrongful use of civil process is dismissed.

II. The claim for abuse of process is also dismissed.

The Mega defendants also move for summary judgment on grounds of abuse of process. This involves use of legal process for purposes not lawfully permitted.¹⁰ It is not enough that a lawsuit was filed for ulterior motives or bad intentions. There is no lovefest requirement between

⁸ Citing *Ludner v. Nernberg*, 433 Pa. Super. 316, 640 A.2d 939, 942 (1994) accord *Meiksin v. Howard Hanna Co.*, 404 Pa. Super. 417, 590 A.2d 1303, 1304 (1991)(plaintiff must show the defendant lacked probable cause to institute the proceedings)

⁹ See *Rosen v. Tabby*, 1997 WL 667147 (E.D. Pa. 1997) (emphasis in original) cited in *Babcock supra.* at 493-494.

¹⁰ *Shaffer v. Stewart*, 326 Pa. Super. 135, 473 A.2d 1017 (1984).

adversarial parties. Rather, the protection is against the type of behavior where persons use legal process as a weapon for illegitimate purposes. Examples include extortion, black mail or coercion to force a defendant to do something such as pay money to a third party when doing so is collateral to the aims of the lawsuit itself.¹¹

As Chesco has not discovered evidence to show Mega used legal process illegitimately, abuse of process is dismissed.

CONCLUSION

For the foregoing reasons, Mega's Motion for Summary Judgment is granted on both counts and Chesco's Complaint is dismissed with prejudice.

BY THE COURT



RAMY I. DJERASSI, J.

¹¹ *Id.*