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

LAUREN H. KANE, Plaintiff,	:	September Term 2013
v.	:	No. 3691
STEPHEN J. SCHATZ, ET.AL., Defendants.	:	Control Nos. 16041753/16062441/ 16062220
	:	Commerce Program

ORDER

AND NOW, this 11th day of August, 2016, upon consideration of Plaintiff's Partial Motion for Summary Judgment and Defendants' responses in opposition and Defendants' Cross Motions for Summary Judgment and Plaintiffs' response in opposition and in accord with the attached Memorandum Opinion, it hereby is **ORDERED** as follows:

1. Plaintiff's Partial Motion for Summary Judgment is **Denied.**
2. Defendants' Cross Motions for Summary Judgment are **Granted** and judgment is entered in favor of Defendants on all Plaintiff's claims. Plaintiff's complaint is dismissed with prejudice.

BY THE COURT,

GLAZER, J.

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LAUREN H. KANE,	:	September Term 2013
Plaintiff,	:	
v.	:	No. 3691
STEPHEN J. SCHATZ, ET.AL.,	:	
Defendants.	:	Control Nos. 16041753/16062441/
	:	16062220
	:	
	:	Commerce Program
	:	

OPINION

GLAZER, J. **August 11, 2016**

This is a wrongful use of civil proceeding action filed by plaintiff Lauren Kane ("Kane") against defendants Stephen J. Schatz, Esquire, Jonathan Kaplan, Esquire, John F. Innelli, Esquire, Anthony P. DeMichele, Esquire and Jeffrey P. Brien, Esquire (collectively referred to as "Defendants") for joining Kane as an additional defendant in a legal malpractice action captioned *Feierstein v. Schermer, et. al.*, January Term, 2011 No. 3716 ("the underlying legal malpractice action").[1] Presently pending before the court is Kane's partial motion for summary judgment and defendants' cross motions for summary judgment. [2]

The Wray litigation

Kane is an attorney. Kane's husband, Marty Feierstein ("Feierstein") at all times relevant hereto, was involved in the music industry. In 2004, Feierstein entered into a Recording Contract

[1] The other defendants in the case were dismissed by orders of the court granting summary judgment on January 6, 2016 and February 19, 2016.

[2] Defendants argue that plaintiff's partial motion for summary judgment should not be considered for failure to comply with Philadelphia Local Rule of Civil Procedure 1035.2 (a)(2) which requires the filing a motion with consecutively numbered paragraphs. This argument is moot since plaintiff filed an amended motion on May 26, 2016 which contained the required consecutive paragraphs.

with a musician known as Link Wray. Under the terms of the Recording Contract, Wray was required to provide Feierstein with songs that Feierstein would license and distribute for sale. In addition to the Recording Contract, Feierstein and Wray also entered into a Loan Agreement whereby Feierstein lent funds and equipment to Wray so that Wray could complete the recordings. Wray gave Feierstein power of attorney on Wray's behalf to collect certain royalties. The Power of Attorney was later assigned to Kane giving Kane the authority to collect the royalties owed to Wray.[3]

On May 26, 2005, Feierstein filed an action alleging breach of the Recording Contract and the Loan Agreement against Wray and his wife and son.[4] At the time, Feierstein was represented by Oscar Schermer, Esquire. Stephen J. Schatz, Esquire ('Schatz") was associated with the Schermer firm at the time of the filing. The Wrays never filed an answer to the complaint and a default judgment was entered against them. Schatz, as Schermer's associate, helped prepare the default judgment. Schatz resigned from Schermer's firm in October 2005 and ceased working at the firm in December of 2005.

On June 27, 2007, Jonathan H. Kaplan, Esquire ("Kaplan") became the attorney of record on the case. On November 10, 2008, an assessment of damages hearing was conducted where testimony and evidence was received before the Honorable Jacqueline Allen. On February 6, 2009, Judge Allen issued a finding that no damages were due Feierstein. Judge Allen's findings of fact and conclusions of law found that plaintiff did not present evidence of a failure to repay loans, return recording equipment, pay telephone bills and/or legal expenses; did not sustain his burden of damages. Specifically, the expert's report was purely individual

[3] Kane's Motion for Summary Judgment Exhibit "2" Recording Contract; Exhibit "3"- Agreement for Payment of Loan.

[4] Kane's Motion for Summary Judgment Exhibit "1" – Wray complaint.

opinions and conjecture without sufficient support in fact and without citation to independent sources; documents referenced were neither attached nor submitted at trial; the damages suggested by the report had little relationship to facts of the case; and plaintiff failed to submit credible evidence sufficient to establish any damages under the contract or for lost profits.[5]

Kaplan filed post-trial motions on Feierstein's behalf arguing that the evidence submitted during the damages hearing supported an award in favor of approximately $600,000. The request for post-trial relief was denied. Thereafter, Kaplan withdrew as counsel for Feierstein at Kane and Feirestein's request. On May 21, 2009, Feierstein appealed Judge Allen's decision to the Superior Court. On March 16, 2011, Judge Allen's order was affirmed.

Throughout the course of the Wray litigation, Kane wrote numerous letters to Schermer and Kaplan wherein she directed counsel to file an injunction to stop the dissipation of Wray's assets, to pursue certain assets and not others, to not speak with Feierstein directly and to communicate with her, to schedule the assessment of damages hearing, to hire a forensic expert to value the recording contract and to report on the status of case by sending updates. She criticized the expert report obtained by counsel, advised counsel to use Feierstein as a source of proof for issues where the expert report fell short, instructed counsel to call the Judge's chamber to obtain a status on the damage assessment, met with Kaplan prior the assessment hearing, instructed Kaplan to notice Wray's son and wife on the assessment of damages hearing, instructed Kaplan to include certain arguments in the post-trial motion and gave settlement

[5] Kane's Motion for Summary Judgment Exhibit "6"- Wray litigation Findings of Fact and Conclusions of Law.

authority on Feierstein's behalf. In a few of the letters, Kane referred to Feierstein as her client. All correspondence was on Kane letterhead and was signed "Lauren H. Kane" attorney at law. [6]

The Legal Malpractice Action

On January 26, 2011, Feierstein instituted a professional negligence action against Kaplan and Schatz alleging negligence in failing to properly pursue the claims against Wray, and in the case of Kaplan, failing to present competent evidence during the damages hearing.[7] The action was captioned *Feierstein v. Schermer, et.al.*, January Term 2011 No. 3716. Kaplan maintained legal malpractice insurance coverage with Minnesota Lawyers Mutual Insurance Company ("MLM") and submitted the claim to it for coverage. MLM appointed Anne Johnson and Tim Gephart as the claims attorneys for Kaplan. Johnson and Gephart thereafter appointed attorneys Anthony DeMichele, Esquire ("DeMichele") and Jeffrey Brien, Esquire ("Kaplan's counsel") to represent Kaplan. John F. Innelli, Esquire ("Innelli") represented Schatz in the underlying legal malpractice action.

On January 1, 2012, Innelli on behalf of his client Schatz filed a joinder complaint against Kane seeking contribution and indemnification. Kaplan filed a motion seeking leave to file a joinder complaint against Kane which was granted by the court on July 2, 2012. On July 20, 2012, DeMichele and Brien, on behalf of their client Kaplan, filed a two count joinder complaint against Kane, one for negligence in drafting the underlying recording contract and the second for negligence in negotiating and drafting the underlying contract and loan agreement.[8]

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[6] Kane's Motion for Summary Judgment Exhibit "5" part 5, 7; DeMichele and Brien's response in Opposition to Motion Kane's Motion for Summary Judgment Exhibit "B", "F" and "G".

[7] Kane's Motion for Summary Judgment Exhibit "8"- Third Amended Complaint in the legal malpractice action. In addition to Kaplan and Schatz, Oscar S. Schermer, Esquire, Oscar S. Schermer & Associates, Steven R. Grayson, Esquire, L. Kenneth Chotiner, Bernard M. Resnick, Esquire and Bernard M. Resnick, Esquire P.C. were also named as defendants in the action. Moving defendants are the only remaining defendants at this time.

[8] Kane's Motion for Summary Judgment Exhibit "10"- Kaplan's joinder complaint.

On the same date, Schatz filed an amended joinder complaint[9] alleging that Kane reviewed the complaint in the Feierstein action and advised him to sign its verification and that she was negligent in not taking steps she was obligated to take under the contract at issue in the Wray action. [10]

In November 2012, DeMichele and Brien offered to dismiss Kaplan's action against Kane in exchange for a release of future claims. Kane refused the offer. On May 21, 2013, the court granted Kane's motion for summary judgment in her favor and dismissed the joinder complaint. The court's order granting summary judgment was never appealed.

Instant Action

In September 2013, Kane filed this action for wrongful use of civil process against defendants Kaplan, DeMichele, Brien, Schatz and Innelli for joining Kane in the underlying legal malpractice action brought by Feierstein. Discovery was complete on June 6, 2016. On April 15, 2016, Kane moved for partial summary judgment against all defendants. On May 26, 2016, Kane filed a praecipe to amend and supplement her April 15, 2016 filing. Defendants respectively filed responses to the partial motion for summary judgment with cross motions. On

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[9] Kane's Motion for Summary Judgment Exhibit "11"- Schatz's amended joinder complaint.

[10]Kane, as part of her record, included an email inadvertently produced during discovery between individuals from MLM about joinder, included in Kaplan's discovery responses. The email, dated October 30, 2012, is from Johnson to Kaplan's counsel and states the following:

> Anthony:
> Tim Gephart is not in favor of pursuing the complaint against Lauren Kane. I discussed with him the documentary evidence we have regarding her involvement in the UL case and he is not swayed. He is against these types of claims in general and feels that the empty chair defense will better serve us here. Further, he is concerned with the Dragonetti threat.
> Please confirm that we will be able to proceed against Ms. Kane via contribution action if it comes to that. Also, please let me know whether we will still be using Mr. Abramson as an expert or was he retained to serve as an expert relative to the joinder complaint.
> Tim and I disagree on this one.

Despite requests to return the email, the document was never returned. Kane's Motion for Summary Judgment Exhibit "9"- email dated October 30, 2012.

June 9, 2016, the court ordered Kane to respond to the cross motions for summary judgment. All responses are filed of record and the motions are ripe for decision.

DISCUSSION

Wrongful use of civil proceedings is a tort which arises when a person institutes civil proceedings with a malicious motive and lacking probable cause.[11] The tort has been codified at 42 Pa.C.S.A. § 8351 as follows:

> **§ 8351. 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:
>
> (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.

To succeed in a cause of action for wrongful use of civil proceedings, a plaintiff must allege and prove the following three elements: 1) that the underlying proceedings were terminated in their favor; 2) that defendants caused those proceedings to be instituted against plaintiffs without probable cause; and 3) that the proceedings were instituted primarily for an improper cause.[12] The Act defines probable cause as it applies to attorney defendants as follows:

> 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:

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[11] *Rosen v. American Bank of Rolla,* 426 Pa. Super. 376, 627 A.2d 190 (1993); *Shaffer v. Stewart,* 326 Pa. Super. 135, 473 A.2d 1017 (1984).

[12] *Hart v. O'Malley*, 781 A.2d 1211, 1218 (Pa.Super.2001).

(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.

The existence of probable cause is a matter of law for the court to decide.[13]

An attorney is not required or expected to prejudge his client's claim, and although he is fully aware that its chances of success are comparatively slight, it is his responsibility to present it to the court for adjudication if his client so insists after he has explained to the client the nature of the chances. If, however, the attorney acts without probable cause or belief in the possibility that the claim will succeed, and for an improper purpose, as, for example, to put pressure upon the person proceeded against in order to compel payment of another claim of his own or solely to harass the person proceeded against by bringing a claim known to be invalid, he is subject to the same liability as any other person.[14]

The crux of the question presented in the parties' respective motions for summary judgment is whether defendants had probable cause to join Kane as a defendant in the underlying legal malpractice action filed by Feierstein against Kaplan and Schatz and various other defendants. According to Kane, there was no probable cause to join her in the underlying action since there was no evidence that she represented her husband in connection with the recording contract that

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[13] *Bochetto & Lentz, P.C. v. WFIC, LLC*, No. 2828 EDA 2014, 2015 WL 7199005, at *4–5 (Pa. Super. Ct. July 30, 2015)

[14] Restatement (Second) of Torts § 674 comment (d).

formed the basis for the contract litigation or the litigation that led to the legal malpractice action. A review of the record in this matter however, suggests the opposite.

Pa. R. Civ. P. 2252 governs the right to join additional defendants and provides, in pertinent part as follows:

> "(a) Except as provided by Rule 1706.1, any party may join as an additional defendant any person not a party to the action who may be
>
> (1) solely liable on the underlying cause of action against the joining party, or ...
> (4) liable to or with the joining party on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the underlying cause of action against the joining party is based."

This rule is to be "broadly construed to effectuate its purpose of avoiding multiple lawsuits by settling in one action all claims arising out of the transaction or occurrence on which [the] plaintiffs' cause of action is based." [15] Courts have favored the policy of broadly interpreting Rule 2252 "not only to compel every interested person to defend the action by the plaintiff, but also to save the original defendant from possible harm resulting from loss of evidence as might result if compelled to await the end of the suit before proceeding against those from whom he seeks contribution."[16]

Here, probable cause existed for defendants to join Kane as an additional defendant in the underlying legal malpractice action. Evidence exists that Kane, despite the lack of a formal entry of appearance, represented Feierstein in the Wray litigation. For instance, Kane made the following statements regarding the legal nature of her relationship with Feierstein:

1. "...At this time, I am writing to you as Marty's legal representative since I am concerned about your latest letter dated April 27, 2006..."-May 1, 2006 letter to Oscar Shermer, Esquire from Kane.

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[15] *Garrett Electronics Corporation v. Kampel Enterprises Inc.*, 382 Pa. Super. 352, 354, 555 A.2d 216, 217 (1989).

[16] *Hileman v. Morelli*, 413 Pa. Super. 316, 325, 605 A.2d 377, 382 (1992).

2. "...I have only recently become involved because, in my professional opinion, I disagree with your interpretation of the Retainer Agreement and the way that the case has currently stalled..."-June 2, 2006 letter to Oscar Shermer, Esquire from Kane.

3. "I represent [Feierstein]....Consequently, I find your effort to contact him directly both disrespectful to me as his counsel as well as a violation of the ethical rules. There is no question that you know it is fundamental that you should not be contacting an individual directly when he or she is represented by counsel...Accordingly, Mr. Feierstein requests that all contact concerning his case be made through me in writing."...January 3, 2008 letter to Jonathon Kaplan, Esquire from Kane.

4. "...It has been nearly a year since you have been working on this case and my client has been very patient. Kindly advise what has been occurring with this matter..." May 20, 2008 letter to Jonathon Kaplan, Esquire from Kane. [17]

Kane argues that she merely provided representation in the capacity of a wife, is only a domestic relations attorney not a litigation attorney and was solely looking out for her husband's best interest. The court, however, is not persuaded. The letters were written on Kane letterhead, requested updates on the litigation, instructed defendants not to contact Feierstein directly and offered guidance and litigation strategy on the assessment of damages hearing, collection and post-trial motion. Examples of some of the statements contained in the letters include the following: "On June 16, 2006, Kane wrote to Schermer, "I felt that we had reached an understanding at our last meeting on April 26, 2006 regarding how this matter should proceed." On February 7, 2008, Kane wrote to Kaplan asking "should any order to freeze Mr. Wray's assets be sought pending Judge Allen's decision" and suggested Kaplan take certain other actions. On November 2, 2008, Kane wrote to Kaplan stating "Mr. Feierstein and I are in agreement with meeting with you prior to the upcoming assessment of damages hearing." She

[17] Kane's Motion for Summary Judgment Exhibit "5" part 5, 7; DeMichele and Brien's response in Opposition to Motion Kane's Motion for Summary Judgment Exhibit "B", "F" and "G".

then advised Kaplan of her litigation strategy in terms of who to notice for the hearing and how they should be noticed, requesting Kaplan take action accordingly.[18]

Additionally, evidence exists that Kane drafted the recording contract and loan agreement which formed the basis of the Wray litigation. Link Wray in a three page document specifically thanked Feierstein and Kane for "talking through this contract [recording contract]. I'll try to do as you dictated."[19] Furthermore, Wray authorized and gave Kane power of attorney to contact and investigate matters of royalty owed, copyright and trademark matters and royalties due. [20]

This evidence provides a reasonable basis for Kaplan and Schatz and their respective attorneys to file a joinder complaint in the legal malpractice action seeking contribution and indemnification against Kane as a joint tortfeaser. As such, probable cause existed to join Kane as a defendant in the underlying legal malpractice action. [21]

The presence of probable cause, however, does not necessarily defeat the entire cause of action for wrongful use of civil proceedings, as "the clear language of Section 8351 permits a cause of action to be based on gross negligence or lack of probable cause."[22] Gross negligence is defined as the want of even scant care and the failure to exercise even that care which a careless

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[18] Id.

[19] Kaplan and Schatz's response to Plaintiff's Motion for Summary Judgment Exhibit "D" – Dictated Contract dated July 17, 2004.

[20] Kaplan and Schatz's response to Plaintiff's Motion for Summary Judgment Exhibit "E"- Power of Attorney.

[21] Kane heavily upon the inadvertently produced email to prove lack of probable cause and improper purpose. The inadvertently disclosed email however was issued after the joinder complaint was filed and discusses the filing in conjunction with Kane's threat of a *Dragonetti* action. The email is not conclusive evidence that defendants lacked probable cause to join Kane as an additional defendant or that defendants were grossly negligent in joining Kane.

[22] *Buchleitner v. Perer,* 794 A.2d 366, 378 (Pa.Super.2002).

person would use.[23] Based on the evidence discussed above, it is clear that Kane's representations in the letters sent to Schermer and Kaplan as well as her active role in drafting the royalties' contract and the loan agreement, and advice on litigation strategy clearly show that defendants were not grossly negligent in joining her as an additional defendant in the underlying legal malpractice action and a finding of gross negligence is not warranted. Because this court finds that defendants had probable cause and were not grossly negligent in joining Kane as an additional defendant in the underlying legal malpractice action, the element of improper purpose need not be discussed.[24]

CONCLUSION

For the foregoing reasons, Plaintiff's partial motion for summary judgment is denied and Defendants' cross motions for summary judgment are granted. Judgment is entered in favor of Defendants and against Plaintiff on all claims and Plaintiff's complaint is dismissed with prejudice.[25]

BY THE COURT,

GLAZER, J.

[23] *Hart v. O'Malley,* 781 A.2d 1211, 1218 (Pa.Super.2001).

[24] Notwithstanding the foregoing, the record is devoid of any evidence that defendants had an improper purpose in joining Kane in the underlying legal malpractice action.

[25] This court need not address whether Kane's claim for wrongful use of civil process against attorney defendants is unconstitutional since the court decided the issue on non- constitutional grounds. *See Sernovitz v. Dershaw,* 127 A.3d 783, 788 (Pa. 2015), citing *Wertz v. Chapman Twp.,* 559 Pa. 630, 633, 741 A.2d 1272, 1274 (1999) (It is preferable to resolve disputes on a non-constitutional basis if reasonably possible.).