

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

CELESTE A. MORELLO,	:	July Term 2009
Plaintiff,	:	
v.	:	No. 1230
ANTHONY ANASTASIO, "ANTHONY'S ITALIAN COFFEEHOUSE, INC.", THOMAS & ANN ANASTASIO and VERNON T. ANASTASIO,	:	COMMERCE PROGRAM
Defendants.	:	2584 EDA 2011

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OPINION

The Pro Se Plaintiff Celeste A. Morello (hereinafter "Morello") filed the instant appeal from the following court orders: 1) order dated April 6, 2011 finding for plaintiff in part and defendant in part with no award of damages after a non jury trial, 2) order dated July 7, 2011 denying plaintiff's post trial motion and 3) order dated August 22, 2011 entering judgment in favor of defendants and against plaintiff. This opinion is submitted relative to the instant appeal.

This is an action for wrongful use of civil process and fraudulent misrepresentation brought by Morello against defendants Anthony Anastasio, Anthony's Italian Coffeehouse, Inc., Thomas & Ann Anastasio and Vernon T. Anastasio, Esquire (hereinafter "Vernon Anastasio"). This action arises from a lawsuit filed by Vernon Anastasio, Esquire on behalf of his brother Anthony Anastasio on August 13, 2008 against Morello (hereinafter "Anastasio complaint") for defamation and intentional infliction of emotional distress. The complaint alleged that Morello, a historian, criminologist and author, produced and published written materials that were defamatory and damaging about Anthony Anastasio, his business and his character within the community. Anthony Anastasio is the owner and sole shareholder of Anthony's Italian Coffee House Inc. located in the Italian Market District of Philadelphia on South Ninth Street. Morello filed preliminary objections to the Anastasio complaint for failure to follow rules of court and for

Morello Vs Anastasio Etal-OPFLD



legal and factual insufficiency. In response to the preliminary objections, Anastasio filed an amended complaint.

Morello once again filed preliminary objections. On January 23, 2009, the court dismissed the preliminary objections for failing to follow the local rules of court. Morello filed a motion for reconsideration which was subsequently denied.

On March 16, 1999, Morello filed an answer with new matter and counterclaim. The counterclaim alleged intentional defamation, negligent defamation and false light- invasion of privacy. On April 21, 1999, Morello filed a motion for judgment on the pleadings. Anastasio did not file an answer to the motion and on June 3, 2009, the court granted Morello's motion for judgment on the pleadings and dismissed the amended complaint. Additionally, on May 1, 2009, Morello filed a motion for default judgment on the counterclaim based on Anastasio's failure to answer the counterclaim. Anastasio filed a motion to open judgment. On June 2, 2009, Morello's motion for default judgment was denied without prejudice. On July 8, 2009, Anastasio's petition to open judgment was denied. Morello filed a motion for default judgment which was granted and is currently awaiting an assessment of damages hearing.¹

On July 13, 2009, Morello filed the instant action against Anthony T. Anastasio, Anthony's Italian Coffeehouse, Inc., Vernon T. Anastasio, Esquire, Thomas Anastasio and Ann Anastasio for wrongful use of process and fraudulent misrepresentation as a result of the Anastasio lawsuit. Thomas Anastasio and Ann Anastasio are the parents of Vernon T. Anastasio, Esquire and Anthony T. Anastasio. Vernon Anastasio, Esquire entered his appearance and filed an answer to the complaint for himself as well as the business entity and the other Anastasio defendants. On March 4, 2010, the court granted in part a motion for judgment on the pleadings and dismissed as defendants Thomas and Ann Anastasio. All other aspects of

¹ Anastasio has filed another petition to open judgment which is awaiting a response and decision by the court.

the motion were denied. On August 31, 2010, Morello's motion for summary judgment was denied.

On December 16 and 17, 2010, the matter was tried as a non jury matter and each party presented witnesses and evidence. During the trial, Anthony Anastasio testified that he informed his counsel, Vernon Anastasio, that he wanted to "walk away" from the Anastasio action with the hope that it would just die down. Vernon Anastasio abandoned the action but never discontinued the action with the court or informed Morello that Anthony Anastasio would not continue with the action. On April 6, 2011, the court found in favor of defendants Anthony Anastasio and Anthony's Italian Coffeehouse, Inc. on the claim for wrongful use of civil process and in favor of Morello and against Vernon Anastasio on the claim for wrongful use of civil process. No damages were awarded. On the claim for fraudulent misrepresentation, the court found in favor of Anthony Anastasio, Anthony's Italian Coffeehouse, Inc. and Vernon Anastasio.

On April 15, 2011, plaintiff filed a motion for post trial relief asserting error in the court's findings. After briefing and oral argument, the court on July 7, 2011, denied the motion for post trial relief. On August 22, 2011, the court entered judgment in favor of defendants and against plaintiff. On September 15, 2011, plaintiff filed this timely appeal.

DISCUSSION

The common law cause of action for wrongful use of civil proceedings has been codified at 42 Pa. C. S. A. section 8352 *et. seq.* The statute is referred to as the "Dragonetti Act." The tort of wrongful use of civil proceedings is interpreted and applied broadly against those who use legal process as a "tactical weapon to coerce a desired result that is not the legitimate object of the process."²

² McGee v. Feege, 517 Pa. 247, 535 A.2d 1020, 1026 (1987).

In order to state a claim for malicious use of process, a plaintiff must prove that defendant initiated or continued civil proceedings against the plaintiff:

- (a) without probable cause or in a grossly negligent manner;
- (b) for an improper purpose; and
- (c) that those proceedings were terminated in favor of the plaintiff.³

Under the Dragonetti Act, “probable cause” is defined 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:

- (1) Reasonably believes that under those facts the claim maybe valid under the existing or developing law;
- (2) 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.⁴

Pennsylvania courts have defined gross negligence to mean the “want of scant care” or “lack of slight diligence or care, or a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party”, who may typically recover exemplary damages.⁵

After hearing the testimony at trial and reviewing the evidence presented during the trial, the court found that at time the Anastasio action was initiated, Anthony and Vernon Anastasio

³ 42 Pa. C. S. A. § 8351 (a) (1) and (2); Rosen v. Tesoro Petroleum Corp. 399 Pa. Super. 226 , 582 A.2d 27 (1990).

⁴ 42 Pa. C. S. A. § 8352.

⁵ Hart v. O’Malley, 781 A.2d 1211, 1218 (Pa. Super. 2001).

possessed a reasonable belief that the claim for defamation was valid. As such, probable cause existed to bring the action.⁶

The testimony and evidence at trial proved that Anthony Anastasio informed his counsel that he no longer wanted to continue the action against Morello. Vernon Anastasio testified that Anthony Anastasio instructed him to walk away from the lawsuit sometime in 2008.⁷ The court found that Anthony Anastasio and his business Anthony's Italian Coffeehouse, Inc. were not liable for wrongful use of civil process for continuing the Anastasio action since he informed his counsel that he wanted to discontinue the action. Accordingly, the court found in favor of Anthony Anastasio and his business Anthony's Italian Coffeehouse, Inc. and against Celeste Morello on the claim for wrongful use of civil process.

The same did not hold true for Vernon Anastasio. Vernon Anastasio testified that he took no steps to discontinue the action against Morello even after his client instructed him to walk away from the lawsuit. In a letter dated April 28, 2009, instead of discontinuing the action as directed by his client, Vernon Anastasio maintained a facade that his client was continuing to prosecute the action. In that letter, Vernon Anastasio stated:

This letter is to confirm that I represent Anthony Anastasio in the above matter. The settlement conference on this matter is scheduled on June 11, 2009 at 9:00 a.m.

I would like to point out that I believe the Defendant is either (sic) the judicial process. A careful review of the Defendant's Answer and Discovery requests should illustrate my point. Further, Defendant is now counter suing the Plaintiff but points to no specific instance or published material upon which to base her claim. Finally, Defendant is acting Pro Se and it is extraordinarily difficult for opposing counsel to engage a Pro Se Defendant in the customs and practice of law.

⁶ Trial Exhibits Exhibit D-6- Philadelphia Public Record Article dated 9-18-08; Plaintiff's Exhibit "9"; Plaintiff's Exhibit "10".

⁷ N.T. December 16, 2011 pp. 140, 154.

Accordingly, I would also like to inform you that I am willing to withdraw the Plaintiff's case against Ms. Morello if she is willing to do the same thing. I respectfully request that the Court intervene in this process so that we can reach the best possible solution for both parties.⁸

Vernon Anastasio represented that he was prepared to withdraw the Anastasio action only if Morello withdrew the counterclaim. Vernon Anastasio never advised his brother that their affirmative action should continue until the counterclaim could be dismissed. The testimony revealed that Anthony Anastasio's unequivocal direction was to discontinue the action. Vernon Anastasio's continued prosecution in contravention of his client's clear instruction to discontinue creates a failure of probable cause to continue the action. However admirable it is to try to end an entire action, the disregard of clear client intention and direction is an improper purpose for which liability exists under the Dragonetti Act.

Having found that Vernon Anastasio was liable under the Dragonetti Act, Morello would be entitled to recover damages under 42 Pa. C. S. § 8353. However, no evidence was presented at trial as to any damages sustained. Title 42 Pa. C. S. § 8353 provides as follows:

When the essential elements of an action brought pursuant to this subchapter have been established as provided in section 8351 (relating to wrongful use of civil proceedings), the plaintiff is entitled to recover for the following:

- (1) The harm normally resulting from any arrest or imprisonment, or any dispossession or interference with the advantageous use of his land, chattels or other things, suffered by him during the course of the proceedings.
- (2) The harm to his reputation by any defamatory matter alleged as the basis of the proceedings.
- (3) The expense, including any reasonable attorney fees, that he has reasonably incurred in defending himself against the proceedings.
- (4) Any specific pecuniary loss that has resulted from the proceedings.
- (5) Any emotional distress that is caused by the proceedings.
- (6) Punitive damages according to law in appropriate cases.⁹

⁸ Exhibit D-16.

⁹ Nominal damages are not permitted under this statute.

There was no evidence presented that plaintiff's reputation was detrimentally harmed. Indeed at least one witness testified that plaintiff's reputation remained unchanged. There was no evidence of any specific pecuniary harm¹⁰ or emotional distress.¹¹

In 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."¹² A plaintiff may not, however, receive attorneys' fees if the party appeared pro se in the underlying litigation.¹³ Since plaintiff represented herself in the underlying action, she is not entitled to a recovery of attorney fees. In addition to compensatory damages, the wrongful use of civil process statute also permits the recovery of punitive damages. However, punitive damages were not warranted in this case.

Morello also alleged a claim for fraudulent misrepresentation concerning the factual averments of the Anastasio action. To state a claim for fraudulent misrepresentation, a plaintiff must prove: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false (scienter); (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. Prevailing in an uncontested motion for judgment on the pleadings in the underlying action does not prove

¹⁰The evidence regarding cook book sales of "Philadelphia Italian Market Cookbook" authored by Morello failed to bear any relationship to the Anastasio action.

¹¹No evidence was introduced demonstrating any medical treatment received by Morello for any emotional harm.

¹² 42 Pa.C.S. § 8353(3).

¹³ 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.")

fraudulent misrepresentation. That judgment on the pleadings order only demonstrates Vernon Anastasio's failure to adequately plead. Scienter, the maker's knowledge of the untrue character of representations is a key element in finding fraudulent misrepresentation.¹⁴ There has been no proof of any essential elements for fraudulent misrepresentation. On the claim for fraudulent misrepresentation, the court found in favor of Anthony Anastasio, Anthony's Italian Coffeehouse, Inc. and Vernon Anastasio.

Based on the foregoing, this court's orders dated April 6, 2011, July 8, 2011 and August 22, 2011 should be affirmed.

Date: 12/8/11

BY THE COURT,


MARK I. BERNSTEIN, J.

¹⁴ Ira G. Steffy & Son, Inc. v. Citizens Bank of Pa., 7 A.3d 278 (Pa. Super. 2010).