

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

DOCKETED


AMERICAN ENTRANCE SERVICES, INC.,	:	December Term 2017	MAR - 2 2020
Plaintiff,	:		
v.	:	No. 51	R. POSTELL
ACME MARKETS, INC.,	:		COMMERCE PROGRAM
Defendant.	:	Commerce Program	
	:		
	:	Control Number 19082398	
	:		
	:		

ORDER

AND NOW, this 2nd day of March 2020, upon consideration of defendant Acme Markets, Inc.'s Motion for Summary Judgment, plaintiff American Entrance Services, Inc.'s response in opposition and the attached Opinion, it hereby is **ORDERED** that the Motion for Summary Judgment is **Granted in part** and count III (abuse of process) and the request for punitive damages related thereto and count IV (breach of implied duty of good faith and fair dealing) in the Second Amended Complaint are dismissed.

It is further **ORDERED** that the motion for summary judgment is **Denied** as to the remaining claims- count I (breach of contract) and count II (breach of implied contract).

BY THE COURT



RAMY I. BJERASSI, J.

American Entrance Servi-ORDOP



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AMERICAN ENTRANCE SERVICES, INC.,	:	December Term 2017
Plaintiff,	:	
v.	:	No. 51
ACME MARKETS, INC.,	:	
Defendant.	:	Commerce Program
	:	
	:	Control Number 19082398

OPINION

Presently before the court is defendant Acme Markets, Inc.’s motion for summary judgment to plaintiff American Entrance Services, Inc.’s second amended complaint. For the reasons discussed below, the motion for summary judgment is granted in part and count III- abuse of process and count IV- breach of the implied duty of good faith and fair dealing are dismissed. Additionally, the claim for punitive damages is stricken. The motion for summary judgment is denied as to the remaining claims.¹

Plaintiff American Entrance Services, Inc. (“AES”) maintains and repairs automatic doors found at the entrance of commercial and retail establishments including supermarkets. Defendant ACME Markets, Inc. (“ACME”) is a supermarket chain operating in the Philadelphia region which has used AES products at many of its stores.

On May 1, 2007, AES and ACME entered into a written contract which cancelled all prior contracts, required AES to perform preventive maintenance and provide emergency service on ACME automatic doors systems for a term of one year at designated store locations. ACME

¹ As it pertains to the claim for breach of contract (count I) and breach of the implied contract (count II), the court finds that genuine issues of material fact exist warranting the denial of the motion for summary judgment.

agreed to pay AES for its services at an agreed upon rate set forth in an addendum attached to the contract. ACME alleges that the May 2007 contract rolled over every year by purchase order.

In 2010, ACME notified AES that it was to cease all non-code related preventative maintenance and non-contract work. ACME further requested that AES receive approval for any non-critical work and defer any non-urgent maintenance. In 2014, AES alleges that ACME terminated the agreement without giving the required 30 day notice and failed to pay the balance owed to AES for services rendered. AES alleges that approximately \$61,000 is due and owing.

During the course of the contractual relationship between the parties, ACME became the target of multiple lawsuits filed by persons claiming to have been injured by malfunctioning doors. In these actions, specifically, *Mason v. ACME Markets et. al.*, No. 1506-4267 (Philadelphia County), *Roth v. ACME, et. al.*, No. 0908-00124 (Philadelphia County), *Fabrizio v. ACME Markets, et. al.*, No. 1304-00202 (Philadelphia County), *Luck v. ACME Markets, et. al.*, No. 11-10304 (Chester County) and *Smith v. ACME*, No. 0805526-26-2 (Bucks County), ACME joined AES as an additional defendant, alleging AES failed to maintain the supermarket doors as promised under the contract. Some of these lawsuits were settled without AES making any payments, others required AES to pay small sums while others required AES to pay substantial sums.

On December 17, 2017, AES initiated this action against ACME. In the second amended complaint, AES alleges claims for breach of contract (count I), breach of implied contract (count II), abuse of process (count III) seeking punitive damages and breach of the implied duty of good faith and fair dealing (count IV). After the pleadings were closed, ACME filed a motion for judgment on the pleadings relating to the claim for abuse of process, specifically, that the claim was barred by the statute of limitations. On June 13, 2019, we granted in part and denied in part

ACME's motion for judgment on the pleadings. We found that claims for abuse of process as it related to *Roth v. ACME, et. al.* and *Fabrizio v. ACME Markets, et. al.* were barred by the statute of limitations. As to the remaining matters, the court denied ACME's judgment on the pleadings motion. On October 28, 2019, we denied ACME's motion to compel this matter to arbitration.

ACME now moves for summary judgment on all claims set forth in AES's second amended complaint. For reasons set forth below, ACME's motion for summary judgment is granted as to abuse process (count III) and the related claim for punitive damages. Summary judgment is also granted in favor of ACME on breach of the implied duty of good faith and fair dealing (count IV).²

With respect to remaining claims, ACME's motion for summary judgment is denied.

DISCUSSION

In count III of the second amended complaint, AES purports to state a claim for abuse of process. The gravamen of the abuse of process claim is that "Plaintiff [AES] was brought into these cases when Defendant [ACME] knew (because they were repeatedly told) that there was no basis for bringing Plaintiff [AES] into the suits because Defendant [ACME] had purposefully not maintained and upgraded its electronic doors contrary to the reason for the contract with Plaintiff [AES] and against the specific advice of Plaintiff [AES]."³ After reviewing the papers and the record in the light most favorable to AES, this court finds that the claim for abuse of process fails as a matter of law.

² AES concedes that a breach of the covenant of good faith and fair dealing is a breach of contract action, not an independent action for breach of a duty of good faith. See, *LSI Title Agency, Inc. v. Evaluation Servs.*, 951 A.2d 384, 391 (Pa.Super.2008). As such, count IV is dismissed.

³ See second amended complaint ¶ 23.

The common law cause of action for abuse of process “is defined as the use of legal process against another ‘primarily to accomplish a purpose for which it is not designed.’ ”⁴ To establish a claim for abuse of process it must be shown 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. 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. Thus, the gravamen of this tort is the perversion of legal process to benefit someone in achieving a purpose which is not an authorized goal of the procedure in question.⁵ Abuse of process requires some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process; there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even if done with bad intentions, though not necessarily the case here.⁶

Here, ACME may not be held liable for abuse of process based on joining AES as an additional defendant in the underlying personal injury matters.⁷ The mere act of joining AES in

⁴ *Rosen v. American Bank of Rolla*, 426 Pa.Super. 376, 627 A.2d 190, 192 (1993).

⁵ *P.J.A. v. H.C.N.*, 156 A.3d 284, 288 (Pa.Super., 2017) citing *Werner v. Plater–Zyberk*, 799 A.2d 776, 785 (Pa. Super. 2002) (citations omitted).

⁶ *Freundlich & Littman, LLC v. Feierstein, et. al.*, 157 A.3d 526, 531–32 (Pa.Super., 2017) citing *Shaffer v. Stewart*, 326 Pa.Super. 135, 473 A.2d 1017, 1019 (1984).

⁷ AES argues that ACME improperly joined AES into cases since ACME repeatedly refused to authorize and pay for preventative maintenance and upgrades and then blamed AES for its own failures. AES argues that ACME knew that there was no basis for bringing AES into the suits. At best, AES purports to state a claim for wrongful use of civil process. An abuse of process claim cannot be based on the wrongful initiation of proceedings but is based on a perversion of the legal process after it is initiated. *See, Greenberg v. McGraw*, 161 A.3d 976 (Pa. Super. 2017)(initiating an alleged baseless investigation into a doctor’s fitness to practice medicine is not abuse of process); *See also, Rosen v. Tesoro Petroleum Corp.*, 399 Pa. Super. 226, 582 A.2d 27 (1990)(abuse of process is concerned with a perversion of a process after it is issued) and *Hart v. O’Malley*, 436 Pa. Super. 151, 647 A.2d 542 (1994)(allegation that a preliminary injunction was filed for an improper purpose only establishes a cause of action for wrongful use of civil proceedings.).

lawsuits over doors that AES had installed and repaired over the years is not sufficient to show that ACME used the process improperly. Nor is it sufficient to show that ACME perverted the process by joining AES for an illegitimate objective after process was served. As a practical matter in commercial cases, joining additional parties in personal injury cases like those ACME is defending is acknowledged common practice among contracting parties.

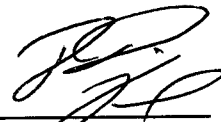
To show abuse of process, AES must allege and provide evidence that ACME acted or threatened AES with action unauthorized by legitimate civil process or continued to do so after process was served. This is absent from the record; accordingly, AES has failed to state a claim for abuse of process and the count is dismissed.⁸

As a result of this dismissal, punitive damages is also dismissed and stricken from the second amended complaint.⁹

CONCLUSION

For these reasons, Defendant Acme Markets, Inc.'s motion for summary judgment is granted in part and the claims for abuse of process (count III) and breach of the duty of good faith and fair dealing (count IV) are dismissed. Additionally, the claim for punitive damages is dismissed and stricken. Defendant's motion for summary judgment is denied as to the remaining claims.

BY THE COURT



RAMY I. DJERSSI, J.

⁸ Additionally, the abuse of process claims stemming from *Luck v. Acme* and *Smith v. Acme* are time barred.

⁹ The court notes that the claim for punitive damages is only requested on the claim for abuse of process.