

defend the lawsuit. On June 14, 1996, a \$400,000 default judgment was entered against J&C. Thereafter, J&C filed a bankruptcy petition.

Plaintiffs now allege that Starzyk, former President and CEO of J&C at the time of the events described above, made the decision to sue the plaintiffs on the secured note. Plaintiffs further allege that while he was J&C's CEO, Starcyk also was Vice-President and Manager of Buccino Associates ("Buccino"). Plaintiffs also claim that Heller, as J&C's "most significant creditor," directed J&C to hire Starzyk as J&C's CEO and hire Buccino to collect J&C's receivables, including plaintiffs' debt to J&C. Based on these claims, plaintiffs conclude that Starzyk acted as an agent of Heller and Buccino in the malicious prosecution action which led to the entry of the against J&C.

Defendants filed motions to dismiss the plaintiffs' complaint. On November 29, 2000, the court held a hearing on the defendants' motions to dismiss. On February 2, 2001, the court on its own motion converted the motions to dismiss into motions for summary judgement and gave the plaintiff the opportunity to file a brief in opposition to the now-converted motions for summary judgment or, in the alternative, to request "leave to submit affidavits, to take depositions, or to conduct discovery before the court rules on the defendant's motions for summary

judgment.”¹ On February 13, 2001, the plaintiffs filed an objection to defendants’ motions for summary judgment claiming that, pursuant to Federal Rule of Civil Procedure 56(f), additional discovery was needed in order to oppose the summary judgment motion. A hearing on the plaintiffs’ request for additional discovery and the motions for summary judgment was held on March 2, 2001.

Defendants argue in their now-converted motions for summary judgment that the plaintiffs’ claims fail as a matter of law because plaintiffs are not the assignees of any claim for indemnity from J&C and because, even if plaintiffs had been assigned such a claim, the plaintiffs cannot show that J&C was not primarily liable for the malicious prosecution. Plaintiffs respond in their request for discovery under Rule 56(f) that they need discovery to show that J&C assigned its alleged claim against defendants and that J&C was not primarily liable for the malicious prosecution of the plaintiffs.

The court finds that plaintiffs have failed to comply with the requirements of Rule 56(f), and, therefore, the plaintiffs’ motion for extending the time of discovery shall be denied. Furthermore, because the court finds that there exists

¹ See Order of February 2, 2001 (doc. no.31), converting the defendants’ motions to dismiss to motions for summary judgment, and granting plaintiff an opportunity to file a reply brief to those now-converted motions for summary judgment, or in the alternative, filing an affidavit under Rule 56(f) for conducting discovery in response to those motions.

no genuine issue of material fact that J&C has not assigned plaintiffs any alleged indemnity claim and because J&C, as a matter of law, is not secondarily liable, as required by common law indemnification, defendants' motion for summary judgment shall be granted.

As to the request to conduct further discovery, a Rule 56(f) motion must "identify with specificity what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained." St. Surin v. Virgin Island Daily News, Inc., 21 F.3d 1309, 1314 (3d Cir. 1994); Hancock Industries v. Schaeffer, 811 F.2d 225, 229-30 (3d Cir. 1987). Courts may deny Rule 56(f) motions for failing to comply with its requirements. See Insulation Corp. of America v. Hunstman Corp., 2000 WL 49370, *8 (E.D.Pa. Jan. 18, 2000). In this case, plaintiffs have failed to comply with the requirement that they specifically name what information they will specifically seek, such as depositions, interrogatories, or document requests, and have failed to explain why such discovery has not yet been obtained. Rather, plaintiffs have simply rested their claim on a wish list of what they would like to prove in order to establish their claim. Because the request for an extension of time to conduct discovery fails to comply in all respects with Rule 56(f), the request will be denied.

As to the merits, plaintiffs claim that, as J&C's assignees, they stand in the shoes of J&C in a claim for

indemnification against defendants. As an initial matter, in order for plaintiffs to stand in the shoes of J&C with respect to any alleged indemnity claim, the plaintiffs must establish that J&C has assigned them a claim that J&C itself has against the defendants. In their motion to extend discovery, the plaintiffs argue that they are entitled to discovery, in part, because they need to determine "whether [J&C] will agree to [p]laintiffs' action in indemnity." Such a statement is an acknowledgment by plaintiffs that J&C has never assigned any alleged claim it may have against defendants to plaintiffs. Because plaintiffs have admitted that J&C has never assigned them any claim against defendants, the defendants' motions for summary judgment shall be granted.

Even assuming that the plaintiffs could establish the assignment of J&C's alleged claims against defendants, the plaintiffs' claim for indemnification still fails for another reason. In order to establish a common law indemnification claim, the plaintiffs would need to prove that J&C was only secondarily, not primarily, liable for the malicious prosecution of the plaintiffs. See Builders Supply Co. v. McCabe, 366 Pa. 322, 77 A.2d 368, 370 (1951). Secondary liability is not a lesser degree of fault, but instead is "distinguished from primary liability . . . [by the fact that it is] fault that is imputed or constructive only. . . ." Sirianni v. Nugent Bros., Inc., 506 A.2d 868 (Pa. 1986) (quoting McCabe, 77 A.2d at 371).

In this case, plaintiffs obtained a judgment against J&C based on malicious prosecution in a previous lawsuit. This court, in that earlier case, awarded punitive damages based on J&C's conduct in the matter. Therefore, as a matter of law, J&C is primarily and not secondarily liable for the malicious prosecution of the plaintiffs.²

For the reasons stated above, the plaintiffs' motion to extend discovery is denied and the defendants' motions for summary judgment are granted.

An appropriate order follows.

² To the extent that plaintiffs argue that Starzyk as well as Heller and Buccino were the agents of J&C and, therefore, were principally responsible for the malicious prosecution, such a theory does not make J&C secondarily liable. Under the principle of agency, a corporation is bound by the acts of its corporate officers. See Lokay v. Lehigh Valley Cooperative Farmers, 342 Pa.Super. 89, 97, 492 A.2d 405, 409 (Pa.Super. 1985). In this case, this court imposed a judgment against J&C based on the acts of Starzyk. Such a conclusion makes J&C primarily liable, not secondarily liable. Consequently, whatever the level of involvement of Starzyk, Heller, and Buccino in the malicious prosecution, J&C remains primarily liable and, therefore, is not entitled to indemnification.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A. J. LYNAM, et al., : CIVIL ACTION
 : NO. 00-3002
Plaintiffs, :
 :
v. :
 :
HELLER FINANCIAL, INC., et al., :
 :
Defendants. :
 :

ORDER

AND NOW, this **30th** day of **April, 2001**, upon consideration of plaintiffs' motion to conduct discovery in support of their opposition to defendant's motion for summary judgment pursuant to Rule 56(f) (doc. no. 20) and defendants' motions to dismiss (converted into motions for summary judgment by order of the court) (doc. nos. 6, 9, & 10), it is hereby **ORDERED** that:

1) Plaintiffs' motion to conduct discovery (doc. no. 20) is **DENIED**;

2) Defendants' motions to dismiss (converted into motions for summary judgment by order of the court) (doc. nos. 6, 9, & 10) are **GRANTED**;

3) It is further ordered that, judgment having been entered in favor of the defendants, the case shall be marked as **CLOSED**.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.