

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

DIANNE EVANS : CIVIL ACTION
 :
 v. :
 :
 DURHAM LIFE INSURANCE CO., :
 PEOPLES SECURITY LIFE :
 INSURANCE CO., MONUMENTAL :
 LIFE INSURANCE CO. and :
 AEGON USA INC. : NO. 00-281

MEMORANDUM ORDER

Plaintiff initiated this lawsuit in the Philadelphia Court of Common Pleas on August 2, 1999. She asserted claims for abuse of process and malicious use of process pursuant to 42 Pa. C.S.A. § 8351. Defendants removed the action to this court on the basis of original diversity jurisdiction and have now moved for summary judgment.¹

In considering a motion for summary judgment, the court determines whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMG, Inc.

¹In defendants' removal notice, Aegon USA Inc. ("Aegon") advised that plaintiff named it improperly in the complaint as "Aegon USA Life Insurance Co." The caption will be changed to reflect correctionly Aegon's name.

v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Anderson, 479 U.S. at 248; Ridgewood Bd. Of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995)

From the competent evidence of record, as uncontroverted or otherwise taken in the light most favorable to plaintiff, the pertinent facts are as follow. Plaintiff was employed as a salesperson by defendant Durham Life from July 1,

1991 through October 15, 1993.² Plaintiff resigned from her employment at Durham effective October 15, 1993 at which time she commenced employment with Paul Revere Life Insurance Company ("Paul Revere"). Shortly thereafter, Durham sued plaintiff in the Eastern District of Pennsylvania, alleging that her solicitation of her former Durham clients on Paul Revere's behalf was in breach of a covenant not to compete and constituted intentional interference with contractual relations. Plaintiff asserted counterclaims in that action for breach of contract, subjecting her to a sexually hostile work environment, defamation and misrepresentation. In a suit against Peoples, she asserted similar claims plus a claim for intentional infliction of emotional distress. The two lawsuits were consolidated under the caption Durham Life Insurance Company v. Evans, Civ. No. 94-801 (the "Durham action").

The Durham action was tried non-jury before the Honorable Joseph L. McGlynn, Jr. from January 13, to January 21, 1997. On August 4, 1997, Judge McGlynn entered judgment in favor of plaintiff on Durham's contractual claims and on her hostile work environment and intentional infliction of emotional distress

²After plaintiff was hired, Durham Life was purchased by Capitol Holding Company to be managed by Peoples Security Life Insurance Company, a Capitol subsidiary. Durham and Peoples are referred to collectively as "Durham." Durham was later acquired by defendants Monumental Life Insurance Company and Aegon.

claims against Peoples. He ruled in favor of defendants on plaintiff's other claims.³

Judge McGlynn found that plaintiff had been subjected to a sexually hostile work environment including acts sufficiently extreme and outrageous to permit recovery for intentional infliction of emotional distress, and was constructively discharged. He also found that a manager had threatened her with suit if she reported an unwelcome sexual advance or quit and attempted to take business to another employer. The court concluded that the covenant not to compete upon which Durham sued plaintiff was tied to a collective bargaining agreement which had expired and was ineffective after Durham unilaterally changed terms of compensation for employees. Thomas Biancardi, a Durham Regional Vice President who was in charge of union negotiations, had informed plaintiff and other employees that they were no longer bound by the covenants not to compete with Durham's abrogation of the collective bargaining agreement.⁴ Judge McGlynn awarded plaintiff damages of \$410,156 plus attorney fees and costs.

³Judge McGlynn dismissed plaintiff's counterclaims against Durham as duplicative of her claims in the latter action against Peoples.

⁴Plaintiff's manager, John Heyman, had twice advised her prior to her departure that to the contrary, she was bound by the covenant. Durham's General Counsel, Betty Morton, also advised plaintiff by letter that the covenant was effective.

The parties filed cross appeals. The Court of Appeals upheld Judge McGlynn's decision on January 15, 1999.

To sustain a malicious use of process claim, a plaintiff must show that the defendant instituted proceedings which terminated in plaintiff's favor and did so without probable cause and for an improper purpose. See 42 Pa. C.S. § 8351; Paparo v. United Parcel Service Inc., 43 F. Supp. 2d 547, 548 (E.D. Pa. 1999). Abuse of process involves a perversion of legal process after it has been issued to achieve an illegitimate objective for which the process was not intended. See McGee v. Feege, 535 A.2d 1020, 1023 (Pa. 1987). To sustain a claim for abuse of process, a plaintiff must show "that the defendant used a legal process to accomplish a purpose for which the process was not designed." Al Hamilton Contracting Co. v. Cowder, 644 A.2d 188, 191 (Pa. Super. 1994). "It is not enough that the defendant had bad or malicious intentions or that the defendant acted from spite or with an ulterior motive. Rather, there must be an act or threat not authorized by the process, or the process must be used for an illegitimate aim." Id. at 192. "[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." Id.

Plaintiff asserts only that Durham sued her out of "malice" and "the process complained of is the entire litigation brought and continued against Evans." Such assertions implicate malicious use of process and not abuse of process. See Id. at

191-92; Rosen v. Tesoro Petroleum Corp., 582 A.2d 27, 33 (Pa. Super. Ct. 1990). A malicious use of process claim is not transformed into an abuse of process claim because a party pursues, with the aim of prevailing, a claim that was initiated with malice. One cannot reasonably find from the competent evidence of record that once it initiated its breach of contract and tortious interference action, Durham pursued the litigation for a purpose other than achieving success on the merits.⁵

Moreover, plaintiff's claim for abuse of process would in any event be time barred. The statute of limitations for abuse of process is two years. See Williams v. City of Philadelphia, 1997 WL 598013, *3 (E.D. Pa. Sept. 17, 1997); Harvey v. Pincus, 549 F. Supp. 332, 342 (E.D. Pa. 1982), aff'd, 716 F.2d 890 (3d Cir.), cert. denied, 464 U.S. 918 (1983). It is triggered when "the process is used for an improper purpose." Id.

⁵Plaintiff testified that "I think she, according to the trial, if I remember correctly," referring to defense counsel, "wanted to continue the lawsuit with no basis just to have a bargaining tool because I had filed a counterclaim." Plaintiff has presented no trial transcript reflecting such a comment or other competent evidence that it was made. A hazy recollection of a comment plaintiff thinks may have been made at the underlying trial by a defense attorney standing alone is simply too speculative to constitute competent evidence of a remarkable admission by an attorney during a trial that her client's claim had no basis. It would also defy reason to find that a meritless claim was asserted as a "bargaining tool" with regard to counterclaims not then filed. For a party to persist to litigate to conclusion a claim asserted with the hope and intent of prevailing for the purpose of obtaining a favorable resolution of the overall litigation would not be illegitimate or a perversion of process.

Plaintiff contends that the limitations period did not commence until the date of the Third Circuit decision in 1999 or at least until the date of Judge McGlynn's decision in the Durham action, one year and 363 days before the instant action was initiated.

If plaintiff is suggesting that she could not reasonably know that defendants had abused process until the parties' respective appeals were decided, she does not remotely explain why.⁶ Insofar as she is suggesting that the prosecution of an appeal by defendants was itself an abuse of process, one cannot reasonably find from the competent evidence of record that defendants, any less than plaintiff, filed an appeal for any purpose other than obtaining a favorable decision.

Insofar as the "entire litigation" of the Durham action in the district court was an abuse of process, as plaintiff suggests, this would surely be apparent before the day Judge McGlynn rendered his decision.⁷ The trial ended on January 21, 1997 and the last trial related item filed by a party was on May 5, 1997, well over two years before the initiation of this action. Plaintiff has not remotely demonstrated how defendants

⁶A termination of proceedings in favor of the plaintiff is not an element of abuse of process which arises upon the perversion or illegitimate use of process. See Smith v. Wambaugh, 887 F. Supp. 752, 757 (M.D. Pa. 1995), aff'd, 87 F.3d 108 (3d Cir.), cert. denied, 519 U.S. 1041 (1996).

⁷For instance, the remark plaintiff believes may have been made by defense counsel regarding the baselessness of her client's claim necessarily would have been made by the close of trial on January 21, 1997, two and a half years before this action was commenced.

perverted process in the months between the conclusion of the district court litigation and the filing of Judge McGlynn's decision.

Plaintiff's malicious use of process claim is another matter. Defendants predicate their motion for summary judgment on this claim on a failure of proof on the element of lack of probable cause. There is evidence that defendant's Regional Vice President had advised plaintiff that the covenant not to compete had been abrogated and was no longer effective. There is also evidence that Durham's General Counsel, as well as plaintiff's manager, conveyed a contrary view to plaintiff at the time she departed. On the record presented, one could reasonably find that Durham did or did not reasonably believe that its claims against plaintiff were based on fact and legally valid.⁸

ACCORDINGLY, this day of July, 2001, upon consideration of defendants' Motion for Summary Judgment (Doc. #13) and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** as to plaintiff's claim for abuse of process and is otherwise **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.

⁸Where the existence of probable cause turns on an assessment of the motivation and credibility of agents or a defendant who expressed perceptions regarding pertinent facts and their legal implications when the defendant filed suit, it is a matter for resolution by the jury. See Bannar v. Miller, 701 A.2d 242, 248 (Pa. Super. 1997), app. denied, 723 A.2d 1024 (Pa. 1998).