

I. BACKGROUND¹

Plaintiff Ronald J. Srein is a citizen and resident of the Commonwealth of Pennsylvania. Plaintiff Paul J. Haaz, Esq., is licensed to practice law in the Commonwealth, but whether he is a citizen of Pennsylvania is not alleged.

Defendant National Legal Research Group, Inc. ("NLRG") is a corporation organized under the laws of Virginia with its principal place of business in Virginia. NLRG is an incorporated group of over seventy attorneys who perform legal research for lawyers throughout the country. Defendant Virginia Metalcrafters, Inc. ("Virginia Metalcrafters") is a corporation organized under Virginia law; its principal place of business is also in Virginia. Defendant Jeffrey N. Sheehan is a citizen and resident of Colorado.

In the spring of 1990, Srein retained Haaz to collect a defaulted debt owed by Robert Welch. Welch granted a mortgage in favor of Srein on a property located in Philadelphia (the "Property") as security for his repayment of the loan. The property was titled in the name of the Historical Second Street Development Association ("HSSDA"); Welch was the general partner.

As of December 31, 1990, Welch had defaulted on the repayment of the note and Haaz entered judgment against Welch and HSSDA on behalf of Srein. In lieu of foreclosure, HSSDA transferred the

¹ Facts are taken from plaintiffs' Complaint. Exhibit citations refer to the supplementary documents submitted by plaintiffs as part of their Complaint.

Property to Srein in January, 1991.

In February, 1992, Richard K. Doty, Esq., filed a civil suit (the "Witkowski litigation") against Srein and others on behalf of his clients, Dr. and Mrs. Witkowski. The lawsuit claimed the HSSDA transfer of the Property to Srein was a fraudulent conveyance. The United States District Court for the Eastern District of Pennsylvania entered judgment in favor of Srein and the decision was affirmed by the Third Circuit Court of Appeals.

Doty had hired NLRG to perform research in connection with the Witkowski litigation. Jeffrey N. Sheehan, Esq. was the NLRG attorney who assisted Doty. Sheehan wrote legal memoranda, briefs, and pleadings for Doty and gave him procedural and tactical advice regarding the prosecution and continuation of the suit against Srein.

Sheehan prepared a memorandum to Doty in which he referred to Srein as "the fraudulent transferee" (Exhibit A, 1). Thereafter, Sheehan sent a draft Motion for Summary Judgment and supporting legal documents to Doty (Exhibit B). In the Memorandum of Law in Support of the Summary Judgment Motion, Sheehan again described Srein as a "fraudulent transferee" (Exhibit B, 1). He also stated, "Srien [sic] was the fraudulent recipient of property for no consideration" (Exhibit B, 6).

In a cover letter highlighting several of the exhibits attached to the summary judgment motion (Exhibit C), Sheehan

referred to the person who:

engineered the preparation and execution of a series of documents, notes, mortgages, and pleadings to fraudulently transfer the property out of the reach of creditors of Historical Second Street and into Srien's [sic] hands. This series of orchestrated events was designed to set up obstacles to untangling the intended fraudulent conveyance. The architect of this scheme, whoever he may be, failed (Exhibit C, 13).

These comments referred to Haaz, Srein's attorney who prepared the documents.

Sheehan twice asserted that Haaz, whom he identified by name, engineered the alleged fraudulent conveyance. In referring to an exhibit, Sheehan stated that it "reveals Haaz fairly clearly as the architect of the fraudulent transfer" (Exhibit C, 1). Sheehan again accused Haaz of being "the architect of this scheme" later in the letter and referred to Srein as a "fraudulent transferee" (Exhibit C, 2).

Sheehan published the above statements by mailing the cover letter and memorandum to Doty, who later read and disseminated them to his clients, expert witnesses, and the court.

II. DISCUSSION

A. Standard of Review

The standard of review for a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss is:

In determining whether a claim should be dismissed under Rule 12(b)(6), a court looks only to the facts alleged in

the complaint and its attachments without reference to other parts of the record. Moreover, a case should not be dismissed for failure to state a claim unless it clearly appears that no relief can be granted under any set of facts that could be proved consistently with the plaintiff's allegations.

Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The court is "required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant." Id.

B. Jurisdiction

1. Subject Matter

A challenge to subject matter jurisdiction may be made "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction...." Fed. R. Civ. P. 12(h)(3). Although there may be complete diversity among all the parties, it has not been specifically alleged in the Complaint; the Complaint was originally filed in State court where Haaz's citizenship was irrelevant. It is stated that Haaz is licensed to practice law in Pennsylvania but his citizenship is not asserted. The removal petition does not cure the deficiency because it alleges as a legal conclusion that there is complete diversity of citizenship, but not the factual premises on which the legal conclusion is based. The complaint must be dismissed for lack of jurisdiction. Ordinarily,

plaintiffs are granted leave to amend the complaint to allege subject matter jurisdiction properly. Therefore, this action will be dismissed without prejudice and leave to amend to assert Counts III and IV. However, leave to amend will not be granted if amendment would be futile.

2. Personal - Virginia Metalcrafters

Defendants assert that there is no personal jurisdiction over Virginia Metalcrafters in the Eastern District of Pennsylvania. The relationship between Virginia Metalcrafters and NLRG and their mutual relationship with Jeffrey Sheehan, allegedly their joint agent, is unclear. It is the plaintiff's burden to show that this court has personal jurisdiction over all defendants; Mr. Srein has failed to provide sufficient information to meet this burden with respect to Virginia Metalcrafters. If an amended complaint is filed against Virginia Metalcrafters, plaintiffs must clarify why there is personal jurisdiction as to this defendant.

C. Statute of Limitations

Defendants assert that Counts I through VIII are barred by the applicable Pennsylvania statutes of limitations. Pennsylvania law tolls the running of the limitations period when, despite the exercise of due diligence, an injured party is unable to know or is reasonably unaware of the existence or cause of his injury. Hayward v. Medical Center of Beaver County, 608 A.2d 1040, 1042-

1043 (Pa. 1992). The complaint does not reveal when plaintiffs could have known, through due diligence, of defendants' involvement in the Witkowski litigation, so this claim is premature. If an amended complaint is filed, it will not be dismissed as time barred; unless apparent from the face of the amended complaint, a motion to dismiss will be denied without prejudice to a motion for summary judgment at the end of discovery.

D. Counts I and II - Defamation

Defendants assert that plaintiffs' defamation claims (Counts I and II) are barred by the doctrines of privilege and/or absolute immunity. It has long been established that statements made in arguing an action are absolutely privileged. Post v. Mendel, 507 A.2d 351, 352 (Pa. 1986). But only "those communications which are issued in the regular course of judicial proceedings and which are pertinent and material to the redress or relief sought" are privileged communications. Post, 507 A.2d at 355 (emphasis in original). Because defendants' alleged defamatory statements were submitted to Doty before submission to the court, determination of this issue hinges on the role the statements played in the Witkowski litigation.

In Post, a letter written by an attorney accused opposing counsel of improper practices in pending litigation and notified opposing counsel of the writer's intent to report the matter to the

Disciplinary Board. The letter was copied to the Disciplinary Board, the presiding judge, and a trial witness. The court ruled this correspondence was not privileged because it was not "issued in the regular course of judicial proceedings as a communication pertinent and material to the redress sought." Post, 507 A.2d at 355-356.

The letter in Post is not analogous to the correspondence at issue here; the statements involved here were research materials and draft motions issued in the regular course of judicial proceedings and were pertinent and material to the relief sought by the Witkowskis in the underlying litigation. The statements are privileged; Counts I and II if reasserted would be dismissed with prejudice. Therefore, leave to amend to assert Counts I and II will be denied.

E. Counts V, VI, and VII - Wrongful Use of Civil Proceedings and Abuse of Process

To succeed in an action for wrongful use of civil proceedings, the plaintiff must show: (1) the defendant has procured, initiated or continued the civil proceedings against him; (2) the proceedings were terminated in his favor; (3) the defendant did not have probable cause for his action; (4) the primary purpose for which the proceedings were brought was not to secure the proper discovery, joinder of parties or adjudication of the claim on which the proceedings were based; and (5) the plaintiff suffered damages.

42 Pa. Cons. Stat. Ann. § 8354; Kit v. Mitchell, 771 A.2d 814, 819 (Pa. Super. Ct. 2001).

The elements for a cause of action for abuse of process are that defendant: 1) used 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. Rosin v. American Bank of Rolla, 627 A.2d 190, 192 (Pa. Super. Ct. 1993).

Plaintiffs failed to allege a valid improper purpose to satisfy the purpose elements of both torts. Counts V, VI, and VII would be dismissed for failure to state a cognizable claim for which relief could be granted. Therefore, no leave to amend will be granted.

F. Count VIII - Unauthorized Practice of Law

There is no private right of action in Pennsylvania for the unauthorized practice of law. See 42 Pa. Cons. Stat. Ann. § 2524. Plaintiffs cite 1 Pa. Cons. Stat. § 1929:

The provision in any statute for a penalty or forfeiture for its violation shall not be construed to deprive an injured person of the right to recover from the offender damages sustained by reason of the violation of such statute.

One Pa. Cons. Stat. § 1929 does not create a civil statutory cause of action where a specific statute authorizing such action does not exist. Alfred M. Lutheran Distributors, Inc. v. A.P. Weilersbacker, Inc., 650 A.2d 83 (Pa. Super Ct. 1994). The only

remedy available to a private party to vindicate the unauthorized practice of law is injunctive relief and the recovery of costs, including reasonable attorney's fees, at the discretion of the court. See 42 Pa. Cons. Stat. Ann. § 2524(c); Haymond v. Lundy, 205 F. Supp. 2d. 403, 407. Count VIII would be dismissed except as it seeks injunctive relief, costs (including attorney's fees). Leave to amend will be granted as to injunctive relief and costs (including attorney's fees) only.

G. Motion to Strike Plaintiffs' Response

Defendants' Motion to Strike Plaintiffs' Response will be denied as moot because the action is dismissed for lack of jurisdiction. But ordinarily on a motion to dismiss, all materials outside the scope of the pleadings will be stricken from the record unless the motion is converted to a motion for summary judgment. Fed. R. Civ. P. 12(b).

IV. CONCLUSION

After consideration of the parties' submissions and oral argument on August 5, 2002, the court will dismiss the complaint for lack of subject matter jurisdiction without prejudice to file an amended complaint as to Counts III and IV. Leave will not be granted as to the remaining counts except plaintiffs may seek injunctive relief and recovery of costs as to Count VIII.

Defendant's Motion to Strike Plaintiffs' Response will be denied as moot.

An appropriate Order follows.

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

RONALD J. SREIN, et al : CIVIL ACTION
Plaintiff :
 :
v. :
 :
 :
NATIONAL LEGAL RESEARCH GROUP, INC., et al. :
Defendant : NO. 02-1164

ORDER

AND NOW, this 16th day of December, 2002, upon consideration of Plaintiffs' Complaint, Defendants' Motion to Dismiss (no. 2), portions of Plaintiffs' Response (no. 6), Defendants' Motion to Strike Plaintiffs' Response (no. 9), and for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that:

- (1) This action is **DISMISSED** for lack of jurisdiction with leave to amend as to Counts III and IV by January 2, 2003.
- (2) No leave to reassert Counts I and II is granted because the counts fail to state a cause of action.
- (3) No leave to reassert Counts V, VI and VII is granted because the counts fail to state a cause of action.
- (4) Leave to reassert Count VIII is granted as to injunctive relief and costs (including attorney's fees) only.
- (5) Defendants' Motion to Strike Plaintiffs' Response is **DENIED** as moot.

Norma L. Shapiro, S.J.