

In 1980, the Tabbys were limited partners in a partnership that owned an interest in an office building in downtown Philadelphia. Displeased with their access to the partnership's financial and accounting records, the Tabbys, through their attorney, Lewis Kates, brought an initial suit against the general partner, Gloria Levin, in state court, to compel Levin to allow them access to the financial books. By consent order, in the spring of 1981, the Tabbys were given access to the books. By the end of 1981, the partnership had entered into an agreement to sell the interest in the property.

In January, 1982, Paul R. Rosen was hired by Levin to represent her in the distribution of the sale proceeds to the partners and to enter an appearance in the aforementioned suit. Rosen placed the sale proceeds into an escrow account of which he made himself agent. He then refused to release to the Tabbys their share of the proceeds until they withdrew the suit against Levin and the costs of further defending Levin were deducted out of the Tabbys' share of the proceeds.

In April, 1982, after formally demanding the release of their share of the sale proceeds, the Tabbys, through their attorney, Kates, brought another suit in state court, this time against Levin, the partnership, Rosen, and his firm. The 1982 suit alleged among other things, fraud and conspiracy to defraud against Rosen and his firm for continuing to withhold the Tabbys' share of the funds. The nine-count complaint also alleged wrongful withholding and conversion claims against the defendants. In 1984, Rosen was replaced as counsel. In 1986, after five years of lying dormant, the initial 1980 suit to access the financial records of the partnership was dismissed by stipulation and court order. Rosen, however, continued to refuse to release the funds in escrow, even after Levin formally demanded that he do so. By then, Rosen also sought

to recover his fees associated with the administration of the escrow account along with reimbursement of costs associated with representing Levin, the partnership, and himself.

In 1991, Rosen successfully petitioned the state court to have the prothonotary assume control of the escrow account pending resolution of the Tabbys' claim against the funds. In 1994, the case proceeded to trial in the Philadelphia Court of Common Pleas. At trial, all of the counts, including the fraud charges, were dismissed as to Rosen and his firm. Nonetheless, the wrongful withholding of funds claim was permitted to continue as to Levin and the partnership. Upon the dismissal of the fraud charges against him, in 1995, Rosen brought the instant action against the Tabbys, their attorney, Kates, and Kates' law firm. On June 6, 1997, in the underlying suit, the state court judge found against Levin and the partnership and ordered that the Tabbys be distributed the entire principal, plus interest, held in escrow by the state prothonotary.

Currently before the Court in the instant suit is a flurry of motions relating to Defendant Kates' Motion for Summary Judgment on the remaining abuse of process and wrongful use of civil proceedings claims.²

II. Discussion

Summary judgment is properly granted to the moving party if the "pleadings, depositions,

² Defendant Kates' Motion for Summary Judgment (docket entry 31), was followed by Defendant Tabby's Motion for Summary Judgment and Joinder in Kates' Motion (docket entry 32). Subsequently, Plaintiff Rosen filed a Motion in Opposition to Defendants' Motion (docket entry 40). After that, Defendant Kates filed a Reply Motion to Plaintiff's Opposition (docket entry 41), with which Defendant Tabby later joined (docket entry 46), and which was then followed by Defendant Kates' Supplement to the Motion for Summary Judgment (docket entry 52), joined by Defendant Tabby (docket entry 53), which was eventually countered, on August 12, 1997, by Plaintiff's Response to Defendant's Supplement (docket entry 56).

answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). A dispute regarding a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The evidence must be viewed in the light most favorable to the nonmoving party. Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once the moving party has satisfied this requirement, the burden shifts to the nonmoving party to present evidence that discloses a genuine issue for trial. Id. at 324, 106 S. Ct. at 2553; Fed.R.Civ.P. 56(e).

Additionally, the substantive law controlling the case will determine those facts that are material for the purposes of summary judgment. Anderson, 477 U.S. at 248, 106 S. Ct. at 2510. Thus, in the instant case, summary judgment may be granted with respect to either the wrongful use of civil proceedings or the abuse of process claims only if there is no genuine issue of fact regarding the elements of the respective claim.

A. Wrongful Use of Civil Proceedings

A claim for wrongful use of civil proceedings, also commonly referred to as “malicious prosecution,” arises “when a party institutes a lawsuit with a malicious motive and lacking probable cause.” Shaffer v. Stewart, 473 A.2d 1017, 1019 (Pa. Super. Ct. 1984). In Pennsylvania, it has been codified at 42 Pa.Cons.Stat. Ann. §§ 8351-8354 which became

effective, February 17, 1981. Id. The statute states in relevant part:

(a) Elements of action. - A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings [if]:

(1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and

(2) The proceedings have terminated in favor of the person against whom they are brought.

42 Pa.Cons.Stat. Ann. § 8351.

To sustain a claim for wrongful use of civil proceedings under this statute, Pennsylvania courts have held that the plaintiff must show that the defendants maliciously instituted proceedings against him, that they lacked probable cause to institute the proceedings and that the proceedings terminated in favor of him. Dietrich Industries, Inc. v. Abrams, 455 A.2d 119, 122 (Pa. Super. Ct. 1982). See also Laventhol & Horwath, et al. v. First Pennsylvania Bank, N.A., et al., 18 Phila. 580, 583 (1988), aff'd, 573 A.2d 626 (Pa. Super. Ct.), appeal denied, 593 A.2d 420 (Pa. 1990) (stating that, “plaintiff must demonstrate that (1) the underlying proceedings terminated favorably to the accused; (2) the defendant caused those proceedings to be instituted without probable cause; and (3) malice”). Thus, section 8351 “essentially seeks to prevent frivolous suits, harassment and abusive legal methods.” Laventhol & Horwath, 18 Phila. at 583.

In the instant suit, defendants argue³ that summary judgment is properly granted because

³ While defendants Kates and the Tabbys each filed separate motions, their arguments are essentially the same. Moreover, the Tabbys also adopted and joined all of defendant Kates’ arguments. See Mot. by Def. Gilbert Tabby for Summ. J. and Joinder in the Mot. for Summ. J. of Def. Kates’ Mem. (docket entry 32); Joinder by Def. Gilbert Tabby in Reply Br. of Def. Kates’ In Supp. of Summ. J. (docket entry 46); Joinder by Def. Tabby in Def. Kates’ Supplement to Mot. for Summ. J. (docket entry 53). Thus, for the purposes of deciding this motion, the different defendants are simply referred to as “the defendants.”

there is no genuine issue as to whether defendants had probable cause to bring the underlying suit. They argue further that the proceedings in the underlying lawsuit did not terminate wholly in favor of Rosen, and that their primary purpose in bringing the lawsuit in the first place was simply to recover the Tabbys' funds. Further, they argue that the wrongful withholding claim terminated in their favor when the state court ordered the prothonotary to distribute to them the funds plus interest held in escrow for fifteen years. This, defendants argue, is indisputable evidence that their underlying suit was brought with probable cause. Plaintiff argues that there was no probable cause at all to bring the fraud claims against him and his firm. Alternatively, he argues that, at the very least, there is a genuine issue of material fact as to whether there was probable cause to bring the fraud claims against him and his firm. He argues that defendants knew there was no probable cause for fraud charges at the time they initiated the suit. He argues further that a personal vendetta against him by defendant Kates is the actual motive underlying what he terms the initiation and continuation of a baseless suit against him and his firm.

Thus, it is apparent from the parties' Motions and supporting Memoranda that the main issue before the Court with respect to the wrongful use of civil proceedings claim is whether there is a genuine issue as to the existence of probable cause to bring the underlying suit, or to bring only the fraud claims in the underlying suit.

In order to clarify what is meant by probable cause for the purposes of section 8351, section 8352 codifies the requirements for the existence of probable cause. The statute states

[a] person who takes part in the procurement, initiation or continuation of civil proceedings against another has probable cause for doing so if he reasonable believes in the existence of the facts upon which the claim is based, and either: (1) Reasonably believes that under those facts the claim may be valid under the existing or developing law; (2) Believes to this effect in reliance upon the advice

of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or (3) 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.

42 Pa.Cons.Stat. Ann. § 8352.

Pennsylvania courts have held that, “[a]bsent material conflicts in the evidence, the presence or absence of probable cause is for the court to determine.” Meiksin v. Howard Hanna Co., Inc., 590 A.2d 1303, 1304 (Pa. Super. Ct. 1991). See also Jaindl v. Mohr, 637 A.2d 1353, 1357 (Pa. Super. Ct. 1994) (stating, “where the evidence is undisputed or only slight differences exist in collateral matters, the issue of probable cause is a matter for the court and not the jury”); Dietrich Industries, Inc. v. Abrams, 455 A.2d 119, 124 (Pa. Super. Ct. 1982)(stating, “[w]hat constitutes probable cause and whether it exists under an admitted or clearly established set of facts are questions of law for the court to determine.”).

In Meiksin, real estate vendors brought an action for wrongful use of civil proceedings against a broker and its attorneys. In the underlying action, the broker had unsuccessfully sued the vendors for commissions. The trial court’s granting of summary judgment for the broker and its attorneys was upheld on appeal because the trial court had correctly determined, as a matter of law, that the broker and its attorneys had had probable cause for filing the action against the vendors. Id. at 1303.

On appeal, the plaintiff vendors had argued that the trial court erred because whether the broker’s lawyers had probable cause for filing the action to recover the commissions was a disputed issue of fact which should have gone to the jury. Id. at 1304. The Superior Court disagreed stating, “[a]bsent material conflicts in the evidence, the presence or absence of

probable cause is for the court to determine.” Id. at 1305. The Meiksin court held

the existence of probable cause was present as a matter of law in view of the existence of a legitimate dispute of fact in the prior action for commissions. This was apparent from the denial of motions for summary judgment and compulsory non-suit in the prior action and the submission of disputed factual issues to the jury.

Id. at 1306.

The facts of the instant case are even more determinative as to the existence of probable cause for bringing the underlying suit than those of Meiksin, where the defendants had been completely unsuccessful as plaintiffs in the underlying suit. In the instant case, not only did the Tabby’s wrongful withholding claim survive a motion for a directed verdict, but the court eventually ordered the Prothonotary to distribute the disputed funds, plus interest, to the Tabbys. (Defs.’ Supplement to Def. Kates’ Mot. for Summ. J., Ex. “A.”) Thus, the Tabbys were, in the end, successful in their underlying litigation, which, under the standard enunciated in Meiksin, would be indicative of the existence of probable cause, as a matter of law. Meiksin, 590 A.2d at 1306.

The essence of plaintiff Rosen’s alternative argument, however, is more specific. He argues that, even though the Tabbys were ultimately successful in their wrongful withholding claim against Levin and the partnership, all of the fraud claims against Rosen and his firm were dismissed by directed verdict in the underlying suit. He argues that the dismissal of specific claims within a suit may be the basis of a subsequent action for wrongful use of civil proceedings based on the lack of probable cause to bring those claims. He presents evidence of a personal vendetta against him and his firm by defendant Kates, which he argues, in light of the fact that all of the fraud claims against him and his firm were dismissed, creates a genuine issue as to

whether there was probable cause to bring the fraud claims.

To support his argument, Rosen cites first to Janetka v. Dabe, 892 F.2d 187 (2d Cir. 1989). In Janetka, plaintiff brought suit for malicious prosecution after he was acquitted of a resisting arrest charge, even though he was convicted of a lesser, related charge. Id. at 188. The court held that his acquittal on the resisting arrest charge constituted a favorable termination of the underlying proceedings for the purposes of a wrongful prosecution claim, despite the fact that the other charge in the proceeding terminated unfavorably to him. Id. Rosen also cites to Greenberg v. Wolfberg, 890 P.2d 895 (Okla. 1995), for the proposition that

if more than one claim is asserted in a proceeding, then [the] court must review each claim separately to determine if it satisfied critical elements for use as [a] predicate proceeding to support [a] malicious prosecution action; if [the] claim is terminated in favor of malicious prosecution plaintiff, then [the] action for malicious prosecution will lie on that singular claim regardless of who prevailed on [the] other claims pressed in the same predicate suit.

(Pl.'s Mot. in Opp'n to Summ. J., at 34.) Thus, Rosen posits, defendants are incorrect in arguing that a prerequisite to maintaining a claim for wrongful use of civil proceedings is that the plaintiff must have prevailed "on each and every claim in the underlying litigation." (Id.)

Ignoring the obvious distinction between the instant case and Janetka -- that the underlying proceeding in Janetka was a criminal proceeding, which carries the extra baggage of a higher burden of proof, possible loss of liberty, and state action -- the cases to which plaintiff cites, which this Court has no reason to doubt are otherwise controlling in the Second Circuit and in the state of Oklahoma, are, nonetheless, contrary to the well-settled law of Pennsylvania on this point. See City of Philadelphia v. Lead Industries Assoc., Inc., 994 F.2d 112, 122 (3d Cir. 1993) (federal courts presiding over diversity cases must apply the substantive law of the state

whose laws govern the action). Because Pennsylvania law forms the basis of the two claims in this case, this Court is bound to apply the well-settled law of Pennsylvania.

The facts of the instant case are very similar to those of Laventhol & Horwath, et al. v. First Pennsylvania Bank, N.A., et al., 18 Phila. 580, 583 (1988), aff'd, 573 A.2d 626 (Pa. Super. Ct.), appeal denied, 593 A.2d 420 (Pa. 1990). In Laventhol & Horwath, the plaintiffs also premised their case on specific fraud counts in the underlying suit lacking probable cause even in light of the existence of probable cause for the remaining counts. In Laventhol & Horwath, Judge Prattis identified the primary issue as whether

the fact that one element of a pleading may have been alleged without sufficient probable cause, may be used as a basis for initiating a suit against the attorney, of a party, under 42 Pa. C.S.A. § 8351 *et seq.*, where the other elements and theories of that pleading, alleged by the party *are* supported by probable cause?

Id. at 583 (emphasis in original).

In Laventhol & Horwath, the named accounting firm and its attorneys sued First Pennsylvania Bank and its counsel for malicious prosecution arising out of an underlying action. Id. at 581. Leading up to this, First Pennsylvania had served as trustee to certain debenture transactions involving Capital First Corp. When Capital First defaulted on the debenture payments, the bondholders had filed suit against First Pennsylvania, as trustee, for failing to insure that sufficient collateral had been pledged. Id. First Pennsylvania then filed the “underlying action” which was a third party complaint against Capital First, its accounting firm (Laventhol & Horwath), and its attorneys, in which it alleged, among other things, fraud, negligent representation, breach of fiduciary duty, and nondisclosure. Id. at 581-82. It was First Pennsylvania’s allegations that it had relied on misrepresentations in Capital First’s financial

reports that gave rise to the accounting firm's suit for malicious prosecution. Id. at 582.

The court, in granting summary judgment for the defendants, stated, “[i]t should not be concluded that First Pennsylvania primarily brought the action for an improper goal merely because one element or argument in the Bank’s pleading may have been untenable. ‘The gravamen of wrongful use of civil proceedings is the baseless or reckless prosecution of *a suit*.’” Id. at 588 (emphasis in original)(quoting Sheridan v. Fox, 531 F. Supp. 151, 153 (E.D.Pa. 1982). With respect to that underlying suit, Zeffiro v. First Pennsylvania Banking and Trust Co., Civil Action, No. 78-3294 and No. 78-4316 (E.D.Pa. Mar. 21, 1984), the Laventhol & Horwath court noted that “much of First Pennsylvania’s case failed because their evidence fell short of the legal requirements to support their cause of action.” Id. at 586. However, the court added, “[t]his failure does not warrant an instant finding that the suit was groundless and therefore the attorneys of the plaintiff initiated the cause of action without probable cause.” Id. The court further noted that, in the underlying proceeding, Judge Bechtle had stated that First Pennsylvania Bank “‘pleaded and advanced this case in what is a sincere and professional belief that there is a claim here. The fact that they have not prevailed doesn’t mean that it was not properly brought.’” Id. (quoting Zeffiro, at 49-50).

Similarly, in the instant case, the trial judge in the underlying proceedings stated,

I have found for the defendants on all items with the single exception of the \$58,000 fee which Gloria Levin claimed and which should now be repaid in the proportionate share to which the Tabbys are entitled. . . . And also, of course, it would require that the full sums which are being held in escrow also be paid out to . . . the Tabbys.

(Defs.’ Mot. for Summ. J., Ex. “V” at 20.) The state court judge continued,

[w]as this a frivolous suit? They [the plaintiffs] have established that the limited

partners were entitled to something that was taken that they [the defendants] shouldn't have taken. So it wasn't frivolous in a sense. They did establish part of that claim. Otherwise stated, however, is this the type of thing where Gloria Levin did such a terrible thing? No. It was a legitimate dispute, a legitimate commercial dispute in the instant case. And the Court is satisfied that having been a legitimate commercial dispute between the parties that each party will bear the costs of its own responsibility. Gloria Levin will pay hers and the Tabbys will pay theirs . . . but everybody [sic] will be responsible for his or her own expenses, including Mr. Rosen.

(Defs.' Mot. for Summ. J., Ex. "V" at 25-26.)

On June 6, 1997, the state court issued an order releasing the all of the funds in escrow to the Tabbys. The order states,

upon consideration of Plaintiffs' Motion for Release of Funds, any opposition thereto and the record, it is hereby ORDERED and DECREED that said Motion is GRANTED. The Prothonotary is directed to issue a check payable to the Plaintiffs and their counsel representing the principal held plus interest earned on deposit in pro-tanto satisfaction of the judgment against the defendants Gloria B. Levin and BOA Associates.

(Defs.' Supplement to Mot. for Summ. J., Ex. "A.")

Thus, the outcome of the entire proceedings in the underlying suit, including the wrongful withholding claim, is determinative, as a matter of law, of the existence of probable cause to have initiated the suit. (Defs.' Supplement to Mot. for Summ. J., Ex. "A."; Ex. "V" at 20.) See Dietrich Industries, Inc., 455 A.2d at 124 (stating "[w]hat constitutes probable cause and whether it exists under an admitted or clearly established set of facts are questions of law for the court to determine. When sufficient material facts operate to disprove the averment of want of probable cause, the cause of action must fail").

Furthermore, independent of the determination that, because the Tabbys were ultimately successful in their claim to recover their share of the proceeds, they had probable cause to bring

the underlying suit as a matter of law, it is also apparent that the underlying proceedings did not terminate wholly in favor of plaintiff Rosen. It was ordered by the state court that all of the money in the escrow account, out of which Rosen had sought to recover his costs and fees, be released to the Tabbys, as rightfully theirs. (Defs.' Mot. for Summ. J., Ex. "V" at 11, 20, 25-26; Defs.' Supplement to Mot. for Summ. J., Ex. "A.") As discussed above, the requirement that the underlying proceedings terminated favorably to the plaintiff is also an essential element of a claim for wrongful use of civil proceedings. Dietrich Industries, Inc., 455 A.2d at 122; Laventhol & Horwath, 18 Phila. at 583. See Sheridan v. Fox, 531 F. Supp. 151, 154 (E.D.Pa. 1982)(stating, "termination of a prior proceeding in plaintiff's favor has always been a prerequisite to a wrongful-use-of-process suit"). See also Lessard v. Jersey Shore State Bank, 702 F. Supp. 96, 99 (M.D.Pa. 1988)(holding plaintiff could not prevail on *Dragonetti* claim as she could not establish that underlying proceedings terminated in her favor where court granted partial relief to opposing party). Thus, there is actually no genuine issue as to whether there was probable cause to bring the underlying suit or as to whether that suit terminated wholly in Rosen's favor.

Rosen, citing the law of Oklahoma as embodied in Greenberg, urges the Court to delve deeper into the factual proffers, including the states of mind of the defendants in bringing the specific fraud claims. However, under Pennsylvania law, it is clear and certain that the probable cause to bring the underlying litigation relates to the entirety of the lawsuit, and not to some specific claim or claims within that suit. Laventhol & Horwath, 18 Phila. at 588. See also Meiksin, 590 A.2d at 1305 (stating that absolute defense to malicious prosecution claim is established, even if express malice is proved, once probable cause is shown to have existed in the

prior proceeding). Accordingly, the Court need not dwell on the possible genuine issues of factual dispute related specifically to the fraud claims, because, as a matter of law, there was probable cause to commence the underlying proceedings as evidenced by the fact that the Tabbys were ultimately successful in getting the disputed money that Rosen claimed an interest in and retained without legal authority. Thus, summary judgment is properly entered for the defendants with respect to the claim of wrongful use of civil proceedings.

B. Abuse of Process

Having determined that summary judgment is appropriately granted as to all defendants with respect to the wrongful use of civil proceedings claim, this Court now considers the defendants' motion with respect to the remaining claim for abuse of process.

"The tort of 'abuse of process' is defined as the use of legal process against another 'primarily to accomplish a purpose for which it is not designed.'" Rosen v. American Bank of Rolla, 627 A.2d 190, 192 (Pa. Super. Ct. 1983) (quoting Restatement (Second) of Torts, § 682). Unlike the former tort of "malicious prosecution" which is now codified in the Pennsylvania statutes as "wrongful use of civil proceedings," the tort of abuse of process remains a common law tort defined by Pennsylvania case law. See Rosen v. Tesoro Petroleum Corp., 582 A.2d 27, 32 (Pa. Super. Ct. 1990) (action for abuse of process must be distinguished from action for malicious prosecution "as the two torts are wholly separate and distinct causes of action . . . action for malicious prosecution is statutorily based, see 42 Pa.C.S.A. § 8351, while malicious abuse of process is a common law action"). Wrongful use of process relates to the wrongful initiation of such process, while abuse of process is a perversion of a process after it has been initiated. Id. "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.” Hart v. O'Malley, 647 A.2d 542, 551 (Pa. Super. Ct. 1994) (quoting Rosen v. American Bank of Rolla, 627 A.2d at 192.).

“A cause of action for 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 though with bad intentions.” Shaffer v. Stewart, 473 A.2d 1017, 1019 (Pa. Super. Ct. 1984). An example of an abuse of process is "the initiation of a civil proceeding to coerce the payment of a claim completely unrelated to the cause of action sued upon." Dietrich Industries, Inc., 455 A.2d at 124. Thus, to sustain a claim for abuse of process, the original action must have been "somehow perverted so as to achieve an unrelated result." Id. The term "process" as used in the tort of abuse of process is interpreted broadly to include the "entire range of procedures incident to the litigation process." Rosen v. American Bank of Rolla, 627 A.2d at 192. This range of procedures includes discovery proceedings, the noticing of depositions, and the issuing of subpoenas. Id.

"The significance of [the word 'primarily'] is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or ulterior purpose of benefit to the defendant." Rosen v. American Bank of Rolla, 627 A.2d at 192. See also Hart, 647 A.2d at 552 (stating, "[i]t is not enough that the process employed was used with a collateral purpose in mind").

In Hart, the Harts were the owners of a mobile home park seeking to expand. Final

approval by the local planning commission of the Harts' application to expand stalled when O'Malley, an adjacent landowner, brought an action in equity against the planning commission to enjoin the commission from approving the Harts' application. Hart, 647 A.2d at 545. A preliminary injunction was granted and then continued "until a hearing or further order of the court." Id. After multiple continuances, recusal of the original judge, and the Harts' intervention, the court lifted the injunction and granted summary judgment for the Harts and the commission. Id. The Harts then instituted a suit for wrongful use of civil proceedings and for abuse of process against O'Malley and her attorney. Id.

With respect to the abuse of process claim, the Harts alleged that because the preliminary injunction was continued, it was "perverted" from redressing any alleged harm done to O'Malley into the objective of preventing the Harts from proceeding with their planned expansion. Id. at 551. In affirming the lower court's dismissal of the abuse of process claim, the court held that the complaint had not addressed an essential element of the claim. Id. at 552. It held that the complaint failed to allege facts that would show that the continuance of the preliminary injunction was used primarily for a purpose for which that process was not designed. Id. at 553.

In American Bank of Rolla, Rosen sued a bank and its attorney for abuse of process after the bank had subpoenaed him to appear and testify in aid of the execution of a valid judgment against Rosen's former client. American Bank of Rolla, 627 A.2d at 191. In affirming the lower court's dismissal of Rosen's claim, the court found that the primary purpose of the discovery proceedings being conducted by the bank and its attorney was in aid of execution against the former client. Id. at 194. The court stated

Rosen admittedly had relevant information. Therefore he could be deposed. See:

Pa.R.C.P. 3117. When [the defendants] sought to compel Rosen's testimony by serving him with a subpoena, they did not seek to pervert the process; nor did they pervert in fact. They were acting precisely as the law permitted them to act and primarily, if not solely, for a purpose for which the process existed.

Id.

Similarly, in the present case, by continuing the litigation until they received their share of the proceeds plus interest, the Tabbys and their lawyer Kates have done “nothing more than carry out the process to its authorized conclusion.” Shaffer, 473 A.2d at 1019. They have presented evidence that the disputed funds were ordered to be released to them on June 6, 1997. (Defs.’ Supplement to Mot. for Summ. J., Ex. “A.”) They have included evidence that Kates pursued this cause of action to its authorized conclusion primarily for that purpose. (Defs.’ Mot. for Summ. J., Ex. “Y.”) Rosen has not offered any evidence tending to show that, now that the Tabbys have received their money by order of the state court, either they or Kates intend to continue their litigation beyond its authorized conclusion. Nor has Rosen offered evidence suggesting that the *primary* purpose of continuing the suit against him was anything other than securing the release of the funds held by Rosen from the claims asserted by Levin, the partnership, and Rosen.

Nonetheless, Rosen argues that the evidence he offers does create a genuine issue as to whether the underlying litigation was initiated and continued “primarily to accomplish a purpose for which the process was not designed.” Specifically, Rosen alleges that defendant Kates named him as a defendant in the suit, rather than leaving him as a “nominal party” for retaliatory purposes only. (Pl.’s Opp’n to Defs.’ Mot. for Summ. J. at 25-26.) He asserts that he was named as a party defendant for the sole purpose of disrupting Rosen’s relationship with his clients,

Levin and the partnership, and to disqualify Rosen from representing Levin and the partnership. (Id. at 40.) Rosen also argues that no basis for continuing the fraud claims against him existed after he interpleaded the funds into the state court. (Id. at 25.) He argues that the primary objective of the suit was to pressure Levin and the partnership into settlement and to satisfy Kates' personal vendetta against Rosen and his firm. (Id. at 40.)

In support of his argument, Rosen offers evidence that Kates was successful in getting Rosen replaced as counsel. (Pl.'s Mot. In Opp'n to Defs.' Mot. For Summ. J., Ex. "L.") To further support his argument, Rosen offers testimonial evidence of a personal animosity between defendant Kates and the Rosen firm. (Id. at Ex. "A.") In fact, Rosen's evidentiary proffers might create a genuine issue as to whether Kates had an ulterior, spiteful motive underlying his prosecution of the fraud claims against him. However, that does not mean he has created a genuine issue as to whether the process was perverted into something other than what it appears to have been, an ordinary and legitimate action against Levin, the partnership, Rosen and his firm for wrongfully and fraudulently withholding funds. (Defs.' Mot. for Summ. J., Ex. "V" at 25.) Thus, even if Rosen can establish that Kates was consumed with hatred for Rosen and his firm, and that Kates thought of little else throughout his waking hours, he still has not created a genuine issue as to whether the *primary* purpose of the suit was anything other than recovering the Tabbys' share of the sale proceeds. See Shaffer, 473 A.2d at 1019 (stating "there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions"). See also Hart, 647 A.2d at 552 (stating, "[i]t is not enough that the process employed was used with a collateral purpose in mind"); Dietrich Industries, Inc., 455 A.2d at 124 (stating that in abuse of process, original action must have been

"somehow perverted so as to achieve an unrelated result").

Rather, the facts show that the funds in the escrow account were the subject of the underlying dispute. (Defs.' Mot. for Summ. J., Ex. "J.") Knowing this, Rosen made himself agent of the escrow account. (Id. at Ex. "H.") There is no evidence presented to indicate that Rosen was required to personally serve as escrow agent. However by choosing to do so, he deliberately placed himself in the path of the suit resulting from the dispute over the funds. Moreover, Rosen later claimed a personal stake in the funds held in escrow. (Id. at Ex. "T" at 56, 58.) He refused to release them after his representation of Levin and the partnership ended, and even after Levin and Levin's new counsel asked, then demanded that he release them. (Id. at Exs. "L," "M," "N," "O," "P," "Q.") By claiming a personal interest in the escrow account funds, Rosen asserted an interest distinct from that of his clients, Levin and the partnership. (Id. at Ex. "Q.") By claiming his own firm's costs against the disputed funds, he thus entangled himself and his firm substantively in the dispute. (See Id. at Ex. "V" at 10-11 (Judge Gafni stating that "throughout this matter Rosen has claimed that he had a right and the firm had a right to withhold this money, even if a demand had been made upon them by Gloria Levin . . . because he had a charging lien . . . However . . . the Court would not find that Rosen had a charging lien"))).

Accordingly, the Tabbys, and their attorney, in naming Rosen as a defendant, were acting "precisely as the law permitted them to act and primarily for a purpose for which the process existed." American Bank of Rolla, 627 A.2d at 194. Indeed, if they had not named Rosen as a defendant, and it turned out later that he was an indispensable party, their case might have been subject to a dismissal for failure to join an indispensable party. See Pa.R.Civ.P. 1032(b) (setting

out situation when court will dismiss action for failure to join indispensable party). Though Rosen argues that Kates named him a defendant for the improper purpose of removing Rosen from the case by creating a conflict between him and his clients, that argument is irrelevant in light of Rosen's own actions with respect to the disputed funds.

After serving as self-appointed escrow agent for nine years, Rosen successfully petitioned the state court to assume control of the escrow account in 1991. (Defs.' Mot. For Summ. J., Ex. "T.") He now argues that from that point on, the defendants had no basis to continue their fraud claims against Rosen since he no longer had control of the funds. (Pl.'s Mot. in Opp'n to Summ. J., at 25.) However, the money was still being withheld from the Tabbys as a result of Rosen's actions. Rosen was still responsible for originally placing the funds out of the Tabbys' reach, and Rosen still sought his charging lien from the funds escrowed in the court. Thus, the Tabbys still required the 1997 court order to receive the funds to which they were entitled, notwithstanding Rosen's claims.

Accordingly, as there is no genuine issue as to whether the suit was brought *primarily* for some other purpose than to secure the release of the funds, or that the process was perverted into something other than a lawsuit over a legitimate dispute, summary judgment is appropriately granted with respect to the claim for malicious abuse of process.

As the underlying litigation determined, the Tabbys had valid claims against Levin, the partnership, Rosen, and his firm for improperly withholding the Tabbys' share of the sale proceeds. Thus, "[t]hey were entitled to be represented by counsel who was able to give undivided loyalty, unafraid of personal liability in the event the suit should fail." See Meiksin, 590 A.2d at 1307. Any other rule would impair the quality of the representation which a client is

entitled to receive from his lawyer. With respect to both the claim for wrongful use of civil proceedings and the claim for abuse of process, the Tabbys and their attorney, Kates, who brought the underlying action on their behalf primarily to secure their rightful share of the sale proceeds, and then prevailed in that claim, are entitled to judgment as a matter of law.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.