

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

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|-------------------------|---|--------------|
| SCOTT SEGEN, | : | CIVIL ACTION |
| Plaintiff, | : | NO. 97-6335 |
| | : | |
| v. | : | |
| | : | |
| THOMAS B. RUTTER, LTD., | : | |
| RUTTER & DiPIERO, and | : | |
| THOMAS B. RUTTER, ESQ. | : | |
| Defendants. | : | |

M E M O R A N D U M

BUCKWALTER, J.

March 2, 1998

This diversity action arises out of a wrongful termination action (the "underlying action") brought by defendants, Thomas B. Rutter, Ltd., Rutter & DiPiero, and Thomas B. Rutter, Esq. (collectively "Rutter") on behalf of Stephen J. Weitz ("Weitz") against plaintiff, Scott Segen ("Segen") and Burton Photo Industries, Inc. ("Burton"). The underlying action was terminated on July 8, 1997 by a confidential settlement agreement. In October 1997 Segen filed a three count complaint alleging that Rutter's involvement in initiating and continuing the underlying action constituted wrongful use of civil proceedings in violation of 42 Pa.S.C.A. § 8351 (Counts I and II) and common law malicious abuse of process (Count III). Presently before the court is Rutter's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (Docket No. 4); Segen's answer (Docket No. 9) and Rutter's reply (Docket No. 10).

In considering a Rule 12(b)(6) motion, the court must accept as true all well pled facts and draw all reasonable inferences from those facts in the light most favorable to the nonmoving party. Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990). For the following reasons Rutter's motion is granted and Segen's complaint is dismissed.

A. WRONGFUL USE OF CIVIL PROCEEDINGS: COUNTS I AND II

The statutory tort of wrongful use of civil proceedings requires that the proceedings at issue terminate in favor of the person against whom they are brought. 42 Pa.C.S.A. § 8351. There is no dispute that the underlying action was settled, but, Pennsylvania's highest court has not ruled on whether a civil settlement constitutes a favorable termination. Therefore, I must predict how the Supreme Court would rule if faced with this issue. See Clark v. Modern Group Ltd., 9 F.3d 321, 326 (3d Cir. 1993). In forming this prediction I consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the issue at hand would be decided. See McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 663 (3d Cir.), cert. denied, 449 U.S. 976 (1980).

Pennsylvania's Superior Court has found that a defendant's compromise agreement to dismiss pending criminal charges does not constitute a favorable termination for purposes

of a claim under § 8351 and has acknowledged that a civil settlement may have a similar effect. See e.g., Georgina v. UMW, 572 A.2d 232 (Pa. Super. Ct. 1990); Dravo Corporation v. Ioli, 584 A.2d 1011, 1013 (Pa. Super. Ct. 1991). Similarly, absent from the definition of a favorable termination contained in § 674 of the Restatement of Torts, upon which § 8351 is modeled, is any mention of civil settlement. Comment J simply defines "favorable termination" as "(1) favorable adjudication of the claim by a competent tribunal, or (2) the withdrawal of the proceedings by the person bringing them, or (3) the dismissal of the proceedings because of his failure to prosecute." Restatement (Second) of Torts § 674 Comment J (1976). Finally, one decision from this district and one from the Third Circuit Court of Appeals mention in passing that a civil settlement would not equal a favorable judgment under § 8351. Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 832 (3d Cir. 1995); Harvey v. Pincus, 549 F.Supp. 332, 339 (E.D.Pa. 1982). Based on the above I conclude that Pennsylvania's Supreme Court would rule that a civil settlement is not a favorable termination for purposes of § 8351; therefore Rutter's motion to dismiss Counts I and II of Segen's complaint is granted.

B. MALICIOUS ABUSE OF PROCESS: COUNT III

An abuse of processes arises when a party employs legal process for some unlawful purpose, not for the purpose for which

it was intended. Triester v. 191 Tenants Ass'n, 415 A.2d 698, 702-03 (Pa. Super. Ct. 1979). A cause of action for abuse of process requires some definitive act or threat not authorized by 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, 472 A.2d 1017, 1019 (Pa. Super. Ct. 1984). The classic example is the initiation of a civil proceeding to coerce the payment of a claim completely unrelated to the cause of action sued upon. Triester, 415 A.2d 698 at 712.

Based on my review of the allegations contained in Segen's complaint it is clear that he has failed to state a cause of action for abuse of process. Count III of Segen's complaint simply mimics the requisite elements of the claim and contains no specific allegations of abuse. The only other portion of the complaint that could arguable support a claim for abuse of process is Paragraph 28(a), included in Count II. However, this allegation is also insufficient. Paragraph 28(a) states "Segen believes and avers his inclusion [in the underlying action] individually was purposefully calculated to coerce a substantial cash payment to Weitz (beneficial fee-wise) by jeopardizing his future economic condition and catastrophic damage to Burton Photo." Besides being virtually incomprehensible, this allegation is devoid of any allegation that service of the

complaint or other process was actually accompanied by an attempt to extort. That Segen distrusted the motives behind Rutter's initiation of the underlying action is immaterial. Furthermore, Segen's characterization of the settlement agreement with Weitz as a "substantial cash payment" does not take away from the fact that the agreement was the product of mutual compromise not coercion. Accordingly, Count III of Segen's complaint is dismissed.

An appropriate order follows.

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O R D E R

AND NOW, this 2nd day of March, 1998, upon consideration of Defendants' motion to dismiss (Docket No. 4); Plaintiff's answer (Docket No. 9) and Defendants' reply (Docket No. 10), it is hereby ORDERED that Defendants' motion is **GRANTED**. Accordingly, the complaint against defendants Thomas B. Rutter, Ltd.; Rutter & DiPiero and Thomas B. Rutter Esq., is DISMISSED, with prejudice.

The Clerk shall mark this case **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.