

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

| | | |
|------------------------------|---|--------------|
| GET-A-GRIPP, II, INC., | : | CIVIL ACTION |
| Plaintiff, | : | |
| | : | |
| v. | : | |
| | : | |
| HORNELL BREWING CO., INC. | : | |
| d/b/a FEROLITO, VULTAGGIO & | : | |
| SONS, | : | |
| Defendants, | : | |
| | : | |
| v. | : | |
| | : | |
| HARVEY BROWN, STEVEN RUBELL, | : | |
| GAVIN P. LENTZ, STEPHEN J. | : | |
| SPRINGER, RONALD PANITCH, | : | |
| BOCHETTO & LENTZ, P.C., and | : | |
| AKIN, GUMP, STRAUSS, HAUER & | : | |
| FELD, LLP, | : | |
| Counterclaim Defendants. | : | NO. 00-3937 |

MEMORANDUM & ORDER

J. M. KELLY, J.

OCTOBER , 2001

This case was initiated as a patent infringement claim filed by the Plaintiff, Get-A-Gripp, II, Inc. (“Get-A-Gripp”). Get-A-Gripp alleged that Defendant, Hornell Brewing Co., Inc. (“Hornell”), had infringed upon its patent for an easily grasped bottle with finger indentations. Get-A-Gripp had previously sued Hornell for patent infringement of its sport bottle in Get-A-Gripp II, Inc. v. Ferolito, Voltaggio & Sons and Hornell Brewing Co., C.A. No. 99-CV-1332 (E.D. Pa.) (“Sport Can case”). Hornell filed a Counterclaim against Get-A-Gripp and named Get-A-Gripp’s attorneys as additional Counterclaim Defendants (“Counterclaim Defendants”). The Counterclaim Defendants filed the present Motion for Judgment on the Pleadings on Counterclaim counts for: (1) wrongful use of civil proceedings; (2) abuse of process; (3)

conspiracy; and (4) prima facie tort. Hornell now concedes that its conspiracy count should be dismissed.

I. BACKGROUND

Get-A-Gripp filed the present case on August 3, 2000. Summary judgment was granted in favor of Hornell in the Sport Can case on August 16, 2000. Get-A-Gripp appealed the grant of Hornell's Motion for Summary Judgment in the Sport Can Case to the United States Court of Appeals for the Federal Circuit. While the present Motion was pending, the Federal Circuit affirmed the Judgment of this Court. On May 3, 2001, the Court granted Hornell's Motion for Summary Judgment against Get-A-Gripp in this case. Get-A-Gripp's appeal was voluntarily dismissed pursuant to Federal Rule of Appellate Procedure 42.

II. STANDARD OF REVIEW

In a Motion for Judgment on the Pleadings, this Court will accept as true all well-pleaded allegations in the complaint and draw all inferences in favor of the non-moving party.

Pennsylvania Nurses Ass'n v. Pa. State Educ. Ass'n, 90 F.3d 797, 799-800 (3d Cir. 1996).

Judgment will not be granted unless the movant clearly establishes that there is no material issue of fact to be resolved and that he is entitled to judgment as a matter of law. Jablonski v. Pan American World Airways, Inc., 863 F.2d 289, 290 (3d Cir. 1988).

III. DISCUSSION

The tort of wrongful use of civil proceedings was codified in Pennsylvania by the Dragonetti Act. 42 Pa. Con. Stat. Ann. §§ 8351-54 (West 1998). To survive a motion for judgment on the pleadings, Hornell must plead that: (1) the Counterclaim Defendants commenced or continued civil proceedings against it; (2) the proceedings were terminated in

favor of Hornell; (3) that the Counterclaim Defendants did not have probable cause for the action; (4) the primary purpose for filing the action was not for adjudicating the claim, discovery or proper joinder of parties; and (5) Hornell suffered damages. While at the time this Motion was filed the Counterclaim Defendants could legitimately argue that the appeal of the Sport Can case precluded finality, the affirmance of this Court's decision has made that finality issue moot. Likewise, the grant of summary judgment in this case and the subsequent dismissal of the appeal are consistent with Hornell's allegation of finality in this matter. Phillips-Burke v. Neshaminy Constructors, Inc., Civ. A. No. 89-8497, 1992 WL 331465 at *3 (E.D. Pa. Nov. 3, 1992), seems to suggest that the Dragonetti Act claim in this case must be dismissed and filed in a subsequent action. A proper use of judicial resources, however, will be to allow the Dragonetti Act claim to continue based upon both cases as the finality issues in this case no longer exist. Review of the pleadings indicates that Hornell has sufficiently plead the remaining elements of its Dragonetti Act claim.¹

Hornell's claim for abuse of process survives as well. While the Counterclaim Defendants try to demonstrate that litigation did not proceed against Hornell under a threat or for an improper purpose, Hornell has sufficiently alleged that the cases were designed to preclude it from using bottle designs for which Get-A-Gripp did not have a lawful patent.

Count VI of the Counterclaim alleges a prima facie tort, that is a violation of a statute that causes an injury to someone that the statute is designed to protect. The Counterclaim Defendants argue and Hornell concedes that Pennsylvania has not recognized this concept. Hornell argues,

¹ Review of the New Jersey False Claims Act demonstrates that it is a procedural tool, whereas the Dragonetti Act creates a cause of action. Accordingly, cases relying upon the New Jersey False Claims Act are not instructive.

however, that the concept has been accepted under New York law and there is a false conflict because Pennsylvania has an interest in protecting its citizens. The Court is convinced that Pennsylvania would not adopt a scheme whereby every statute creates a remedy in tort for the parties the statute is designed to protect. Accordingly, the Motion for Judgment on the Pleadings will be granted as to Count IV.

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| FELD, LLP, | : | |
| Counterclaim Defendants. | : | NO. 00-3937 |

ORDER

AND NOW, this day of October, 2001, in consideration of the Motion for Judgment on the Pleadings (Doc. No. 19) filed by Counterclaim Defendants, Gavin P. Lentz, Stephen J. Springer, and Bochetto & Lentz, P.C., the Motion for Judgment on the Pleadings (Doc. No. 20) filed by Counterclaim Defendants, Ronald Panitch, Esq. And Akin, Gump, Strauss, Hauer & Feld, LLP, the Response of Counterclaim Plaintiff, Hornell Brewing Co., Inc. and the Replies thereto of the Counterclaim Defendants, it is ORDERED:

1. The Counterclaim Defendants' motion is GRANTED IN PART. Judgment is ENTERED in favor of the Counterclaim Defendants, Gavin P. Lentz, Stephen J. Springer, Bochetto & Lentz, P.C., Ronald Panitch, Esq. and Akin, Gump, Strauss, Hauer & Feld, LLP, and against the Counterclaim Plaintiff, Hornell Brewing Co. on Counts III and IV of the

Counterclaim.

2. The Motion for Judgment on the Pleadings is DENIED as to Counts I and II of the Counterclaim.

BY THE COURT:

JAMES MCGIRR KELLY, J.