



Defendants, in their Answer, counterclaimed against plaintiff for fraudulent misrepresentation (Counts I and IV), tortious interference with prospective economic advantage (Count II and V), defamation, slander, and libel per se (Counts III and VI), and abuse of process (Count VII).

Presently before the Court is Plaintiff Nand Todi's Motion to Dismiss Defendants' Counterclaims Pursuant to Federal Rule of Civil Procedure 12(b)(6). The Motion is granted for the reasons that follow.

## **II. DISCUSSION**

### **A. Defendants' Counterclaims for Fraudulent Misrepresentation, Tortious Interference With Prospective Economic Advantage, and Defamation, Slander, and Libel Per Se**

Plaintiff contends that defendants' counterclaims for fraudulent misrepresentation, tortious interference with prospective economic advantage, and defamation, slander, and libel per se must be dismissed because they are based solely upon statements in the Complaint and are therefore barred by the doctrine of absolute judicial privilege.

The doctrine of absolute judicial privilege applies to statements made in the "regular course of judicial proceedings" that are "pertinent and material" to the litigation. Moses v. McWilliams, 549 A.2d 950, 956 (Pa. Super. Ct. 1988). The statements made in the pleading, however, in order to be protected by the absolute judicial privilege, must be relevant to the litigation.

The absolute judicial privilege extends to protect statements made in judicial proceedings regardless of the tort claimed. Clodgo by Clodgo v. Bowman, 601 A.2d 342, 345 (Pa. Super. Ct.

1992). “The form of the cause of action is not relevant to application of the privilege.

Regardless of the tort contained in the complaint, if the communication was made in connection with a judicial proceedings [sic] and was material and relevant to it, the privilege applies.” *Id.* at 345.

Defendants contend that, because plaintiff filed his first suit against two other companies, reXnow.com, LLC and Commercial Realty Review, both now in bankruptcy, the allegations of the present Complaint are not relevant to plaintiff’s cause of action. The Court disagrees on the ground that the two defendants named in the original litigation, reXnow.com and Commercial Realty Review, and the defendants in the pending case, Henry J. Stursberg and Stursberg & Fine, are related and the allegations of the Complaint are relevant to plaintiff’s claims against moving defendants. Thus, the allegations in the Complaint before the Court are relevant to the litigation.

Defendants also contend that plaintiff abused the privilege and, therefore, has lost it. The Court disagrees with that statement. To the contrary, “[a]ll communications pertinent to any stage of a judicial proceeding are accorded an absolute privilege which cannot be destroyed by abuse.” Binder v. Triangle Publ’ns, Inc., 275 A.2d 53, 56 (Pa. 1971); see also Milliner v. Enck, 709 A.2d 417, 421 (Pa. Super. Ct. 1998) (“[W]here statements are made in the course of judicial proceedings, it is clear that such statements are absolutely privileged, and ‘[h]owever false and malicious, they are not libelous.’”).

The foregoing analysis covers the counts which allege claims of fraudulent misrepresentation (Counts I and IV), tortious interference with prospective economic advantage (Count II and V), and defamation, slander, and libel per se (Counts III and VI). The Motion to Dismiss will be granted as to those counts and those counts are dismissed.

**B. Defendants' Counterclaim for Abuse of Process**

In Count VII of the Counterclaim defendants purport to assert a 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. 1993) (quoting Restatement (Second) of Torts, § 682). “To establish a claim for abuse of process it must be shown that [a litigant] (1) used a legal process against [another], (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the [other party].” Id. The Court concludes that defendants’ claim for abuse of process fails for two reasons.

First, the instant litigation was brought by plaintiff in order to recover an investment and loan totaling \$500,000.00, which plaintiff claims was improperly diverted by or to the defendants from the company in which plaintiff invested, reXnow.com. The Court concludes, based on the allegations of the Complaint, that plaintiff’s purpose in bringing the action against defendants was entirely proper - to recover what he claims was an illegally diverted investment or loan.

Second, defendants fail to allege that plaintiff abused previously existing process. “An abuse of process claim may be asserted where an individual improperly uses process *after* it has been issued.” Zappala v. Hub Foods, Inc., 683 F. Supp. 127, 130 (W.D. Pa. 1988) (emphasis added). In this case, defendants do not allege that plaintiff abused the process subsequent to its issuance, but only that plaintiff initiated suit against defendants for the improper purpose of circumventing the protections afforded by the bankruptcy court. Absent allegations that a party “has abused the process *after* its issuance . . . an abuse of process claim cannot stand.” Cameron v. Graphic Mgmt. Assocs., Inc., 817 F. Supp. 19, 22 (E.D. Pa. 1992).

The inquiry does not end with the foregoing analysis because defendants' claim could be construed as a claim for malicious use of process, codified at 42 Pa. Cons. Stat. § 8351-54 by the Pennsylvania legislature in 1980 as wrongful use of civil proceedings. See McGee v. Feege, 535 A.2d 1020, 1023 (Pa. 1987) ("Malicious use of civil process has to do with the wrongful initiation of such process, while abuse of civil process is concerned with a perversion of a process after it has been issued."). Wrongful use of civil proceedings is "a cause of action in tort against one who wrongfully initiates civil proceedings against another for improper purposes." Zappala, 683 F. Supp. at 130. The essential elements of this cause of action are: (1) the party who initiates civil proceedings against another "acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing . . . 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." Id. at 129-30 (quoting Pa. Cons. Stat. § 8351).

In this case, defendants allege that plaintiff instituted the instant action "to circumvent the protections afforded by the bankruptcy court . . . in order to exact vexatious and punitive remedies against the named defendants." Henry Stursberg and Stursberg & Fine's Answer to Pl.'s Compl., Affirmative Defenses, and Countercl., ¶ 141. Defendants, however, do not allege, and cannot allege, that the instant action terminated in their favor because the action is presently pending before this Court. "Section 8351, on its face, requires that the proceeding alleged to be the misuse of legal process terminate in favor of the defendants before the defendant's claim for wrongful use of civil proceedings is ripe for adjudication." Zappala, 683 F. Supp. at 131. Thus, if construed as a claim for wrongful use of civil proceedings, the claim is unripe and must be dismissed.

For the foregoing reasons, the Court grants plaintiff's Motion to Dismiss as to Count VII of the Counterclaim in which defendants purport to assert a claim for abuse of process.

**BY THE COURT:**

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**JAN E. DUBOIS, J.**