

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

UNITED STATES OF AMERICA ex rel. :
DEBORAH RIVA MAGID : CIVIL ACTION
 :
v. :
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 :
BARRY WILDERMAN, M.D., P.C., : NO. 96-CV-4346
BARRY WILDERMAN, M.D., ERIC :
GERWIRTZ, M.D., STEVEN PALLONI, :
M.D. :

SURRICK, J.

FEBRUARY 28, 2005

MEMORANDUM & ORDER

Presently before the Court is Relator’s Motion for Judgment on the Pleadings (Doc. No. 154). For the following reasons, Relator’s Motion will be granted.

I. BACKGROUND

Relator Deborah Riva Magid, Ph.D., M.D., (“Relator”) brought this qui tam action under the False Claims Act, 31 U.S.C. §§ 3729-3733, on behalf of herself and the United States. Relator worked as an anesthesiologist from July, 1994, through May, 1996, for Defendant Barry Wilderman, M.D., P.C. (“Wilderman, P.C.”), a corporation that provided anesthesia-related services. (Doc. No. 1.) Defendants Barry Wilderman, M.D., Eric Gewirtz, M.D., and Steven Palloni, M.D., all worked with Relator as anesthesiologists for Wilderman, P.C.

On June 13, 1996, Relator filed a Complaint against Defendants,¹ alleging that the

¹ Relator’s Complaint also named North Penn Hospital (“North Penn”) as a defendant. (Doc. No. 1.) On April 29, 2004, we granted North Penn’s motion for summary judgment on all of Relator’s claims. *United States ex rel. Magid v. Wilderman*, Civ. A. No. 96-4346, 2004 U.S. Dist. LEXIS 8459 (E.D. Pa. Apr. 29, 2004).

Defendants violated the False Claims Act by submitting false claims for Medicare reimbursement for anesthesia services from 1990 to 1996.² (Compl. ¶¶ 3, 13-14.) Defendants filed an Answer and Counterclaim on January 20, 1998, alleging claims of malicious use of process (Count One), malicious abuse of process (Count Two), defamation (Count Three), punitive damages (Count Four), and intentional infliction of severe emotional distress (Count Five). The instant Motion seeks to dismiss all counterclaims under Federal Rule of Civil Procedure 12(c).³

II. LEGAL STANDARD

A motion for judgment on the pleadings under Rule 12(c) is judged under the same standards as a motion to dismiss pursuant to Rule 12(b)(6). *Turbe v. Gov't of the V.I.*, 938 F.2d 427, 428 (3d Cir. 1991). We may dismiss a claim in a Rule 12 motion only if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *H. J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)); see also *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990) (“Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved.”). When considering a motion to dismiss, we must “accept as true all of the allegations in the [counterclaim] and all reasonable inferences that can be drawn therefrom, and view them

² The Complaint was filed under seal in accordance with 31 U.S.C. § 3730(b)(2), and was unsealed by the Honorable Robert F. Kelly on November 10, 1997. (Doc. No. 4.)

³ We note that Defendants failed to timely respond to Relator’s Motion. Under Local Rule 7.1(c), any party opposing a motion must submit a response within fourteen (14) days after the motion’s service. E.D. Pa. R. 7.1(c). As of the date of this Memorandum and Order, we have received no response from Defendants.

in the light most favorable to the non-moving party.” *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989). We need not, however, credit a party’s “bald assertions” or “legal conclusions.” *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997).

III. DISCUSSION

A. Malicious Use of Process and Malicious Abuse of Process

Defendants’ first two counterclaims allege that Relator has committed the torts of malicious use of process and malicious abuse of process with respect to her False Claim Act claims. (Doc. No. 6 ¶¶ 30-39.) Defendants assert that Relator wrongfully initiated process in this case knowingly and intentionally, and that Relator was aware that her allegations were false. (*Id.* ¶ 33.) Defendants also assert that after instituting this action, Relator knowingly and intentionally perverted it for an improper and illegal purpose. (*Id.* ¶¶ 37-38.)

Although often confused, in Pennsylvania, the common law torts of malicious use of process and malicious abuse of process are separate and distinct claims. *McGee v. Feege*, 535 A.2d 1020, 1023 (Pa. 1987) (citing *Publix Drug Co. v. Breyer Ice Cream Co.*, 32 A.2d 413 (Pa. 1943)). Malicious use of process “arises when a party institutes a lawsuit with a malicious motive and lacking probable cause.” *Hart v. O’Malley*, 781 A.2d 1211, 1219 (Pa. Super. Ct. 2001) (quoting *Rosen v. Am. Bank of Rolla*, 627 A.2d 190, 191 (Pa. Super. Ct. 1993)). Abuse of process, on the other hand, involves a perversion of the legal process to accomplish some unlawful purpose for which it was not designed. *Al Hamilton Contracting Co. v. Cowder*, 644 A.2d 188, 191 (Pa. Super. Ct. 1994). “The classic example” of 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.” *Triester v. 191 Tenants Ass’n*, 415 A.2d 698, 712 (Pa. Super. Ct. 1979).

In Pennsylvania, the tort of malicious use of process, also known as wrongful use of civil proceedings, has been codified and modified by the Dragonetti Act, 52 Pa. Cons. Stat. Ann. §§ 8351-8354. See, e.g., *Ritzel v. Pa. Soc’y for the Prevention of Cruelty to Animals*, Civ. A. No. 04-2757, 2005 U.S. Dist. LEXIS 1904, at *15 (E.D. Pa. Feb. 9, 2005). The relevant portion of the Dragonetti Act provides that:

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:

(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(a) (West 1998). In order to prevail in an action for wrongful use of civil proceedings, a party must prove that: (1) the underlying proceedings terminated in his or her favor; (2) the defendant caused those proceedings to be instituted without probable cause; and (3) the proceedings were instituted for an improper purpose. *Bannar v. Miller*, 701 A.2d 242, 247 (Pa. Super. Ct. 1997). If a successful claim is made, the Dragonetti Act provides for recovery of “[t]he expense, including any reasonable attorney fees, that [a party] has reasonably incurred in defending himself against the proceedings.” 42 Pa. Cons. Stat. Ann. § 8353(3) (West 1998).

Malicious abuse of process, however, remains a separate and distinct common law tort.⁴

⁴ We note that in *U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 394 (3d Cir. 2002), the Third Circuit stated in passing that the torts of malicious use of process and malicious abuse of process are both subsumed under the general scope of the Dragonetti Act. It appears,

Werner v. Plater-Zyberk, 799 A.2d 776, 785 (Pa. Super. Ct. 2002); *Al Hamilton Contracting Co.*, 644 A.2d at 191-92. The elements of a claim for abuse of process are: (1) that a party used a legal process against another party; (2) the legal process was used primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the other party. *McGee*, 535 A.2d at 1026; *Rosen*, 627 A.2d at 192; *see also* Restatement (Second) of Torts § 682 (1977) (“One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.”). “The word process ‘has been interpreted broadly, and encompasses the entire range of procedures incident to the litigation process.’” *Access Fin. Lending Corp. v. Keystone State Mortg. Corp.*, Civ. A. No. 96-191, 1996 U.S. Dist. LEXIS 14073, at *9 (W.D. Pa. Sept. 4, 1996) (quoting *Rosen*, 627 A.2d at 192). To establish a claim for abuse of process, Pennsylvania courts have stated that “[i]t is not that the defendant had bad or malicious intentions or that the defendant acted from spite or with an ulterior motive. Rather, there must be an act or threat not authorized by the process, or the process must be used for an illegitimate aim such as extortion, blackmail, or to coerce or compel the plaintiff to take some collateral action.” *Al Hamilton Contracting Co.*, 644 A.2d at 191-92 (citations omitted).

Relator argues that Defendants’ counterclaims of malicious use of process and malicious abuse of process should be dismissed because they are not ripe for adjudication. We agree. A

however, that Pennsylvania courts continue to view the two torts as distinct causes of action. *See, e.g., In re Larsen*, 616 A.2d 529, 587, 592-93 (Pa. 1992) (“The common law tort of malicious prosecution has been codified and modified as a statutory cause of action. . . . Abuse of process differs from malicious [civil] prosecution”); *Werner*, 799 A.2d at 785 (“Abuse of process is a state common law claim. However, allegations of malicious prosecution invoke Pennsylvania’s statutory law in the form of the wrongful use of civil proceedings statute or ‘Dragonetti Act.’”).

claim of wrongful use of civil proceedings “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 v. Hub Foods, Inc.*, 683 F. Supp. 127, 131 (W.D. Pa. 1988). Because “defendants cannot possibly make the required allegation in their counterclaim [while] this action is still pending,” *id.*, the counterclaim for wrongful use of civil proceeding have not matured and must be dismissed without prejudice for failure to state a claim. *See Access Fin. Lending Corp.*, 1996 U.S. Dist. LEXIS 14073, at *12 (“Claims for malicious use of process must be dismissed if the underlying proceedings have not been terminated in favor of the complaining party.”)

Defendants’ counterclaim of abuse of process is also unripe. Here, Defendants allege that Relator’s use of this action “constitutes a perversion of legitimate, lawful process for an illegal or improper purpose.” (Doc. No. 6 ¶ 37.) However, a claim that a plaintiff has perverted the purpose of the entire action, when alleged in the first pleading after the filing of the Complaint, is not a claim ripe for adjudication. “The assertion, by way of a counterclaim, that the underlying litigation as a whole constitutes an abuse of process fails to state a claim which is ripe for adjudication. By definition, a lawsuit in its entirety cannot constitute an abuse of process when it has not yet been concluded.” *Access Fin. Lending Corp.*, 1996 U.S. Dist. LEXIS 14073, at *13-14.

In addition, Defendants’ abuse of process claim fails to allege that Relator acted with an improper purpose barred by the tort. As previously mentioned, assertions that a party had “bad or malicious intentions” or that it “acted from spite or with an ulterior motive” in filing litigation are insufficient to establish abuse of process; rather, the claim must allege that the filing party

committed “an act or threat not authorized by the process, or [that] the process [was] used for an illegitimate aim such as extortion, blackmail, or to coerce or compel the plaintiff to take some collateral action.” *Al Hamilton Contracting Co.*, 644 A.2d at 191-92; *see also Rosen v. Tesoro Petroleum Corp.*, 582 A.2d 27, 32 (Pa. Super. Ct. 1990) (“[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.” (quoting *Di Sante v. Russ Fin. Co.*, 380 A.2d 439, 441 (Pa. Super. Ct. 1977))). In their abuse of process claim, Defendants allege that Relator initiated this proceeding “for the purpose of retaliation for her dismissal and for personal profit,” and that the use of this action for such purposes was improper and illegal. (Doc. No. 6 ¶¶ 35-36.) Allegations of bad motive alone, however, are insufficient to state a claim for abuse of process. Defendants’ counterclaim for abuse of process therefore must also be dismissed.

B. Defamation

The next counterclaim alleges that Relator defamed Defendants by falsely accusing them of dishonesty and fraud in the conduct of their anesthesiology practice to unnamed administrators of North Penn Hospital. (Doc. No. 6 ¶¶ 41-44.) Relator asserts that this counterclaim should be dismissed because a claim of defamation must be brought within one year of the alleged defamatory statement. (Doc. No. 154 ¶ 7.) Again, we agree. A statute of limitations defense may be raised in a motion to dismiss if it appears from the face of the pleadings that the cause of action has not been commenced within the limitations period. *Linker v. Custom-Bilt Mach., Inc.*, 594 F. Supp. 894, 903 (E.D. Pa. 1984); *see also Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385 n.1 (3d Cir. 1994) (“While the language of Fed. R. Civ. P. 8(c) indicates that a statute of limitations defense cannot be used in the context of a Rule 12(b)(6) motion to

dismiss, an exception is made where the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleading.”). Under Pennsylvania law, the statute of limitations for defamation is one year from the date of the alleged defamatory statement. 42 Pa. Cons. Stat. Ann. § 5523(1) (West 2004); *see also Barclay v. AMTRAK*, 343 F. Supp. 2d 429, 433 (E.D. Pa. 2004). Although Defendants do not allege a specific date for Relator’s alleged defamatory statements, after reviewing the allegations in the counterclaims, we are satisfied that the statements were made no later than the end of 1996. Defendants assert that Relator made the allegedly defamatory statements after Relator was notified that her contract with Wilderman, P.C. would not be renewed. (Doc. No. 6 ¶ 26.) According to Defendants, Relator was notified that her contract would not be renewed in July, 1995. (*Id.* ¶ 23.) Defendants also aver that the statements were made to North Penn in conjunction with the commencement of this action. (*Id.* ¶ 26.) Relator’s Complaint was filed on June 7, 1996. (Doc. No. 1.) Defendants’ defamation counterclaim was filed on January 20, 1998, over one year from the end of 1996. (Doc. No. 6.) Thus, we conclude that Defendants’ counterclaim is barred by Pennsylvania’s statute of limitations.

C. Intentional Infliction of Severe Emotional Distress

Next, Relator seeks to dismiss Defendants’ counterclaim for the intentional infliction of severe emotional distress. Although the Pennsylvania Supreme Court has repeatedly stated that it has not expressly recognized the tort of intentional infliction of emotional distress, and thus has never formally adopted Section 46 of the Restatement (Second) of Torts, *see, e.g., Taylor v. Albert Einstein Med. Ctr.*, 754 A.2d 650, 652 (Pa. 2000), courts in the Third Circuit “ha[ve] repeatedly held that Pennsylvania [law] does recognize the tort, in spite of ‘speculation’ to the

contrary.’’ *Echevarria v. Unitrin Direct Ins. Co.*, Civ. A. No. 02-8384, 2003 U.S. Dist. LEXIS 4680, at *7 (E.D. Pa. Mar. 17, 2003) (quoting *Weinstein v. Bullick*, 827 F. Supp. 1193, 1203 (E.D. Pa. 1993)); *see also Brown v. Muhlenberg Township*, 269 F.3d 205, 217 (3d Cir. 2001) (predicting that “the Supreme Court of Pennsylvania would recognize the tort of intentional infliction of emotional distress as described in Restatement (Second) of Torts § 46”); *Hunger v. Grand Cent. Sanitation*, 670 A.2d 173, 177 (Pa. Super. Ct. 1996) (stating that the Superior Court recognizes a cause of action for intentional infliction of emotional distress under § 46). Section 46 provides that:

- (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
- (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
 - (a) to a member of such person’s immediate family who is present at the time, whether or not such distress results in bodily harm, or
 - (b) to any other person who is present at the time, if such distress results in bodily harm.

Restatement (Second) of Torts § 46 (1977); *see also Taylor*, 754 A.2d at 652 (quoting Section 46). A party claiming the tort of intentional infliction of emotional distress must allege facts sufficient to establish that the alleged conduct: (1) was “extreme and outrageous”; (2) was performed intentionally or recklessly; and (3) caused severe emotional distress. *Bradshaw v. Gen. Motors Corp.*, 805 F.2d 110, 113-14 (3d Cir. 1986) (citing *Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265, 1274-76 (3d Cir. 1979)). In addition, if the alleged conduct is directed at a third party, then the Relator must also allege that he was present at the time the allegedly extreme and outrageous conduct was committed. *See Taylor*, 754 A.2d at 653 (“Presence is . . . an

essential element which must be established to successfully set forth a cause of action for intentional infliction of emotional distress.”).

In this case, the factual allegations in Defendants’ counterclaim are insufficient to constitute a claim for intentional infliction of emotional distress. Defendants fail to allege that Relator committed extreme and outrageous conduct. In the counterclaim, Defendants assert that Relator reported false allegations to the United States government; that as a result of Relator’s allegations, a federal investigation of Defendants’ anesthesiology practice was undertaken; and that the allegations and initiation of the investigation were outrageous. (Doc. No. 6 ¶¶ 53-55.) Under Pennsylvania law, extreme and outrageous conduct is defined as actions that are “so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Hunger*, 670 A.2d at 182 (quoting Restatement (Second) of Torts § 46 cmt. d (1977)). Even assuming Defendants’ allegations are true, as we must for a Rule 12(c) motion, Relator’s alleged actions do not constitute extreme or outrageous conduct under Pennsylvania law. Mere allegations of criminal conduct are insufficient to establish that a person acted in an extreme or outrageous manner. *See, e.g., Kuper v. Colonial Penn Ins. Co.*, Civ. A. No. 99-172, 1999 U.S. Dist. LEXIS 7179, at *16-17 (E.D. Pa. May 18, 1999) (“While being falsely accused of a crime . . . is an unfortunate experience, such conduct does not rise to the level of extreme and outrageous conduct that has been found to permit a recovery for intentional infliction of emotional distress.”); *Sugarman v. RCA Corp.*, 639 F. Supp. 780, 788 (M.D. Pa. 1985) (finding that false charges of theft, even when made in front of plaintiff’s coworkers, was not outrageous); *see also* Restatement (Second) of Torts § 46 cmt. d (1977) (stating that “[i]t has not been enough [to

allege] that the defendant has acted with an intent which is tortious or even criminal” to establish that a party engaged in extreme and outrageous conduct); *Jones v. Trump*, 971 F. Supp. 783, 787 (S.D.N.Y. 1997) (finding that plaintiff’s allegations of “‘defendants’ false criminal charges against plaintiff and subsequent false arrest, false investigation, and false imprisonment” were legally insufficient to qualify as extreme and outrageous conduct), *aff’d*, No. 97-9017, 1998 U.S. App. LEXIS 23531 (2d Cir. Sept. 21, 1998); *Estate of Smith v. Town of West Hartford*, No. 7CV020080891S, 2003 Conn. Super. LEXIS 2163, at *13 (Conn. Super. Ct. July 28, 2003) (“Extreme and outrageous conduct means behavior exceeding all bounds usually tolerated by decent society. . . . False accusations of crime have been held insufficient to meet this definition.”) (citations omitted).

D. Punitive Damages

Defendants’ final counterclaim is for punitive damages. (Doc. No. 6 ¶¶ 50-51.) Pennsylvania law does not recognize an independent cause of action for punitive damages. *See, e.g., Mest v. Cabot Corp.*, Civ. A. No. 01-4943, 2004 U.S. Dist. LEXIS 9112, at *18 (E.D. Pa. May 17, 2004); *Peer v. Minn. Mut. Fire & Cas. Co.*, Civ. A. No. 93-2338, 1993 U.S. Dist. LEXIS 18008, at *17 (E.D. Pa. Dec. 21, 1993) (“There is no independent cause of action for punitive damages under Pennsylvania law. Punitive damages are an element of damages that must be tied to a specific cause of action.” (citing *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 802 (Pa. 1989))). As the Pennsylvania Supreme Court has stated, “[i]f no cause of action exists, then no independent action exists for a claim of punitive damage since punitive damages is only an element of damages.” *Kirkbride*, 555 A.2d at 802 (emphasis omitted); *see also Pioneer Commercial Funding Corp. v. Am. Fin. Mortgage Corp.*, 855 A.2d 818, 833 n.33

(Pa. 2004) (restating this rule). Defendants' independent counterclaim for punitive damages must also be dismissed.

An appropriate Order follows.

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ORDER

AND NOW, this 28th day of February, 2005, upon consideration of Relator's Motion for Judgment on the Pleadings (Doc. No. 154, No. 96-CV-4346), it is ORDERED that the Motion is GRANTED and Defendants' Counterclaims are DISMISSED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge