

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

JOHN HEFFERNAN : CIVIL ACTION  
: :  
v. : :  
: :  
ROBERT HUNTER, GEORGE BOCHETTO, :  
and BOCHETTO & LENTZ : NO. 97-6041

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

August 10, 1998

Plaintiff, John Heffernan ("Heffernan"), filing an amended complaint, alleged violations of 42 U.S.C. §§ 1985(1) and 1986, and wrongful use of civil proceedings, 42 Pa.C.S. §§ 8351, et seq. Defendants George Bochetto ("Bochetto") and Bochetto & Lentz ("B&L"), joined by defendant Robert Hunter ("Hunter"), filed a motion to dismiss the amended complaint for failure to state a cause of action under § 1985(1). The facts alleged do not establish a conspiracy between Bochetto and/or B&L and Hunter, so the claim under § 1985(1) will be dismissed. A claim under § 1986 cannot stand without a successful § 1985 claim, so that claim will also be dismissed. The court lacks independent subject matter jurisdiction for Heffernan's claim under Pennsylvania law for wrongful use of civil proceedings, and it will be dismissed.

**FACTS**

The factual background has been stated both by this court in Heffernan v. Hunter, 1998 WL 150953 (E.D. Pa. Mar. 26, 1998), and by Judge Waldman in Hunter v. Heffernan, 1996 WL 694237 (E.D. Pa. Sept. 26, 1996).

Heffernan's original complaint alleged that defendants filed the underlying action and made misrepresentations to the media to "prevent, hinder and impede [Heffernan] in the discharge of his duties as an officer of the United States," (Complaint, ¶ 35), in violation of 42 U.S.C. § 1985(1). Heffernan also claimed violations of 42 U.S.C. § 1985(2), 42 U.S.C. § 1986, and 42 Pa. Cons. Stat. Ann. § 8351.

On defendants' motion to dismiss that complaint, the court found that "filing of a complaint in court does not constitute 'force, intimidation or threat' sufficient to impose § 1985 liability." Heffernan v. Hunter, 1998 WL 150953, at \*4. "However, publication of specific defamatory statements can form the basis of a § 1985(1) action." Id. at \*5. The court dismissed the complaint with leave to amend to allege with more specificity any conspiracy to injure Heffernan by defamation or libelous statements to the press. Id. at \*7. The court also found Heffernan had no standing to assert a claim under § 1985(2), and dismissed the claims under 42 U.S.C. § 1986 and 42 Pa. Cons. Stat. Ann. § 8351.

On this motion to dismiss, the facts alleged in the amended complaint are as follows: in January 1994, Heffernan, an investigator with the Securities and Exchange Commission ("SEC"), was assigned to investigate possible insider trading violations involving Independence Bancorp, Inc.'s ("Bancorp") possible merger with Corestates Financial Corp. ("Corestates"). (Amended Complaint, ¶¶ 17-18). During the investigation, Hunter, a

director of Bancorp, came under scrutiny. (Amended Complaint, ¶ 17).

In early February, 1994, Hunter was arrested and charged with molesting the eleven-year-old daughter of his former companion of five years, Joanne Kelly ("Kelly"). (Amended Complaint, ¶ 19). Kelly suggested to the Pennsylvania detective in the child molestation case that she had relevant information regarding the insider trading investigation. (Amended Complaint, ¶ 20). The Pennsylvania detective referred Kelly to Heffernan. (Amended Complaint, ¶ 21). Heffernan and Kelly first met on February 24, 1994. (*Id.*)

During the course of the insider trading investigation, Heffernan and Kelly "began a social and then romantic relationship"<sup>1</sup> that led to their marriage in May, 1995. (Amended Complaint, ¶ 23). On August 1, 1994, recognizing the increasing seriousness of his relationship with Kelly, Heffernan requested to be relieved of his duties with respect to Bancorp and Hunter. (Amended Complaint, ¶ 24). The SEC transferred the investigation to the Northeast Regional Office in New York City. (*Id.*)

Hunter filed a federal civil rights action, (Civil Action No. 94-5340, E.D. Pa.), alleging defendant Heffernan caused Kelly to leave Hunter, (Motion to Dismiss, Ex. C, ¶¶ 56-57), "pursued a romantic relationship with [Kelly] and, thereby, began using her

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<sup>1</sup> Heffernan's relationship with Kelly violated SEC policy against maintaining an intimate personal relationship with a material witness in a pending investigation for which the agent was responsible.

as an information source to fuel his investigation." (Id. at ¶ 54). Hunter also alleged that Heffernan provided Kelly with financial information obtained during the course of the investigation, (id.), and Kelly used that information in an effort to extort millions from Hunter by threat of civil action for child molestation.<sup>2</sup> (Id. at ¶¶ 86, 88.) Hunter's lawyers hired a private detective, (Id. at ¶ 75), who videotaped: Heffernan and Kelly kissing in public; Heffernan's car parked at Kelly's house for the night; and Kelly dropping Heffernan off at the train station in the morning and picking him up in the evening. (Id. at ¶ 77). Hunter alleged that Heffernan used his position as a federal law enforcement officer to bolster Kelly's settlement demands in a civil child molestation action. (Id. at ¶ 85).

In addition to providing the video, or portions of it, to the media, Bochetto was interviewed on Channel 6 Action News, and said:

Rather than take [Kelly's] statement and go on with the investigation, [Heffernan] took her statement and decided he wanted to stay for the night. . . . Its literally the equivalent of the law enforcement agent jumping into your wife's bed, and prosecuting you from it. . . . [Heffernan] starts sharing with [Kelly] information which we believe she is now using to demand two million dollars of Mr. Hunter to settle an alleged molestation case in Montgomery County.

(Amended Complaint, ¶ 29). Heffernan alleges that defendants filed the civil rights complaint and "unleashed their media blitz," (Amended Complaint, ¶ 33), to "interfer[e] with the

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<sup>2</sup> Hunter was convicted of child molestation on June 9, 1995.

investigation of defendant Hunter." (Amended Complaint, ¶ 36). As a result of this "media blitz," various publications not under defendants control had headlines and statements critical of Heffernan. (See, Amended Complaint, ¶ 32). Although Heffernan no longer had any duties relating to the Hunter investigation, (Amended Complaint, ¶¶ 24-25), he alleged that the media blitz "ma[de] it impossible for John Heffernan or his agency, the SEC, to respond effectively." (Amended Complaint, ¶ 33).

Heffernan's amended complaint alleges that Hunter and his lawyers: conspired to file the federal civil rights action and defame Heffernan to injure him because of his lawful discharge of the duties of his office, in violation of 42 U.S.C. § 1985(1); failed to stop their coconspirators from taking those actions, in violation of 42 U.S.C. § 1986; and wrongfully instituted civil proceedings, in violation of 42 Pa.C.S. § 8351.

Defendants, filing a motion to dismiss the amended complaint, argue: (1) Heffernan cannot establish causation because he affirmatively withdrew from the SEC investigation; (2) an attorney's providing legal representation does not constitute an unlawful conspiracy with his client; (3) defendants are immune from liability for dissemination of information to the media; (4) the action is barred by the statute of limitations; (5) the claim under § 1986 is not viable because it is derivative of the baseless § 1985 claim; and (6) the wrongful use of civil proceedings claim is improper because the defendants had probable cause to institute the federal civil rights complaint. Heffernan

filed a response to the motion, and defendants filed a reply.

## DISCUSSION

### I. Standard of Review

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). A motion to dismiss may be granted only if the court finds the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

### II. Causation

Heffernan's Amended Complaint alleges a violation of 42 U.S.C. § 1985(1), providing:

If two or more persons in any State or Territory conspire . . . to injure [any person] in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation.

42 U.S.C.A. § 1985(1) (West 1994).

Heffernan's civil rights claims are grounded in tort, Cito v. Bridgewater Township Police Dep't, 892 F.2d 23, 25 (3d Cir. 1989); Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc., 153 F.

Supp. 589 (D.N.J. 1957), aff'd, 307 F.2d 210 (3d Cir. 1962), cert. denied, 372 U.S. 929 (1963), so he must allege that defendants' actions caused his injuries. "Though causation is a concept not often discussed in civil rights cases, it is an implicit requirement." Angle v. Sabatine, 1998 WL 54400, \*6 (E.D. Pa. Jan. 27, 1998). Causation must be established in both § 1983 and § 1985 actions. Arnold v. Intern. Business Machines, 637 F.2d 1350 (9th Cir. 1981). See also Monell v. New York City Department of Social Services, 436 U.S. 658, 692 (1978) (requiring causation for a § 1983 claim); Mays v. Scranton City Police Dept., 503 F. Supp. 1255 (M.D. Pa. 1980) (a causal link between the wrongful conduct and the alleged constitutional violation must be established before liability attaches).

Section 1985 "provide[s] a cause of action for damages caused by purely private conspiracies." Great Am. Fed. Sav. & Loan Ass'n. v. Novotny, 442 U.S. 366, 372 (1979) (emphasis added). See also Arnold v. Intern. Business Machines, 637 F.2d 1350 (9th Cir. 1981); Lawrence v. Acree, 665 F.2d 1319, 1324 (D.C. Cir. 1981) (sufficient to allege that defendants' actions caused plaintiff injury). To recover on his claim under 42 U.S.C. § 1985(1), Heffernan must establish that the defendants' actions caused his injuries.

Defendants claim that Heffernan, having already removed himself from the investigation, cannot show that defendants' civil rights complaint and statements to the media caused any interference with his duties. Filing the complaint did not

hinder or impede Heffernan in the lawful discharge of his duties because Heffernan no longer had any official duties with respect to the investigation. However, § 1985(1) provides a cause of action if two or more persons conspire "to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof." 42 U.S.C.A. § 1985(1) (West 1994) (emphasis added). See Chocallo v. Bureau of Hearings and Appeals, SSA, 548 F. Supp. 1349, 1360 (E.D. Pa. 1982), aff'd, 716 F.2d 889 (3d Cir.), cert. denied, 464 U.S. 983 (1983). It is not limited to direct interference with a federal official's duties. Heffernan has a valid claim if he was injured on account of his official actions, even if that injury occurred after the actions were complete because the statute expressly protects federal officers from injury for the performance of their official duties even when they are no longer performing them.

Section 1985 is not "a narrow and limited remedy," but rather "a statute . . . of broad applicability, and unlimited duration." Stern v. U.S. Gypsum, Inc., 547 F.2d 1329, 1335 (7th Cir.), cert. denied, 434 U.S. 975 (1977) (citation omitted). Courts have "accord[ed reconstruction civil rights statutes] a sweep as broad as [their] language." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968); United States v. Price, 383 U.S. 787, 801 (1966). Heffernan must show that defendants actions caused him injury on account of the lawful discharge of the duties of his office, but not that he was still discharging those

duties at the time of the injury. Defendants motion to dismiss cannot be granted on this ground.

### III. Conspiracy

Liability under § 1985 only attached if "two or more persons . . . conspired . . . to injure" Heffernan. 42 U.S.C. § 1985(1). Defendants argue that the claim for conspiracy under § 1985(1) must be dismissed because Hunter was allegedly "conspiring" with his attorneys. An attorney is an agent of the client, and generally cannot conspire with the client. There are two exceptions to this general rule: (1) when the attorney acts solely for his/her own personal benefit, rather than for the client; and (2) when the attorney violates an independent duty owed to a third person. Defendants argue that neither of these situations is presented here. Heffernan claims that he is within the first exception because the complaint alleges Bochetto's defamatory comments were made to enhance B&L's reputation for aggressive advocacy for its personal gain.

In order to determine whether Heffernan has a viable § 1985 claim, the court must determine under what circumstances an attorney can conspire with his client. The court was unable to find any federal law involving a conspiracy between an attorney and his client to violate the civil rights of a third party. Federal courts have "discretion to fill gaps in federal statutory law by formulating federal common law or by looking to other analogous law." Sentry Corp. v. Harris, 802 F.2d 229, 232-33 (7th Cir. 1986), cert. denied, 481 U.S. 1004 (1987). See also

Janetka v. Dabe, 892 F.2d 187, 189 (2d Cir. 1989); Conway v. Village of Mount Kisco, 750 F.2d 205, 214 (2d Cir. 1984)). When federal civil rights law fails to furnish a particular rule, the court may apply analogous state law consistent with the meaning and purpose of the federal statute. Bass by Lewis v. Wallenstein, 769 F.2d 1173, 1188 (7th Cir. 1984). When court looks to analogous state law, that law is incorporated into federal law. Sentry Corp. v. Harris, 802 F.2d at 233. See also Wilson v. Garcia, 471 U.S. 261, 269 (1985); Hanna v. Plumer, 380 U.S. 460, 465 (1965).

The general rule is that an attorney will be held liable only to his client; "[i]n the absence of special circumstances, he will not be held liable to anyone else." Mentzer & Rhey, Inc. v. Ferrari, 532 A.2d 484, 486 (Pa. Super. 1987); Smith v. Griffiths, 476 A.2d 22, 26 (Pa. Super. 1984). See also Worldwide Marine Training Corporation v. Marine Transport Service, Inc., 527 F. Supp. 581 (E.D. Pa. 1981)

Attorneys are immune from "charges of conspiracy based upon advice rendered to clients. . . . [But] [a]ttorneys may be liable for participation in tortious acts with their clients, and such liability may rest on a conspiracy." Wolfrich Corp. v. United Services Automobile Assn. 197 Cal. Rptr. 446, 449 (Cal. Ct. App. 1983), disapproved on other grounds, Doctors' Co. v. Superior Court 775 P.2d 508 (Cal. 1989). "Liability [of an attorney] as a conspirator requires pleading and proof that the attorney's participation involved more than legal representation." Mallen &

Smith, Legal Malpractice, § 6.1 (3d ed. 1989). To substantiate a conspiracy claim, Heffernan must establish that Bochetto or B&L acted without legal justification and with the intent of injuring him. Fraidin v. Weitzman, 611 A.2d 1046, 1079 (Md. Ct. Spec. App. 1992); Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App. 1985). To be liable for conspiracy, Bochetto or B&L "must possess a desire to harm which is independent of the desire to protect [Hunter]." Fraidin, 611 A.2d at 1080. "[T]here can be no conspiracy where an attorney's advice or advocacy is for the benefit of his client and not for the attorney's sole personal benefit." Id.

To prevail on the § 1985(1) claim, Heffernan must establish that Bochetto or B&L did not act in the role of an advisor and representative zealously advocating Hunter's interests, but instead acted for Bochetto's or B&L's own sole personal benefit.<sup>3</sup>

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<sup>3</sup> Bochetto or B&L could also be liable if they individually committed fraud, collusion, or a malicious or tortious act, even if they did so in for Hunter's benefit. Such actions are beyond the qualified privilege and an attorney is personally liable for them. Fraidin, 611 A.2d at 1080 (citing Strid v. Converse, 331 N.W.2d 350, 356 (Wis. 1983)). However, the complaint does not allege defamation as an individual claim. Heffernan's claims are limited to §§ 1985(1) and 1986, and a claim under Pennsylvania law for Wrongful Use of Civil Proceedings. Both §§ 1985(1) and 1986 actions require conspiracies, so the court will not explore the viability of an independent claim of defamation by Bochetto or B&L.

In addition Bochetto or B&L could be liable under 42 U.S.C. § 1985(2) if they conspired to deter any party or witness from attending or testifying in any court of the United States. However, as stated in the court's decision on the motion to dismiss the original complaint, that section only provides protection to parties. Heffernan, 1998 WL 150953, at \*3. If Bochetto or B&L conspired with Hunter to defame Heffernan to deter him from testifying in the insider trading action, a party to that action, namely the SEC, could bring a claim pursuant to

Worldwide Marine Trading, 527 F. Supp. at 583-84. See also Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627, 639 (Cal. Ct. App. 1991); Fraidin, 611 A.2d at 1080; Williams v. Grand Lodge of Freemasonry, 355 N.W.2d 477, 480 (Minn. Ct. App. 1984); Stiles v. Onorato, 457 S.E.2d 601, 602 (S.C. 1995). The fact that Bochetto and B&L were paid legal fees for representing Hunter does not satisfy the sole personal benefit requirement. Doherty v. American Motors Corp., 728 F.2d 334, 343 (6th Cir. 1984); Macke Laundry Serv. Ltd. v. Jetz Serv. Co., 931 S.W.2d 166, 178 n.4 (Mo. Ct. App. 1996). See also Skarbrevik, 282 Cal. Rptr. at 639.<sup>4</sup>

Heffernan argues that Bochetto individually benefitted from the conspiracy to defame him because Bochetto enhanced his reputation and that of his firm for aggressive representation of criminal defendants. (See, Amended Complaint, ¶ 35). However, in the same paragraph Heffernan alleges that the actions "were

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§ 1985(2). The SEC did not bring such a claim, and Hunter cannot do so on its behalf. Id.

<sup>4</sup> Limiting attorney-client conspiracies to those in which the attorney is acting for his sole personal benefit is consistent with federal law regarding conspiracies between corporate agents and their principals. See Johnson v. Hills & Dales General Hosp., 40 F.3d 837, 840-41 (6th Cir. 1994) (no conspiracy if the alleged acts were within the scope of the agents' employment or the corporate entity's legitimate activity), cert denied, 514 U.S. 1066 (1995); Robinson v. Canterbury Village, Inc., 848 F.2d 424, 431 (3d Cir. 1988) (§ 1985(3) conspiracy can be maintained between a corporation and one of its officers if the officer is acting in a personal, as opposed to official, capacity); Garza v. City of Omaha, 814 F.2d 553, 556 (8th Cir. 1987); Cross v. General Motors Corp., 721 F.2d 1152 (8th Cir. 1983), cert. denied 466 U.S. 980 (1984); Swann v. City of Dallas, 922 F. Supp. 1184 (N.D. Tex. 1996); aff'd, 131 F.3d 140 (5th Cir. 1997).

taken to aid the goal of interfering with the investigation of defendant Hunter." (Id.) The allegation that Bochetto and B&L benefitted in the context of representing Hunter does not satisfy the requirement that Bochetto and B&L acted for their own sole personal benefit and not on behalf of Hunter. When an attorney zealously and effectively represents his client, he may enhance his reputation as an advocate. Future clients and referrals may result from successful, and at times highly aggressive, representation.<sup>5</sup> An attorney's interest in his reputation and future business is generally not an end in and of itself, but rather the beneficial consequence of skilled advocacy for a particular client.

Heffernan admits that Bochetto and B&L's filing the federal civil rights complaint and discussing it on television were done as part of Bochetto and B&L's desire to protect Hunter's interests in the SEC and child molestation actions. (Amended Complaint, ¶¶ 35, 45). Even if Bochetto and B&L's reputation would have been enhanced by their advocacy on behalf of Hunter, they still did not pursue the federal civil rights action solely for their own personal benefit. The enhancement of Bochetto's

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<sup>5</sup> This is not to say that excessively aggressive advocacy is appropriate or condoned. Bochetto and B&L have an ethical and statutory duty to act "with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Pa. R.P.C. 1.3, Comment. When such zeal and advocacy becomes overly aggressive, courts have methods, such as sanctions under Fed. R. Civ. P. 11 or 28 U.S.C. § 1927, to restrain the lawyers before them. Heffernan did not file a motion under Rule 11 or 28 U.S.C. § 1927, against Bochetto and B&L in the federal civil rights action before Judge Waldman.

and B&L's reputation in the context of protecting Hunter's interests is insufficient to establish that their actions were for their sole personal benefit and not in furtherance of their representation of Hunter. Fraidin, 611 A.2d at 1080.

#### VI. Claims under Section 1986

Section 1986 provides for a private right of action against anyone who knew of a conspiracy in violation of § 1985 and failed to prevent the wrong. Brown v. Reardon, 770 F.2d 896, 905 (10th Cir. 1985); Loehr v. Ventura County Comm. College Distr., 743 F.2d 1310, 1320 (9th Cir. 1984); Silo v. City of Phila., 593 F. Supp. 870, 874 (E.D. Pa. 1984); Fishman v. De Meo, 590 F. Supp. 402, 406 (E.D. Pa. 1984).

Without a valid claim under § 1985, Heffernan cannot recover under § 1986. "Having failed to state a claim under § 1985[], a fortiori [Heffernan] failed to state a claim under § 1986." Brawer, 535 F.2d at 840. Heffernan's § 1985(1) claim is dismissed, so the § 1986 claim will be dismissed as well.

#### IV. Wrongful Use of Civil Proceedings

Heffernan seeks to recover for wrongful use of civil proceedings in violation of Pennsylvania law, 42 Pa. Cons. Stat. Ann. § 8351. The court's jurisdiction over the amended complaint was based on 28 U.S.C. § 1343, providing jurisdiction in federal court for claims under § 1985. Jurisdiction for the wrongful use of civil proceedings claim arose under 28 U.S.C. § 1367, providing "supplemental jurisdiction over all other claims . . . that form part of the same case or controversy under Article

III." 28 U.S.C. § 1367.

Section 1367(c)(3) allows district courts to decline to exercise supplemental jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction." 42 U.S.C. § 1367(c)(3). The court has dismissed all claims over which it had original jurisdiction,<sup>6</sup> and it declines to exercise jurisdiction over Heffernan's claim for wrongful use of civil proceedings.

#### CONCLUSION

Heffernan brought this action under 42 U.S.C. §§ 1985(1) and 1986, and 42 Pa.C.S. § 8351. Bochetto and B&L did not conspire with Hunter when they filed a federal civil rights action and appeared on a television interview on his behalf; the § 1985(1) claim will be dismissed. There is no § 1986 claim in the absence of a valid § 1985 claim, so Heffernan's § 1986 claim will be dismissed. The court does not have independent subject matter jurisdiction over Heffernan's Pennsylvania claim for wrongful use of civil proceedings; that claim will be dismissed for lack of jurisdiction.<sup>7</sup>

An appropriate order follows.

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<sup>6</sup> There would be jurisdiction under 28 U.S.C. § 1332 for a claim of wrongful use of civil proceedings under Pennsylvania law if there were complete diversity of citizenship between the plaintiff and the defendants. Because Heffernan and several defendants are Pennsylvania citizens, there is not complete diversity, so there is no jurisdiction under § 1332.

<sup>7</sup> Because the court is granting defendants' motion to dismiss for lack of a conspiracy, the court need not reach defendants' arguments involving qualified immunity, the statute of limitations, and probable cause to commence civil proceedings.

