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Franklin County Legal Journal
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Shively Motors Inc., and Robert Freet, Plaintiffs vs.

Buchanan Auto Park, Inc., Defendant

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Civil Action No. 2015-2651

HEADNOTES

Wrongful Use of Civil Proceedings (Dragonetti Act)

1. To survive demurrer, Dragonetti plaintiffs must "allege and prove" three elements: (1) termination of prior proceedings in their favor, (2) the Dragonetti defendant instituted prior proceedings absent probable cause, and (3) the prior proceedings were brought for an improper purpose. Bannar v. Miller, 701 A.2d 232, 247 (Pa. Super. 1997); 42 Pa. C.S.A. § 8351(a).

2. Discontinuance of the prior proceedings in the absence of any source of bad faith, such as an imminent deadline, does not warrant an inference of involuntariness or termination in the Dragonetti plaintiff's favor. Compare Bannar, 701 A.2d at 247.

3. Favorable termination of prior proceedings must be a final judgment on the merits. D'Elia v. Folino, 933 A.2d 117, 122-23 (Pa. Super. 2007).

4. Under the Dragonetti Act, a person has probable cause to institute civil proceedings "if he reasonably believes in the existence of the facts upon which the claim is based, and either: (1) reasonably believes that under those facts the claim may be valid under the existing or developing law; (2) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or (3) believes as an attorney of record, in good faith that his procurement, initiation or continuation of a civil cause is not intended to merely harass or maliciously injure the opposite party." 42 Pa. C.S.A. §8352.

5. Whether a Dragonetti defendant had probable cause to bring the prior action or brought the prior proceedings for an improper purpose are questions of fact.

Appearances:

Chris Sheffield, Esq. for Plaintiffs

Barbara Darkes, Esq. and Kimberly Selemba, Esq. for Defendant

OPINION

Before Meyers, J.

FACTUAL & PROCEDURAL HISTORY

The case before this court reveals a historic rivalry between two

automotive dealerships, Buchanan Auto Park ("Buchanan") and Shively Motors, Inc. ("Shively"), which directly compete in the sale of used cars and new Dodge, Jeep Chrysler and Ram vehicles. Answer and New Matter ¶72.

The rivalry before this court began on October 17, 2008, when Shively filed Civil Action No. 2008-4451 against Buchanan and two of its employees for Lost Profits, Unjust Enrichment, Fraud and Punitive Damages, Civil Conspiracy and Tortious Interference with Business Relations ("2008 suit").[1] Complaint ¶8. Shively alleged Buchanan had "misappropriated a proprietary customer list of [Shively] and utilized that proprietary customer information to contact [Shively] customers and effectuate sales to existing [Shively] customers." Complaint ¶8. On February 14, 2014, the Court issued a Notice of Proposed Termination of Court Case on Shively. Answer and New Matter ¶9. Shively responded on March 6, 2014 by filing a Statement of Intention to Proceed. Answer and New Matter ¶9. No further action has been taken by either party in the 2008 suit since Shively responded to Buchanan's discovery requests on March 12, 2012. Answer and New Matter ¶9.[2]

Robert Freet started working for Buchanan as a salesperson on December 15, 2003. Answer and New Matter ¶13. In May 2013, Mr. Freet notified Buchanan that his last day would be May 31, 2013. Answer and New Matter ¶13. Assuming Mr. Freet was retiring to spend more time with his sick wife, Buchanan threw him a retirement party on his last day at work. Answer and New Matter ¶¶81. However, at the time, Mr. Freet was aware that he was not in fact retiring, but had already accepted employment with Shively. Response to New Matter ¶82. Despite this obvious misunderstanding, Mr. Freet did not inform Buchanan that he was not actually retiring allegedly due to fear of retribution from Rodney "Chuck" Bumbaugh. Response to New Matter ¶82. Mr. Freet began working for Shively on June 3, 2013. Response to New Matter ¶83. Buchanan did not realize Mr. Freet had not actually retired until they saw his advertisements on behalf of Shively in local publications. Complaint Exhibit 3, p. 4

While employed with Buchanan, Mr. Freet had access to the company's customer information, which he knew was confidential. Answer and New Matter ¶¶76-78. When leaving Buchanan, Mr. Freet was told by Shively "not to take so much as a paper clip from Buchanan." Complaint ¶16. Mr. Freet did not take any physical or digital copies of customer lists from Buchanan, nor did he produce his own list from his memory. Complaint ¶¶17-21. Early on in his employment with Shively, Mr. Freet "went through business directories and phonebooks to create a list of potential clients

1 Neither party has attached to its pleadings any documents from the 2008 suit.
2 No additional facts were pled by either party with regard to the substance and merits of the 2008 suit.

to send letters to." Answer and New Matter ¶86. While searching these directories and phone books, Ms. Freet "recognized some names . . . as customers he had dealt with at Buchanan Auto Park, Inc." Response to New Matter ¶87. In addition, Mr. Freet placed the names which he remembered from Buchanan on his mailing list by looking up their information in business directories and phonebooks. Transcript p. 63 l. 15-25. Furthermore, Mr. Freet remembered the vehicle preferences of a customer he had dealt with during his employment with Buchanan, which he subsequently added to his mailing list. Answer and New Matter ¶¶ 89-90.

Adding fuel to the this fiery feud, Buchanan filed Civil Action No. 2014-2461[3] against Shively and Robert Freet on July 2, 2015, alleging misappropriation of trade secrets and conversion by Mr. Freet and Shively's vicarious liability for Mr. Freet's actions. Answer and New Matter ¶¶ 91-92. The complaint specifically alleged that Mr. Freet had taken proprietary customer information, at least in part by taking documents containing this information from Buchanan and using them for Shively's benefit. Complaint ¶¶10, 24-26. Simultaneous to this complaint, Buchanan also filed a Motion for Preliminary Injunction against Shively and Mr. Freet. Answer and New Matter ¶93. On July 3, 2014, the Court authorized expedited discovery on the preliminary injunction. Answer and New Matter ¶94. Shively "expended considerable effort and expense" responding to the numerous Buchanan's subsequent Interrogatories and Request for Production of Documents. Answer to New Matter ¶¶93-96. Shively alleges it wished to litigate this 2014 suit prior to moving forward with the 2008 suit. Response to New Matter ¶ 114.

A hearing on the Motion for a Preliminary Injunction was held on August 21, 2014. New Matter ¶98. As of the date of the hearing, Buchanan did not have any actual evidence that Mr. Freet had misappropriated Buchanan's confidential customer information. Complaint. ¶¶ 34-35. Judge Krom issued an order dated September 16, 2014, denying Buchanan's Motion and holding Buchanan did "not meet its burden of showing that an injunction [was] necessary to prevent immediate and irreparable harm that [could not] be compensated adequately by monetary damages." Complaint Exhibit 3, p. 5. Additionally, Judge Krom noted, "As the Court will not address whether Buchanan is likely to succeed on the merits, at this time the Court makes no determination as to whether Freet's memory of names of Buchanan's commercial customers is a trade secret or the validity of the non-disclosure clause contained in the Employee Handbook." Complaint Exhibit 3, p. 5, n. 3.

Based on testimony by Mr. Freet at the Preliminary Injunction

3 Despite referencing the 2014 suit throughout all pleadings, the entirety of the 2014 suit was not attached to a pleading by either party in the instant case.

hearing that he had added Buchanan customers to his Shively mailing list from memory, Buchanan amended its complaint on August 29, 2014, to include allegations that confidential customer information had been acquired "by memory or otherwise." New Matter ¶¶ 102-03. Shively filed its Answer to the Amended Complaint on March 25, 2015. A Praecipe to Discontinue was eventually filed by Buchanan on April 9, 2015. New Matter ¶105.

In the present case, Mr. Freet and Shively allege that the 2014 suit was commenced "in retaliation" for the 2008 suit. Complaint ¶40. Mr. Freet and Shively also allege that Buchanan "initiated and continued the civil proceedings" in the 2014 suit "in a grossly negligent manner or without probable cause" as well as "for a purpose other than serving proper discovery, joinder of parties or adjudication of the claims." Id., ¶¶41-42. Shively claims it "expended significant expenses" and Mr. Freet claims he "suffered emotional distress" as a result of this retributive litigation. Id., ¶¶50-51. Therefore, Mr. Freet and Shively each claim wrongful use of civil proceedings against Buchanan in a Complaint filed July 21, 2015. Id., ¶¶52-66.

Buchanan filed an Answer and New Matter on August 19, 2015. On September 21, 2015 Mr. Freet and Shively filed a Response to Buchanan's New Matter. Buchanan filed a Motion for Judgment on the Pleadings, together with a Brief in Support, on March 16, 2016. Mr. Freet and Shively filed an Answer to the Motion for Judgment on the Pleadings with their own Brief in Opposition, on April 11, 2016. Oral Argument on the Motion for Judgment on the Pleadings was heard on June 2, 2016. This matter is now ripe for a decision by this court

DISCUSSION

I. Applicable Standards

A. Judgment on the Pleadings

Judgment on the pleadings is governed by Section 1034 of the Pennsylvania Rules of Civil Procedure, which states that if party has moved for a judgment on the pleadings at the appropriate time, "the court shall enter such judgment or order as is proper on the pleadings." Pa.R.C.P. §1034. Pleadings and their contents are to be "viewed in the light most favorable" to the non-moving party. Karns v. Tony Vitale Fireworks Corp,. 259 A.2d 687, 688 (Pa. 1969). As such, the non-moving party's "well-pleaded allegations" are deemed true, and only facts admitted by the non-moving party can be used against it. Id. The established standard of deciding a judgment on the pleadings is set out in Kelly v. Nationwide Insurance Co.:

A motion for judgment on the pleadings should be granted

> only where the pleadings demonstrate that no genuine issue of fact exists, and the moving party is entitled to judgment as a matter of law. … Neither party can be deemed to have admitted either conclusions of law or unjustified inferences. Moreover, in conducting its inquiry, the court should confine itself to the pleadings themselves and any documents or exhibits properly attached to them. It may not consider inadmissible evidence in determining a motion for judgment on the pleadings. Only when the moving party's case is clear and free from doubt such that a trial would prove fruitless will an appellate court affirm a motion for judgment on the pleadings.

Kelly v. Nationwide Ins. Co., 414 Pa. Super. 6, 9-10, 606 A.2d 470, 471-72 (1992) (internal citations omitted).

B. Wrongful Use of Civil Proceedings

Wrongful use of civil proceedings is codified at 42 Pa.C.S.A. §8351 et seq., (also known as the Dragonetti Act) and lists the elements of the action:

> (a) 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.C.S.A. § 8351(a). To survive demurrer, a Dragonetti plaintiff must "allege and prove" three elements:

> (1) that the underlying proceedings were terminated in their favor;
>
> (2) that defendants caused those proceedings to be instituted without probable cause; and
>
> (3) that the proceedings were instituted for an improper purpose.

Bannar v. Miller, 701 A.2d 242, 247 (Pa. Super. 1997) (citing Hart v. O'Malley, 647 A.2d 543, 547 (Pa. Super. 1994), *aff'd* 676 A.2d 222 (Pa. 1996)).

Buchanan claims it is entitled to Judgment on the Pleadings because (1) the 2014 suit did not terminate in Mr. Freet and Shively's favor, (2) the 2014 suit was not filed in a gross negligence and/or was supported by probable cause, and (3) the 2014 suit was brought for the proper purpose of adjudicating a legitimate claim. This court now analyzes each argument in turn.

II. ANALYSIS

A. Termination of Prior Proceedings

Although Mr. Freet and Shively defeated the Preliminary Injunction requested by Buchanan in the 2014 suit, a final judgment on the merits was not found before Buchanan's discontinuance in 2015. Therefore, the 2014 suit was not terminated in Mr. Freet and Shively's favor. "Whether withdrawal or abandonment constitutes a final termination of the case in favor of the person against whom the proceedings are brought . . . depends on the circumstances under which the proceedings are withdrawn." Bannar v. Miller, 701 A.2d 242, 247 (Pa.Super. 1997) (citing Rosenfield v. Pennsylvania Auto. Ins. Plan, 636 A.2d 1138 (Pa. Super. 1994)).[4]

Unfavorable termination may be presumed depending on the circumstances of the voluntary discontinuance. In Bannar, the Superior Court held that "a last-second dismissal in the face of imminent defeat" was favorable to the party against whom the action was brought. Bannar, 701 A.2d at 248. The plaintiffs in Bannar had discontinued proceedings "on the eve of trial on the original complaint" after failing to respond to numerous interrogatories regarding the factual basis of their claims.[5] Id. at 245. The court reasoned this type of behavior established that the plaintiffs in the prior proceedings had not attempted to truly adjudicate their claim. Id. See also Contemporary Motorcar Ltd. V. MacDonald Illig Jones & Britton, LLP, 2013 WL 11253857 (Pa. Super. 2013) (holding no favorable termination inferred "unless the voluntary withdrawal of the prior case was tantamount to [an] unbidden abandonment of a claim brought in bad faith") (internal citations omitted)).

4 Despite Plaintiffs' counsel's mischaracterization of case law on this matter.

5 The underlying suit in Bannar was a claim brought by the Millers against the Grist Mill Area Conservancy (GMAC) and its individual members for actions that allegedly occurred while GMAC was protesting outside the Miller's restaurant. Bannar 701 A.2d at 245. GMAC was concerned about the "environmental and personal impact" of various dangerous activities the Millers engaged in on this property. Id. After failing to respond to the individual's interrogatories, the Millers discontinued their claims against the individuals, leaving GMAC as the only defendant. Id. The defendants in this suit filed a Dragonetti action months later. Id. Two years after the Dragonetti action had been filed and immediately before the original complaint was set to go to trial, the Millers withdrew their remaining claims against GMAC. Id.

Here, Buchanan's initial complaint was filed on July 2, 2014. On August 29, 2014, Buchanan amended its complaint to include additional allegations of misappropriation of confidential customer information via memory or otherwise. Although Judge Krom issued an order on September 16, 2014, that Buchanan had not met its burden in showing the irreparable harm required to issue a preliminary injunction, and Buchanan's other substantive claims were not litigated. Mr. Freet and Shively did not file an Answer to Buchanan's Amended Complaint until March 25, 2015. Consequently, Buchanan discontinued the action on April 9, 2015. Based on the undisputed procedural facts, this court finds that Buchanan was not facing the "imminent defeat" described in Bannar which would allow a conclusion of termination in Mr. Freet and Shively's favor. No trial date had been set in the matter. No pleadings had been filed after Mr. Freet and Shively responded to the amended complaint and prior to Buchanan's discontinuance. Even if Buchanan was "pursuing a witch hunt" in the 2014 suit, that witch hunt did not terminate in Mr. Freet or Shively's favor because there was no overwhelming pressure or need for Buchanan to discontinue proceedings as there was in Bannar. Although in some instances the timing of voluntary discontinuance may negate the voluntariness of the action and be considered a favorable termination for a Dragonetti plaintiff, that is simply not the case here. It appears from the pleadings that Buchanan, without pushing or pressure from upcoming deadlines, voluntarily withdrew their 2014 claim against Mr. Freet and Shively.

Favorable termination in the context of wrongful use of civil proceedings claims must be a final judgment on the merits of the underlying claim. In D'Elia, the court held the liability of the defendant must be decisively determined to be considered a favorable termination. D'Elia v. Folino, 933 A.2d 117, 122-23 (referencing Electronic Lab. Supply Co. v. Cullen, 712 A.2d 304, 310-11(Pa. Super. 1998) where settlement was not favorable termination because liability was "never determined with finality"). Since the underlying claim was settled in D'Elia, the court could not declare the underlying suit had favorably terminated for the plaintiff in the subsequent wrongful use of civil proceedings suit. Id. at 123. Therefore, the plaintiff as a matter of law could not be successful in a claim for wrongful use of civil proceedings in the absence of a determination of liability in the underlying suit. Id.

Here, Judge Krom explicitly stated in a footnote that the court's denial of the preliminary injunction was not a final decision on the merits of Buchanan's claims. Although the court expressed some skepticism on the evidentiary foundation of Buchanan's claims within that opinion, no final determination of liability was made as required under D'Elia. See Complaint Exhibit 3, p. 5 ("Based on the Complaint, Motion for Preliminary

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