[Cite as *Mansour v. Croushore*, 2009-Ohio-2627.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

JOSEPH B. MANSOUR, dba Mansour Consulting CPA Firm,	:	
Plaintiff-Appellant/Cross-Appellee,	:	CASE NOS. CA2008-07-161 CA2008-07-170
- vs -	:	O P I N I O N 6/8/2009
PAUL CROUSHORE,	:	
Defendant-Appellee/Cross-Appellant.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2007-08-3180

Joseph B. Mansour, 7248 Basswood Drive, West Chester, OH 45069, plaintiff-appellant/cross-appellee, pro se

Paul Croushore, P.O. Box 75170, Cincinnati, OH 45275, defendant-appellee/cross-appellant, pro se

POWELL, P.J.

{¶1} Plaintiff-appellant/cross-appellee, Joseph B. Mansour, appeals a decision of the Butler County Court of Common Pleas dismissing his claim for abuse of process on the ground that Mansour was required under Civ.R. 13(A) to bring the claim as a compulsory counterclaim in a previous action brought against him by defendant-appellee/cross-appellant, Paul Croushore. Croushore cross-appeals, arguing the trial court erred by not declaring

Mansour a vexatious litigator under R.C. 2323.52 based upon his behavior in this and other cases.

{¶2} On August 17, 2007, Mansour filed a complaint in the Butler County Court of Common Pleas alleging that his former attorney, Croushore, engaged in abuse of process by bringing an action against him in 2000 in the Butler County Court of Common Pleas, Case No. CV 2000 11 2359. Croushore answered and counterclaimed, requesting that Mansour be declared a vexatious litigator pursuant to R.C. 2323.52.

{¶3} Both parties filed cross-motions for summary judgment on both the abuse of process and vexatious litigator claims. On April 1, 2008, the trial court issued a decision denying Croushore's motion for summary judgment on his vexatious litigator claim.

{¶4} On June 12, 2008, the trial court issued a decision dismissing Mansour's abuse of process claim for the reason that Mansour was required under Civ.R. 13(A) to bring the claim as a compulsory counterclaim in the 2000 action brought against him by Croushore. The trial court also dismissed Croushore's vexatious litigator claim for the reason that Croushore should have brought the claim in the 2000 case, and therefore, the claim was barred under the doctrine of res judicata. The trial court stated that "to allow this matter to continue would be a 'substantial duplication of effort and time by the parties and the courts' under the standard discussed in *Rettig* [*Enterprises, Inc. v. Koehler*, 68 Ohio St.3d 274, 1994-Ohio-127]."

{¶5} Mansour now appeals from the trial court's June 12, 2008 decision, raising two assignments of error. Croushore cross-appeals from that decision and the trial court's April 1, 2008 decision, raising two cross-assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRS TO THE PREJUDICE OF APPELLANT

MANSOUR BY DISMISSING APPELLANT'S COMPLAINT FOR THE TORT OF ABUSE OF PROCESS UNDER CIV.R. 13(A), STATING IT IS A COMPULSORY COUNTERCLAIM IN THE UNDERLYING ACTION CASE NO CV-2000-11-2359 [sic]."

{¶8} Mansour argues the trial court erred in dismissing his claim for abuse of process for the reason that he was required under Civ.R. 13(A) to bring the claim as a compulsory counterclaim in the 2000 action brought against him by Croushore. We agree.

{¶9} Civ.R. 13(A) states in pertinent part:

{¶10} "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

{¶11} In *Rettig Enterprises, Inc. v. Koehler*, 68 Ohio St.3d 274, 1994-Ohio-127, paragraphs one and two of the syllabus, the court stated:

{¶12} "1. All existing claims between opposing parties that arise out of the same transaction or occurrence must be litigated in a single lawsuit pursuant to Civ.R. 13(A), no matter which party initiates the action.

{¶13} "2. The 'logical relation' test, which provides that a compulsory counterclaim is one which is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts, can be used to determine whether claims between opposing parties arise out of the same transaction or occurrence."

{¶14} Citing *Rettig Enterprises, Inc.*, the trial court found that Mansour's abuse of process claim "should have been brought in the 2000 case[,]" and "that to allow this matter to continue would be a 'substantial duplication of effort and time by the parties and the

courts[.]'" Id., 68 Ohio St.3d 274 at paragraph two of the syllabus. However, the trial court failed to consider *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 298-299, 1994-Ohio-503, in which the court stated:

{¶15} "Civ.R. 13(A) provides that, as a general rule, a party must state as a counterclaim any claim he or she has against an opposing party 'if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim * * *.' We acknowledge that some courts have found that an abuse of process claim is a compulsory counterclaim in the underlying litigation, and that the failure to raise such a claim at that time precludes it from being raised in a subsequent suit. See, e.g., *Yost v. Torok* (1986), 256 Ga. 92 * * *. However, we, along with many other courts which have considered the issue, do not take that view. [Citation omitted.]

{¶16} "We agree with the proposition that an abuse of process claim may be raised as a permissive counterclaim in the underlying litigation in the appropriate case. See, e.g., *Clermont Environmental Reclamation Co.* [*v. Hancock* (1984), 16 Ohio App.3d 9], and *Avco Delta Corp.* [*v. Walker* (1969), 22 Ohio App.2d 61], both of which implicitly recognized that a claim for abuse of process can legitimately be brought as a counterclaim in the proper case. [Footnote omitted.] At the same time, we determine that the abuse of process claim need not be raised as a compulsory counterclaim pursuant to Civ.R. 13(A). In a typical case, the abuse of process does not '*arise out of* the transaction or occurrence that is the subject matter of the underlying claim' (emphasis added) but instead arises from events that occur during the course of the underlying litigation. *Therefore we hold that a claim for abuse of process is not a compulsory counterclaim which must be brought in the underlying litigation*." (Emphasis added.) *Yaklevich*, 68 Ohio St.3d at 298-299.

{¶17} Croushore contends that *Yaklevich* should not be applied in this matter

because this is an "atypical" case. In support, he cites *Automation Tool & Die, Inc. v. Cook*, Medina App. No. 02CA0015-M, 2002-Ohio-7325, ¶16, 17, which states in pertinent part:

{¶18} "*In a typical case,* the abuse of process does not arise out of the same transaction or occurrence that is the subject matter of the underlying claim, but arises from events occurring during the course of the underlying litigation. (Emphasis added.) [*Yaklevich*] at 299 * * *.

{¶19} "A review of the complaint indicates that this is an *atypical* case of abuse of process. The complaint alleges in Count I that the proceedings were instituted with 'the improper purpose of coercing [Automation] into re-enrolling [Cook] in the company's health plan[.]' Likewise in Count II, the complaint alleges that [Cook's attorney] improperly instituted legal proceedings against Automation. Therefore, this is a case alleging improper motive ab initio, and so the cause of action did not arise solely from events occurring during the course of the underlying litigation. That being the case, and the *Yaklevich* holding notwithstanding, this is a case which could have been litigated in the prior action, and the doctrine of res judicata directs that the prior litigation is conclusive as to all claims between these parties."

{¶20} Croushore contends that the trial court followed this same reasoning in dismissing Mansour's abuse of process claim and even "apologizes for not having understood [the trial court's position] earlier." However, there is nothing in the trial court's decision to show that the trial court found this case to be an "atypical case" to which *Yaklevich* should not apply. Instead, it appears the trial court simply overlooked *Yaklevich*.

{¶21} Furthermore, whatever the merits may be of *Automation Tool & Die, Inc.*, that case is readily distinguishable from this one. In *Automation Tool & Die, Inc.*, the court found that "this is a case alleging improper motive ab initio, and so the cause of action did not arise solely from events occurring during the course of the underlying litigation." As a result, the

court in *Automation Tool & Die, Inc.*, found that the appellant's action could have been raised earlier, and thus was barred under the doctrine of res judicata. Id.

{¶22} By contrast, in this case the trial court stated in its decision that "Mansour's claim of abuse of process clearly relates to Croushore's actions at the time of Croushore filing the 2000 case, as well as Croushore's behavior during the 2000 case." Therefore, despite Croushore's assertion to the contrary, this *is* a "typical case" where "the abuse of process does not '*arise out of* the transaction or occurrence that is the subject matter of the underlying claim' (emphasis added) but instead arises from events that occur during the course of the underlying litigation." *Yaklevich*, 68 Ohio St.3d at 299. Consequently, *Yaklevich* is controlling here, and the trial court erred in dismissing Mansour's abuse of process claim on the ground that he failed to bring it as a compulsory counterclaim in the 2000 case. See id. at paragraph two of the syllabus.

{¶23} Accordingly, Mansour's first assignment of error is sustained.

{¶24} Assignment of Error No. 2:

{¶25} "MANSOUR ESTABLISHES THROUGH EVIDENTIARY MATERIAL UNDER CIV.R. 56(C) THERE IS NO GENUINE ISSUE OF MATERIAL FACT AND MANSOUR IS ENTITLED TO JUDGMENT AS A MATTER OF LAW. THE TRIAL COURT ERRS TO THE PREJUDICE OF APPELLANT MANSOUR BY DENYING MANSOUR'S MOTION FOR SUMMARY JUDGMENT AGAINST CROUSHORE AS TO COMPLAINT FOR ABUSE OF PROCESS."

{¶26} Mansour argues the trial court erred in refusing to grant him summary judgment on his abuse of process claim. We disagree.

{¶27} This court reviews a trial court's decision to grant summary judgment on a de novo basis, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, meaning

that we use the same standard the trial court should have used in ruling on the summary judgment motion. *Reese v. Barbiere*, Clermont App. No. CA02-09-079, 2003-Ohio-5110, ¶ 8.

{¶28} A trial court may award summary judgment only when (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence, which must be viewed in a light most favorable to the nonmoving party, that reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 1993-Ohio-191. Trial courts must award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party. Id.

{¶29} "The three elements of the tort of abuse of process are: (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process." *Yaklevich*, 68 Ohio St.3d at 298.

{¶30} When the evidence presented during the summary judgment proceedings is viewed in a light most favorable to Croushore as the nonmoving party, it is apparent that genuine issues of material fact remain to be litigated as to the second and third elements of Mansour's abuse of process claim, including whether the 2000 "proceeding ha[d] been perverted to attempt to accomplish an ulterior purpose for which it was not designed[,]" id., as "'there is no liability [for abuse of process] where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.'" Id., fn. 2, citing Prosser & Keeton, The Law of Torts (5 Ed.1984) 898, Section 121.

{¶31} Therefore, Mansour's second assignment of error is overruled.

{¶32} Cross-Assignment of Error No. 1:

{¶33} "THE TRIAL COURT DID NOT ERR IN DISMISSING MANSOUR'S CLAIM THAT CROUSHORE ABUSED PROCESS, WHERE THE JURY FOUND MANSOUR TO HAVE DEFRAUDED CROUSHORE, TO BE INCOMPETENT TO PRACTICE HIS PROFESSION AS A CPA, AND TO HAVE ATTEMPTED TO BLACKMAIL CROUSHORE."

{¶34} Croushore argues the trial court's decision to dismiss Mansour's abuse of process claim should be upheld on the alternative basis that (1) Mansour did not prevail in the first trial, which Croushore asserts is "a key element of an abuse of process claim"; and (2) in bringing the 2000 case, he (Croushore) did "nothing more than carry out the process to its authorized conclusion," even if he may have done so "with bad intentions." *Yaklevich*, 68 Ohio St.3d at 298, fn. 2. We find this argument unpersuasive.

{¶35} When an abuse of process claim is raised as a permissive counterclaim in the underlying litigation, it is unnecessary for the party who brings such a claim to first establish that he is entitled to prevail in the underlying litigation. See *Yaklevich* at 299, fn. 4. However, when a party waits to bring a claim for abuse of process in a separate suit after the underlying action has been terminated, the party will need to show, as a practical matter, that he has prevailed in at least some substantial aspect of the underlying litigation. Otherwise, it likely will be difficult, if not impossible, for the party to establish the final two elements of the tort of abuse of process, i.e., that the underlying "proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed" or "that direct damage has resulted from the wrongful use of process." *Yaklevich* at 298.

{¶36} Furthermore, because a party who brings an abuse of process claim must establish that the underlying "proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed," id., "'there is no liability [for abuse of process]

where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.'" Id. at fn. 2, citing Prosser & Keeton, The Law of Torts (5 Ed.1984) 898, Section 121.

{¶37} Viewing the evidence in the light most favorable to Mansour as the nonmoving party on this issue, we conclude that Croushore has failed to show that he is entitled to summary judgment on Mansour's abuse of process claim. Croushore presented evidence showing that the jury in the 2000 case found that Mansour committed fraud against him; that Mansour tried to blackmail him; and that Mansour was not competent to practice his trade or business, which was accounting. However, Croushore acknowledges that the jury also found that "Croushore owed Mansour slightly more than Mansour owed him[.]" Thus, Mansour did prevail, at least to some extent, in the first trial.

{¶38} Furthermore, Mansour filed an affidavit in the summary judgment proceedings, stating that during the 2000 case, Croushore told him:

{¶39} "I want you to pay more than my invoices [for legal services]; I want you to suffer personally for all of the wasted time I put in on all of your cases. Money is not enough."

{¶40} Looking at all of the evidence presented by the parties on Mansour's abuse of process claim, reasonable minds could differ on the question of whether Croushore actually did "*nothing more* than carry out the process to its authorized conclusion." (Emphasis added.) *Yaklevich*, 68 Ohio St.3d at 298, fn. 2. Therefore, it would be inappropriate to grant summary judgment to Croushore on Mansour's abuse of process claim. See *Welco Industries, Inc.*, 67 Ohio St.3d at 346 (summary judgment should be awarded with caution, resolving doubts and construing evidence in nonmoving party's favor).

{¶41} Accordingly, Croushore's first cross-assignment of error is overruled.

{¶42} Cross-Assignment of Error No. 2:

{¶43} "THE TRIAL COURT ERRED IN FAILING TO FIND MANSOUR TO BE A VEXATIOUS LITIGATOR BASED UPON HIS BEHAVIOR IN THIS AND OTHER CASES."

{¶44} Croushore asserts that the trial court erred by failing to find Mansour to be a vexatious litigator pursuant to R.C. 2323.51(A)(3) and requests that we declare Mansour a vexatious litigator or remand the case to the trial court with instructions to do so.

{¶45} In its April 1, 2008 decision, the trial court denied Croushore's motion for summary judgment on his vexatious litigator claim. In support, the trial court stated that while Croushore had provided evidence that Mansour has been involved in litigation on numerous occasions, "it is the nature of the conduct, not the number of actions, that determines whether a person is a vexatious litigator." *Borger v. McErlane*, Hamilton App. No. C-010262, 2001-Ohio-4030. The trial court concluded that under the evidence presented, reasonable minds could differ on the question of whether Mansour was a vexatious litigator.

{¶46} On June 12, 2008, the trial court dismissed Croushore's vexatious litigator claim for the reason that Croushore should have raised the claim in the 2000 case, and therefore, the claim was barred under the doctrine of res judicata. However, Croushore's vexatious litigator claim was based on Mansour's bringing the instant action, as well as other claims he has brought in the past. Therefore, the trial court erred in dismissing Croushore's vexatious litigator claim on the ground that he should have brought the claim in the 2000 case.

{¶47} Nevertheless, we cannot agree with Croushore's request that we declare Mansour to be a vexatious litigator or remand the case to the trial court with instructions that it do so. Instead, we agree with the trial court's April 1, 2008 decision wherein the trial court overruled Croushore's motion for summary judgment on his vexatious litigator claim for the reason that reasonable minds could differ on whether Mansour is a vexatious litigator.

{¶48} R.C. 2323.52(A)(3) states in pertinent part:

{¶49} "'Vexatious litigator' means any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil action or actions."

{¶50} Declaring a plaintiff to be a vexatious litigator is "an extreme measure" that should be granted only "when there is no nexus" between "the filings made by the plaintiff[ ] and [his or her] "intended claims." *McClure v. Fischer Attached Homes*, 145 Ohio Misc.2d 38, 2007-Ohio-7259 at ¶33. Looking at the evidence in a light most favorable to Mansour as the non-moving party on this issue, we conclude that the trial court did not err by refusing to grant summary judgment to Croushore on his vexatious litigator claim.

{¶51} Croushore's second cross-assignment of error is sustained in part and overruled in part.

{¶52} The trial court's judgment is reversed, and this cause is remanded to the trial court for further proceedings in accordance with this opinion and the law of this state.

BROGAN and FAIN, JJ., concur.

Brogan, J., of the Second Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), Article IV of the Ohio Constitution.

Fain, J., of the Second Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), Article IV of the Ohio Constitution.

[Cite as *Mansour v. Croushore*, 2009-Ohio-2627.]