

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR SUSSEX COUNTY**

RAPHAEL F. NEVINS, : C.A. No. 05C-07-041 - ESB  
Plaintiff, :  
v. :  
GEORGE BRYAN, DEAN WHITLA, :  
WILLIAM SCHULER, CAROLYN TINKER, :  
VICKI IRVING, and nominal defendant, :  
The CENTER for the ADVANCEMENT of :  
DISTANCE ECUDCATION: in RURAL :  
AMERICA, a corporation, :  
Defendants. :

UPON REVIEWS OF MOTION TO PROCEED IN FORMA PAUPERIS AND COMPLAINT

MOTION TO PROCEED IN FORMA PAUPERIS - DENIED

COMPLAINT - DISMISSED

DATE SUBMITTED: August 2, 2005

DATE DECIDED: September 8, 2005

Raphael F. Nevins, pro se, P.O. Box 1348, Las Cruces, New Mexico 88004

BRADLEY, J.

Pending before the Court is a motion to proceed in forma pauperis which Raphael F. Nevins (“plaintiff”) has filed in connection with his complaint alleging malicious prosecution against various defendants.

The motion to proceed in forma pauperis is denied. Although plaintiff has submitted an affidavit, he has not submitted one containing all the information which Administrative Directive No. 2003-6 requires.<sup>1</sup> The Court would provide plaintiff with the opportunity to file the correct affidavit if it thought that the pleadings might pass the initial review which the Court undertakes pursuant to 10 Del. C. § 8803. It undertakes such a review to prevent the taxpayers of the State of Delaware from subsidizing a meritless suit. A review of the complaint shows that plaintiff has not stated a claim for malicious prosecution, and consequently, the Court dismisses the complaint.

Actions for malicious prosecution are viewed with disfavor by the law “because of their undesirable tendency to unduly discourage citizens from seeking redress in the courts.”

Alexander v. Petty, 108 A.2d 575, 577 (Del. Ch. 1954). Accord Kaye v. Pantone, Inc., 395 A.2d 369, 372 (Del. Ch. 1978). As explained in Kaye v. Patone, Inc., 395 A.2d at 372:

In order to sustain a cause of action sounding in malicious prosecution, several allegations must co-exist: (1) the institution of civil proceedings; (2) without probable cause; (3) with malice; (4) the termination of the proceedings in the aggrieved party’s favor; and (5) damages which were inflicted upon the aggrieved party by seizure of property or other special injury. [Citations omitted.]

Case law has defined some of these elements.

The Superior Court examined the “probable cause” element in the case of Henriksen v. Henriksen, Del. Super., C.A. No. 87C-MR-2, Bifferato, J. (Nov. 18, 1987) at 3, reargu. den.,

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<sup>1</sup>A copy of the required affidavit is attached hereto as Exhibit A.

(December 2, 1987):

A person has probable cause for bringing a civil suit if he reasonably believes that he has a good chance of establishing it to the satisfaction of the Court or the jury. [Citation omitted.]

As further explained in Stidham v. Diamond State Brewery, Inc., 21 A.2d 283, 285 (Del. Super.

1941): “[T]he existence or want of probable cause is determined at the time of the inception of the original proceedings, and not at its termination....”

The definition of “malice” is examined in Stidham v. Diamond State Brewery, Inc., 21 A.2d at 285:

Malice ... is not easy to define in such a way as to include all of its characteristics. It does not necessarily mean that there must exist actual spite, ill will or grudge. These may exist but their presence is not essential. For an act to have been done in such a way as to form the basis of a suit for malicious prosecution the act must have been done with a wrongful or improper motive or with a wanton disregard for the rights of that person against whom the act is directed.

“The bare allegation that defendants instituted these proceedings solely to intimidate and harass is insufficient.” Nix v. Sawyer, 466 A.2d 407, 412 (Del Super. 1983).

The Superior Court also has addressed what constitutes a “special injury”. A “special injury” has to be something more than expenses and attorneys fees incurred in connection with defending the original suit and alleged damage to the claimant’s reputation. Cuccia v. Edinburg, Del. Super., C.A. No. 83C-MY-6, Stiftel, P.J. (January 10, 1984).

Before examining the allegations of the complaint, I provide some background as set forth in an unemployment compensation decision of the New Mexico Department of Labor<sup>2</sup> as

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<sup>2</sup>Plaintiff attached to his complaint and incorporated by reference the decision of the Administrative Law Judge in that matter.

well as the decision of the Vice Chancellor in the case of Nevins v. Bryan, Del. Ch., C.A. No. 19975-NC, Parsons, V.C. (May 4, 2005), a case of which I take judicial notice.<sup>3</sup>

Plaintiff originally incorporated the Center for Advancement of Distance Education in Rural America (“CADERA”). The initial Board of Directors (“the Board”) included plaintiff and two others. These three voted to expand the Board to three additional members. In July, 2001, Federal Marshals arrested plaintiff on charges of air rage. At about the same time, CADERA’s auditors identified to the Board certain expenditures of plaintiff as questionable. At a meeting on October 24, 2001, of CADERA’s members and directors, the topic of the expenditures was addressed. Defendant William Schuler reported his belief plaintiff had inappropriately spent or inadequately accounted for approximately \$55,000. Plaintiff objected “on the grounds that a grantee of a direct federal grant is afforded broad latitude in their use of grant money, and that all of his expenditures at issue were in furtherance of CADERA.” Nevins v. Bryan, *supra* at 18. The Board then voted to terminate plaintiff’s employment as CADERA’s Executive Director and they voted to remove him from his seat on the Board.

Plaintiff thereafter took two significant steps. First, he sought unemployment compensation with the New Mexico Department of Labor (“NMDOL”). Second, he filed a suit in the Court of Chancery pursuant to 8 Del. C. § 225 (“Chancery case”).

Plaintiff filed his claim for unemployment compensation with the NMDOL in 2001. The employer decided not to participate in a hearing on the claim which was held July 2, 2002. The Administrative Law Judge (“ALJ”) noted that the employer has the burden of establishing that

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<sup>3</sup>The Court does not employ the facts therein which are not contained in the plaintiff’s complaint in deciding the validity of the pending complaint; it merely uses the decision to set the stage for the litigation involving these parties.

the plaintiff should be disqualified from receiving benefits. Because the employer chose not to appear to offer evidence, the ALJ ruled that the discharge was not for reasons constituting misconduct and plaintiff could receive benefits. It is clear the ruling was based upon the employer's lack of participation in the proceedings, and not upon findings made after a presentation of facts regarding specific allegations of misappropriation of corporate assets, corporate waste or fraud.

In the Chancery case, plaintiff sought both a declaration he was the only valid member of CADERA and a temporary restraining order prohibiting the dissolution of the corporation. The defendants in the Chancery case are the defendants in this case. They filed, in the Chancery case, counterclaims against plaintiff to recover \$52,638.67 on the grounds of breach of fiduciary duty by misappropriation of corporate assets, waste of corporate assets and fraud on the corporation. This pleading was dated November 8, 2002. On August 2, 2004, defendants voluntarily dismissed their counterclaims. The Court of Chancery ordered that the dismissal be with prejudice.

In its May 4, 2005, decision, the Vice Chancellor stated as follows at pages 49-50:

The Court expresses no opinion on the merits of the Board's charge in October 2001 that Nevins owed CADERA approximately \$55,000, except to find that Nevins has not shown that, based on the information available at that time, the charge was made in bad faith or as a pretext for an improper motive. n 76 Even assuming that Nevins spent those funds properly on CADERA business, the evidence supports an inference that he failed to maintain appropriate records from the point of view of a well run, non-profit corporation dependent primarily on government funding.

-----FOOTNOTE-----

n 76 Defendants initially asserted a counterclaim against Nevins to recover that amount on grounds of misappropriation of corporate

assets, waste and fraud on the Corporation. Defendants pursued that claim until August 2, 2004, when they voluntarily dismissed it.

-----END FOOTNOTE-----

The Court of Chancery denied plaintiff's request for relief and granted a declaratory judgment in favor of defendants. Both sides sought sanctions and attorneys fees. The Chancery Court denied those requests, ruling that it did "not find either side engaged in conduct sufficiently egregious as to warrant an award of sanctions or attorneys fees." Id. at 60. Plaintiff has appealed the rulings of the Vice Chancellor to the Delaware Supreme Court, and that appeal currently is pending.

On July 29, 2005, plaintiff filed the suit now pending before this Court. The complaint includes as attachments and incorporates by reference the Answer and Counterclaim of Defendants to the Complaint in the Chancery case; the docket filing which evidences the dismissal of defendants' counterclaims in the Chancery case; the above-referenced decision of the ALJ; a March 6, 2002, Independent Auditors' Report of Neff + Ricci, LLP; a May 17, 2002, Independent Auditors' Report of Neff + Ricci, LLP; and some pages of the Trial Transcript of the Chancery case dated August 4, 2004.

I now examine plaintiff's complaint alleging that defendants' counterclaims in the Chancery case constituted malicious prosecution.

1) Probable Cause and Malice Elements

Plaintiff maintains that defendants had no probable cause for asserting the counterclaims based on misappropriation of corporate assets, waste and fraud and that the counterclaims were malicious. He seeks to establish these elements by asserting the factual issues had been litigated

before the NMDOL ALJ and decided in his favor and by asserting auditors at Neff + Ricci had found no wrongdoing. He then asserts that defendants, being aware there was no misappropriation by him, “knowingly, willfully, and without probable cause, and with reckless indifference to the truth, and without merit, elected to file their counterclaim in the Chancery Court action.” Plaintiff maintains defendants’ collective motive for doing so was to access the CADERA Directors and Officers Liability Policy. He alleges generally that the defendants are guilty of malice.

Plaintiff maintains that defendants’ claims of alleged misappropriation of funds in the amount of \$52,628.27 are the same as “had been previously litigated by Defendants against Plaintiff in New Mexico.” Plaintiff further asserts: “The Counterclaim falsely asserted that the NM DOL made no determination as to whether Plaintiff had misappropriated funds. (Exhibit A - No. 25)” Finally, with regard to the ALJ decision, plaintiff alleges: “the finding of the NMDOL Appeals Tribunal was that Plaintiff (Nevins) was not guilty of any misappropriation of funds....”

In their Answer to plaintiff’s complaint in the Chancery case, defendants stated:

25. Denied. By way of further response, Plaintiff sought unemployment compensation from his termination of employment from CADERA. It is denied that the New Mexico Department of Labor made any finding or adjudication as to whether Plaintiff had misappropriated and/or misused the corporate funds of CADERA. Moreover, it is specifically denied that the unemployment compensation decision has any bearing on the factual or legal issues of this case.

A review of the ALJ decision evidences that the NMDOL ALJ did not make any findings that plaintiff was not guilty of any misappropriation of funds. Thus, plaintiff’s assertion that defendants made false assertions with regard to the NMDOL proceedings are not valid and accordingly fail to support plaintiff’s contention that defendants lacked probable cause to make

these assertions or made them with malice.

The other allegations regarding probable cause and malice are those pertaining to the Independent Auditors' Reports. Plaintiff makes two allegations regarding the Independent Auditors' Reports. The first is that in their answer to the complaint in the Chancery case, defendants made false assertions and misrepresentations regarding an auditor's report. The second is that defendants pursued their counterclaims after they allegedly knew the auditor had not found plaintiff had misappropriated anything.

I first address defendants' answer to the complaint which plaintiff says constituted false assertions and misrepresentations. Specifically, plaintiff alleges:

16. \*\*\* In addition, the Counterclaim falsely asserted and misrepresented the true facts that an independent audit had found that Plaintiff had misappropriated funds. (Exhibit A, No. 21) when in fact independent auditors, Neff and Ricci, made no determination that Plaintiff had misappropriated any funds in either the year 2000 or the year 2001 in their audit reports to the CADERA Board of Directors (Exhibits D - Neff and Ricci opinion letter for 2000, Exhibit E - Neff and Ricci opinion letter for 2001).

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18. \*\*\* Moreover, contrary to the representations Defendants made in their Counterclaim, official independent audits conducted and signed by Neff and Ricci for the years 2000 and 2001, expressed no opinion, nor found any alleged misappropriation by Plaintiff.

Exhibits D and E referenced in this answer are two opinion letters dated, respectively, March 6, 2002 and May 17, 2002. These opinion letters from Neff + Ricci note the dispute regarding the alleged misappropriations and state that because of the dispute, they, as accountants, cannot issue an opinion on the financial statements of the corporation for the years ending in December 30, 2000 and December 30, 2001. They do not make any finding, reach any



conclusions or offer any opinions. In other words, these letters do not conclude there were misappropriations or that there were not misappropriations.

The assertion in defendants' answer in the Chancery case which plaintiff attacks does not reference the two letters dated, respectively, March 6, 2002, and May 17, 2002. The assertion in defendants' answer is:

21. Denied. By way of further response, the Board of Directors had also removed Plaintiff as the Executive Director of CADERA pending an investigation by the Board of misappropriation of corporate funds by Plaintiff. The issue of misappropriation and/or misuse of funds was brought to the attention of Plaintiff as well as the Board of Directors by an independent auditor hired by Plaintiff. ... Plaintiff was given the opportunity to explain and justify the expenses in question, had access to all records in CADERA possession, but could not account for or demonstrate the allowability of said expenses. See Minutes of the Meetings for August 15, 22, 2001 and October 3, 2001 ....

The counterclaims explain that plaintiff hired an independent auditor, Larry Carmony ("Carmony") of Neff + Ricci, who, by correspondence dated June 26, 2001, made them aware that expenses plaintiff incurred were unaccounted for and misused. In addition, Carmony informed them that he could not proceed with the audit with the information presented to him because plaintiff failed to adequately document his expenses or demonstrate the allowability of the corporate funds he had advanced.

Thus, the March 6, 2002, and May 17, 2002, letters which plaintiff references in his complaint **are not and cannot** be the information from the independent auditor which defendants discussed in the summer and fall of 2001. Consequently, plaintiff's contention that defendants' allegations in their answer to the Chancery case were false and constituted misrepresentations is factually meritless.

Plaintiff's second contention with regard to the March 6, 2002, and May 17, 2002 letters

is that they precluded defendants from asserting the counterclaims. This contention is meritless. The letters express no opinion regarding the misappropriations. They do not clear plaintiff of anything. Thus, they did not in any way preclude defendants from asserting their counterclaims.

The Court has examined plaintiff's exhibits, which are a part of his complaint. These exhibits do not support plaintiff's allegations that defendants had no basis for making the assertions they made in their counterclaims. In fact, they directly contradict plaintiff's allegations and they clarify that defendants did have a basis for pursuing their counterclaims against plaintiff. Since the crux of his assertions fails, his claim for malicious prosecution fails.

## 2) Special Injury Element

An additional problem with plaintiff's claim is the failure to assert any special injury. The injuries which he maintains he incurred as a result of "Defendants' willful, reckless and malicious acts" were:

1) Plaintiff was obliged to expend his resources to needlessly defend and litigate the false claims;

2) Plaintiff, who was pro se, incurred \$27,060.25 in reasonable costs, legal fees and expenses;

3) Plaintiff was caused undue emotional and physical stress, and embarrassment in the community in which he lives;

4) Plaintiff was unable to gain employment in New Mexico in similar occupations;

5) Plaintiff had to declare himself in a state of poverty due to expending his resources in defense of false claims.

Based on the chronology of events, it is not possible for plaintiff to establish that

defendants' counterclaims, which came about after plaintiff was terminated from CADERA's employment and its Board and after he filed a suit in Chancery, could have caused him undue emotional and physical stress, and embarrassment in the community in which he lives; render him unable to gain employment in New Mexico in similar occupations; and require him to declare himself in a state of poverty due to expending his resources in defense of false claims. Plaintiff cannot use the injuries from the initial firing to support his claim for "special injury" with regard to these counterclaims. In addition, as noted earlier, "special injury" has to be something more than expenses and attorneys fees incurred in connection with defending the counterclaims and alleged damage to the plaintiff's reputation. Cuccia v. Edinburg, Del. Super., C.A. No. 83C-MY-6, Stiftel, P.J. (January 10, 1984).

Thus, plaintiff has failed to allege a special injury sufficient to state a claim for malicious prosecution.

For the foregoing reasons, I deny plaintiff's motion to proceed in forma pauperis and I dismiss his complaint for failure to state a claim for malicious prosecution.

IT IS SO ORDERED.