IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-475

Filed:15 September 2020

Catawba County, No. 17-CVS-2534

LAW OFFICES OF MATTHEW K. ROGERS, PLLC, and, MATTHEW K. ROGERS, Plaintiff,

v.

JEFFREY FISHER, UNIQUE PLACES, LLC, and ENIGMA UNIVERSAL TECHNOLOGIES, LLC d/b/a ENIGMA LED, Defendants.

Appeal by Plaintiff from order entered 31 July 2018 by Judge Daniel A. Kuehnert in Superior Court, Catawba County. Heard in the Court of Appeals 12 November 2019.

Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for Plaintiff-Appellants.

Ragsdale Liggett, PLLC, by William W. Pollock and Amie C. Sivon, for Defendant-Appellees Jeffrey Fisher and Unique Places, LLC.

McGEE, Chief Judge.

The Law Offices of Matthew K. Rogers, PLLC, and Matthew K. Rogers ("Mr. Rogers") (together, "Plaintiffs") appeal from an order dismissing their claims for (1) tortious interference with contract; (2) tortious interference with prospective

economic advantage; and (3) abuse of process for failing to state claims upon which relief can be granted.

I. Factual and Procedural History

This case is the third to arise out of a business dispute between George Erik McMillan ("Mr. McMillan") and Kisa McMillan ("Ms. McMillan") (together, "the McMillans") and one of the named defendants in the present case, Jeffrey Fisher ("Mr. Fisher"). Mr. McMillan invented various types of LED lights. The McMillans started a business based on his ideas to manufacture and sell LED lights. The business, a limited liability company, was named Enigma Universal Technologies, LLC d/b/a Enigma LED ("Enigma"), now another named defendant in the present action. Mr. McMillan sought investors in 2013 to help Enigma grow and soon entered into a business relationship with Mr. Fisher, that is summarized in a memorandum of understanding for starting a new business, operating agreement, and amended operating agreement between them. Mr. Fisher became an investor and minority member of Enigma. Mr. Fisher is also the owner of Unique Places, LLC, a limited liability company and defendant in the present lawsuit ("Unique Places") (Mr. Fisher and Unique Places together being "Defendants," as Enigma did not appeal). Unique Places is a member owner of Enigma.

As alleged in Plaintiffs' complaint, after Mr. Fisher acquired minority ownership stakes in Enigma and became an officer and manager, he and Mr. McMillan began to have disputes about the management of the business. Plaintiffs

alleged that "from the time period of May 2013 through the summer of 2014, [Mr. McMillan] believed . . . and alleged that [Mr.] Fisher and/or Unique Places did not perform numerous material terms of agreements and promises made to [the McMillans]." As a result, Mr. McMillan began "to seek potential buyers of [Mr.] Fisher's interests in Enigma LED and/or to purchase Enigma[]." Plaintiffs alleged that Mr. McMillan introduced Jack Temple ("Mr. Temple") to Mr. Fisher "in or about June 2014," introducing him as a potential buyer who could buy out the ownership interests in Enigma not owned by Mr. McMillan. The complaint alleged that Mr. Temple offered to purchase the membership interests in Enigma except for Mr. McMillan's interests. It further alleged that in July 2014, the McMillans engaged Plaintiffs "to provide legal co-counsel for and to [the McMillans]."

Plaintiffs alleged, "On [30 July] 2014, [Mr.] Fisher notified [Mr.] Temple and [Mr. McMillan] in writing that [Mr.] Fisher was acquiring membership interests sufficient to make [Mr.] Fisher 55% owner of Enigma LED." The McMillans again met with Plaintiffs on 12 August 2014 and signed an engagement agreement. The same day, Mr. Rogers sent a letter via email to Mr. Fisher and Unique Places, stating he had been engaged regarding "among other issues, failure of consideration relating to formation, improper distribution of ownership interests, failure to provide necessary working capital by obtaining a business line of credit and failure of sweat-equity promises" relating to Enigma.

Mr. Fisher responded the next day in an email to Mr. Rogers stating "[y]ou should know that [Mr. McMillan] has denigrated, I'd even argue slandered, his partners to a potential buyer, [Mr.] Temple . . . [y]our client has extremely unclean hands, and his partners are very upset with how he has comported himself." Mr. Fisher forwarded Mr. Rogers an email which he had sent to Mr. McMillan and Mr. Temple. Addressing Mr. McMillan, Mr. Fisher gave two options: (1) either "reset" the company with Mr. Fisher and others selling their interests to Mr. Temple and another new partner or (2) Mr. Fisher buying out another partner and have him "working with [Mr. Temple] . . . or anyone else that might help grow the company." In the email, Mr. Fisher threatened that if Mr. McMillan "will be instigating the 'litigious and destructive' route [he] ha[d] been insinuating/positioning," Mr. Fisher would be "prepared to defend [Enigma's] patents, covenants not to compete, and [his] reputation." A subsequent email from David Schumaker ("Mr. Schumaker"), another potential buyer, to Mr. Fisher alleged that the language and tone of the letter was "a deal breaker for [him]" and for Mr. Temple.

Mr. Rogers sent a letter to Mr. Fisher and Unique Places saying he was counsel to the McMillans and stating he would attend an upcoming Enigma member meeting "as legal counsel for [the McMillans.]" The complaint alleges Mr. Rogers attended the meeting on 26 August 2014 with Mr. McMillan but no action was taken at the meeting. The day after, Mr. McMillan sent Enigma's members a letter which Plaintiffs entitle "First Derivative Demand Letter," seeking specific actions. Two

days later, Enigma terminated the McMillans in a letter attached as an exhibit to Plaintiffs' complaint and, according to Plaintiffs, "[Mr.] Fisher caused most of the business property of Enigma LED to be moved from Enigma LED's then principal place of business."

1. The "McMillan Lawsuit"

The McMillans and Enigma, represented by Mr. Rogers, filed a lawsuit (Catawba County File No. 14 CVS 2179, hereafter "the McMillan Lawsuit") five days later against Mr. Fisher and Unique Places, among others, asserting the following claims: fraud, breach of fiduciary duties owed to minority owners, various defamation claims, misappropriation of trade secrets, obtaining property under false pretenses, and conversion. The plaintiffs in the action sought a temporary restraining order as well as preliminary and permanent injunction. As Defendants note, the complaint in the McMillan Lawsuit did not specify "that the claims of plaintiff Enigma were brought in terms of a derivative lawsuit." The temporary restraining order was granted, placing the McMillans temporarily back in charge of Enigma's daily operations, but the permanent injunction was later denied. According to the complaint in the present case, Mr. Fisher notified the McMillans they were terminated around the first week of January 2015.

The McMillan Lawsuit was designated a complex business case and referred to the North Carolina Business Court. The Business Court granted the defendants' motion to stay proceedings and compel arbitration. *McMillan v. Unique Places, LLC*,

2015 NCBC 4, 2015 WL 222752, at *8 (N.C. Super. Ct. Jan. 14, 2015). The parties did not participate in arbitration as ordered by the court.

2. The "Enigma Lawsuit"

Plaintiffs sent Mr. Fisher's counsel a letter dated 16 December 2014 providing notice that Mr. McMillan was in business discussions with two individuals who might loan Mr. McMillan money to continue the business of Enigma provided Mr. McMillan remained employed there. The letter stated Mr. McMillan was "willing to discuss settlement terms pursuant to which the [McMillan Lawsuit] c[ould] be dismissed in conjunction with the transfer of ownership interests to [Mr. McMillan]." Plaintiffs allege Defendants understood that the potential lenders referenced in the letter were John Romulus ("Mr. Romulus") and Steven Lambros ("Dr. Lambros").

Plaintiffs' complaint alleges that on 10 January 2015, shortly before arbitration was ordered in the McMillan Lawsuit, Mr. Rogers provided an engagement letter to the McMillans, Dr. Lambros, and Mr. Romulus, which they all signed. The engagement agreement stated the McMillans, Dr. Lambros and Mr. Romulus sought to retain Mr. Rogers "to provide advice related to potential restrictions (if any) on [Mr. McMillan's] ability to work for the new company, and discuss potential risks associated with your potential new venture." The "new company" referenced in the agreement was Epic Scientific Corporation ("Epic"). The engagement agreement continued, stating "You may also call on this firm to assist in the event any claims are levied against the new business, and to the extent advisable,

potentially enter into transactions with Enigma LED. I must clearly disclose that I have worked for the McMillans, and to date, filed derivative claims on behalf of Enigma LED." Plaintiffs allege "[u]pon information and belief" that Mr. Fisher accessed Ms. McMillan's email account without permission and discovered emails including the engagement agreement.

On 12 February 2015, nearly a month after the Business Court ordered arbitration in the McMillan Lawsuit, Enigma filed a lawsuit (Catawba County File No. 15 CVS 375, hereafter "Enigma Lawsuit") against Epic, Dr. Lambros, Mr. Romulus, and Plaintiffs.[1] Mr. Fisher verified the Enigma Lawsuit.

The Enigma Lawsuit alleged Mr. Rogers had claimed to represent Enigma directly rather than derivatively in the McMillan Lawsuit, that the McMillan Lawsuit complaint did not allege that he represented Enigma in a derivative capacity, and that Mr. McMillan did not comply with the statutory requirements of bringing a derivative suit. The Enigma Lawsuit alleged the following claims against Mr. Rogers and Law Offices: breach of fiduciary duty, negligence and malpractice, tortious interference with contract, violation of trade secrets, and civil conspiracy.

Mr. Fisher and Unique Places moved for a preliminary injunction and a hearing was scheduled for 9 March 2015. The complaint here alleges Mr. Fisher's counsel agreed to prepare a stipulation that Plaintiffs asserted derivative claims in

[1] Plaintiffs refer to the Enigma Lawsuit in their briefs and the complaint contained in the record as the "Frivolous Lawsuit." We decline to use this conclusory language and refer to it as the "Enigma Lawsuit" throughout.

the McMillan Lawsuit and that this stipulation mooted the motion for preliminary injunction. The hearing on the motion for preliminary injunction did not proceed. According to Plaintiffs' complaint, on 18 March 2015, Mr. Fisher's counsel stated the stipulations would not work and refused to prepare them or withdraw the preliminary injunction motion.

According to the complaint, Mr. McMillan emailed Mr. Fisher on 26 April 2015 that he would "like to try to save Enigma if possible. . . ." The complaint alleges Mr. Fisher responded as follows:

> My proposal is simple. All of this would need to happen *at the same time.*
> 1. You continue to work through Epic with [Mr. Romulus] and [Dr. Lambros], or you simply start a new company and get new investors.
> 2. Enigma and your new company share all lighting IP developed by Enigma. No money changes hands.
> 3. Everyone would be released from covenants not to compete.
> 4. You convey your 35% interest in Enigma back to the company
> . . . .
> 5. If you would like, as soon as your new company/investors have the money to do so, you can buy the Newton facility. . . .
> 6. *All lawsuits against all parties are dropped with prejudice*. . . .
> [Mr. McMillan], I've come to think of this situation as you and I being in a bad marriage, and we really need to separate and go our own ways.

Plaintiffs alleged Mr. Fisher also "communicated with representatives of [Dr.] Lambros and [Mr.] Romulus as well as directly with [Dr.] Lambros and [Mr.]

Romulus . . . intending to benefit [Mr.] Fisher in his personal capacity and intending to intimidate." Plaintiffs further alleged "[Mr.] Fisher expressed he would be willing to dismiss the [Enigma] Lawsuit if Plaintiffs would waive rights to pursue legal fees against [Mr.] Fisher and provided [Mr. McMillan] would release [Mr.] Fisher for liability referenced in the McMillan Lawsuit."

Plaintiffs moved to dismiss the Enigma Lawsuit. The motion was heard on 8 September 2015. The morning of the hearing, Mr. Fisher filed and served an amended complaint that included an unfair and deceptive trade practices claim. Plaintiffs filed a second motion to dismiss in response to the amended complaint on 9 October 2015, which was set for hearing on 16 November 2015. Plaintiffs alleged that counsel for Defendants said that "most of what we've alleged here was to stop the competing business[,]" and that "there is no question that the primary point of this litigation was to stop that competing company. And that was successful. That is a true statement." The trial court granted the motion to dismiss with prejudice on 17 November 2015. Although the trial court expressed Rule 11 concerns about the amended complaint, Plaintiffs did not file a Rule 11 motion or otherwise seek sanctions.

3. The Present Lawsuit

The complaint in the case before us was filed on 8 September 2017 against Mr. Fisher, Unique Places, and Enigma alleging claims for the following causes of action: (1) tortious interference with contract; (2) tortious interference with prospective

economic advantage; (3) abuse of process; (4) malicious prosecution; and (5) piercing the corporate veil. Defendants filed an answer and motion to dismiss.

After a hearing on Defendants' motion to dismiss, the trial court entered an order dismissing with prejudice the claims of tortious interference with contract, tortious interference with prospective economic advantage, and abuse of process against Mr. Fisher and Unique Places. Plaintiffs voluntarily dismissed the claims of malicious prosecution and piercing the corporate veil against Mr. Fisher and Unique Places on 1 November 2018. Plaintiffs also voluntarily dismissed the remaining claims against Enigma on 29 January 2019. Plaintiffs filed notice of appeal of the trial court's order dismissing some of the claims on 22 February 2019. Further facts and allegations are discussed as needed below.

II. Analysis

Plaintiffs argue the trial court erred in dismissing their claims for tortious interference with contract, tortious interference with prospective economic advantage, and abuse of process. This Court's standard of review for a motion to dismiss under N.C. Rule of Civil Procedure 12(b)(6) is as follows:

> The motion to dismiss under [N.C. Rule of Civil Procedure] 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion, the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.
>
> It is well-settled that a plaintiff's claim is properly dismissed under Rule 12(b)(6) when one of the following

> three conditions is satisfied: (1) the complaint on its face reveals that no law supports the claim; (2) the complaint on its face reveals the absence of facts sufficient to make a valid claim; or (3) the complaint discloses some fact that necessarily defeats the claim.
>
> This Court reviews a trial court's ruling on a motion for Rule 12(b)(6) de novo.

Asheville Lakeview Properties, LLC v. Lake View Park Commission, Inc., 254 N.C. App. 348, 351-52, 803 S.E.2d 632, 636 (2017) (internal citations omitted). However, while "[t]he trial court regards all factual allegations of the complaint as true[, l]egal conclusions . . . are not entitled to a presumption of truth." *Estate of Baldwin v. RHA Health Services, Inc.*, 246 N.C. App. 58, 62, 782 S.E.2d 554, 558 (2016) (citation omitted). We consider Plaintiffs' claims in turn.

1. Tortious Interference with Contract

Plaintiffs argue the trial court erred in dismissing their claim for tortious interference with contract against Mr. Fisher and Unique Places. Under North Carolina law, to establish a claim for tortious interference with contract, a plaintiff must show the following elements:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff.

Embree Const. Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992) (citation omitted). In their complaint, Plaintiffs allege the two engagement

letters from Mr. Rogers signed by the McMillans on 12 August 2014 and signed by the McMillans, Dr. Romulus, and Mr. Lambros on 9 January 2015 were valid contracts and Enigma, Mr. Fisher, and Unique Places tortiously interfered with the contracts by suing Mr. Rogers and Law Offices. In particular, Plaintiffs make the following allegations:

> 137. Plaintiff Law Offices had contracts with [Mr. McMillan], [Ms. McMillan], [Dr.] Lambros and [Mr.] Romulus which conferred Plaintiffs' [(sic)] contractual rights with and against all four. [Mr.] Rogers was an intended beneficiary and had unique rights as an attorney to provide legal services to each of the four individuals.
>
> 138. From August 2014 and thereafter, [Mr.] Fisher was aware that Plaintiffs represented [the McMillans] pursuant to contract, and was aware Plaintiffs represented [Mr. McMillan] as a minority member of Enigma LED both (i) pursuing derivative claims filed by the minority member for the benefit of Enigma LED as a nominal party and (ii) provide legal counsel relating to potential purchase of [Mr.] Fisher's interest in Enigma LED and/or obtaining financing for Enigma LED.
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> 139. [Mr.] Fisher was aware that [Ms. McMillan], [Dr.] Lambros and [Mr.] Romulus engaged Plaintiffs to provide legal counsel for legitimate purposes, including without limitation relating to a prospective business which had not yet commenced operation.
>
> 140. [Mr.] Fisher caused the January 2015 Engagement Agreement to be attached as Exhibit M to the [Enigma] Lawsuit Complaint . . . and which . . . clearly reflects that services to be provided by Plaintiffs were ordinary legal services which no Defendants could not legitimately interfere.

141. [Mr.] Fisher directed for his personal benefit and without following corporate formalities, intentionally and maliciously filed the [Enigma] Lawsuit intending to maliciously interfere with [Mr.] Rogers['] legal counsel of [Mr. McMillan] and representation of [Mr. McMillan], both individually and derivatively for the benefit of Enigma LED and [Ms. McMillan].

142. [Mr.] Fisher directed for his personal benefit and without following corporate formalities, intentionally and maliciously filed the [Enigma] Lawsuit (in the name of Enigma LED controlled solely by [Mr.] Fisher) intending to interfere with Plaintiffs['] legal counsel to [Dr.] Lambros, [Mr.] Romulus, and [Ms. McMillan].

143. [Mr.] Fisher causing the [Enigma] Lawsuit and continued the [Enigma] Lawsuit with threat of preliminary injunction intending to cause and proximately causing [Dr.] Lambros and [Mr.] Romulus to breach the January 2015 Engagement Agreement, to interfere with legal services contemplated thereby and interfering with, and intending to stop all prospective legal services to [Mr.] Romulus and [Dr.] Lambros as a proximate result of the [Enigma] Lawsuit.

144. [Mr.] Fisher caused and directed the [Enigma] Lawsuit (including continuation thereof) out of spite and malice towards [the McMillans], and malice and spite for Plaintiffs providing legal counsel and assistance to [the McMillans], and otherwise intended to interfere with Plaintiffs' contracts and economic relationships for improper purposes and without legal justification.

145. Defendants['] conduct was for a wrong, unjustified and/or illegitimate purpose.

146. Counsel on behalf of one or more Defendants admitted that neither [Mr. McMillan] nor [Ms. McMillan] were parties to the Frivolous Lawsuit, and [the McMillans] intentionally excluded therefrom, is tantamount to

> admission of Defendants' intent of interference was to unjustifiably harm Plaintiffs.
>
> 147. Defendants[']' conduct was not justified and Defendants admitted on [26 November 2015] that the primary filing of the Frivolous Lawsuit was expressly to prevent legitimate competition in business.
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> 148. As a direct and proximate result of the Frivolous Lawsuit, and [Mr.] Fisher's conduct in relating thereto, [Mr.] Rogers continued representation of [Mr. McMillan] in the McMillan Lawsuit was frustrated, delayed representation and continuation of the McMillan Lawsuit, and prevented [Mr. McMillan] and [Ms. McMillan] from paying legal fees owing to Law Offices and/or [Mr.] Rogers.
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> 149. But for that interruption in continued representation, interference caused by the Frivolous Lawsuit and the effects resulting therefrom, and [Mr.] Fisher's tortious conduct in continuing the Frivolous Lawsuit, [the McMillans] would have been able to make payments to [Mr.] Rogers to continue to provide legal counsel representation, [Ms. McMillan] would have been employed by either Enigma LED or adequately funded new business and ultimately paid all legal fees owing to Law Offices.
>
> 150. [Mr.] Fisher's conduct including filing and continuing the Frivolous Lawsuit amounts to maliciously interfering with contract between Law Offices, [Dr.] Lambros, [Mr.] Romulus and [Ms. McMillan], and intending to maliciously procure breach of a contract by [Mr.] Romulus and [Dr.] Lambros, and interfering with contract with [the McMillans], not in the legitimate exercise of Enigma, Fisher or Unique Places own rights [(sic)], but with design to injure the Plaintiffs, and/or gain advantage at Plaintiffs' expense.

Plaintiffs' allegations are repetitive and conclusory. Nevertheless, we discern the gist of Plaintiffs' claims against Defendants as alleging that Defendants, by filing

a lawsuit against Plaintiffs, sought to prevent Epic from competing with Enigma and thus "prevent legitimate business competition," to "procure breach of a contract by" Dr. Lambros and Mr. Romulus, and to "prevent [the McMillans] from paying legal fees ow[ed] to [Plaintiffs]."

After reviewing the complaint and the record, we agree with the trial court's determination that Plaintiffs failed to state a claim for intentional breach of contract against Defendants in their complaint. Assuming, *arguendo*, Plaintiffs have sufficiently alleged Defendants had knowledge of valid contracts, that there was no justification, and that Plaintiffs had actual damages, Plaintiffs have failed to adequately allege that, even if Defendants acted with malice, any of Defendants' actions "induce[d]" the McMillans, Dr. Lagos, and Mr. Romulus not to perform their contracts. At most, Defendants filed and maintained a lawsuit that Plaintiffs argue was frivolous and lacked legal merit. But Plaintiffs did not sufficiently allege and show that Defendants' filing of the lawsuit in fact caused Dr. Lagos and Mr. Romulus to cease pursuing a business relationship with Ms. McMillan through Epic and thus retain Plaintiffs to assist in the deal. Plaintiffs merely allege that, through the lawsuit, Defendants "proximately caus[ed]" Dr. Lagos and Mr. Romulus to breach the engagement agreement with Plaintiffs, but this statement is not a factual allegation, but merely a legal conclusion and is thus "not entitled to a presumption of truth" for purposes of a motion to dismiss. *Estate of Baldwin*, 246 N.C. App. at 62, 782 S.E.2d at 558 (citation omitted).

Similarly, Plaintiffs have not adequately alleged how, merely by filing the lawsuit, Defendants "induce[d]" the McMillans to breach their contract by not paying Plaintiffs. Plaintiffs assert that the lawsuit "prevented [the McMillans] from paying legal fees owing to [Plaintiffs.]" But merely filing the lawsuit is not inducement for purposes of tortious interference. Filing and maintaining the lawsuit did not prevent Ms. McMillan from seeking and obtaining other work to pay Plaintiffs or from paying Plaintiffs the money owed out of the McMillans' other assets. Thus, Plaintiffs' allegations, taken as true, do not adequately allege Defendants intentionally induced a third party to breach a contract with Plaintiffs. We hold the trial court did not err in dismissing the claims for tortious interference with contract against Defendants.

2. Tortious interference with prospective economic advantage

Plaintiffs next argue the trial court erred in dismissing their claim against Defendants for tortious interference with prospective economic advantage. A claim for tortious interference with prospective economic advantage

> arises when a party interferes with a business relationship "by maliciously inducing a person not to enter into a contract with a third person, which he would have entered into but for the interference, . . . if damage proximately ensues, when this interference is done not in the legitimate exercise of the interfering person's rights." However, a plaintiff's mere expectation of a continuing business relationship is insufficient to establish such a claim. Instead, a plaintiff must produce evidence that a contract would have resulted but for a defendant's malicious intervention.

Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC, 368 N.C. 693, 701, 784 S.E.2d 457, 463 (2016) (internal citations omitted).

In the present case, the only allegation in Plaintiff's complaint regarding a claim for tortious interference with prospective economic advantage, as distinct from interference with an existing contract, is the following:

> 156. [Mr.] Fisher's conduct and the Frivolous Lawsuit proximately caused and Plaintiffs have incurred special and consequential damages, including without limitation adverse effect on [Mr.] Rogers' reputation with one or more clients ([Dr.] Lambros and/or [Mr.] Romulus), chilled and delayed at critical time the ability to provide legal counsel to clients, increased professional malpractice insurance premiums, [Dr.] Lambros and [Mr.] Romulus not paying amounts owed to Law Offices (and [Mr.] Rogers's benefit), lost revenues and profits to Law Offices *and reasonable revenues likely to result from continuing to represent [Ms. McMillan], [Dr.] Lambros and [Mr.] Romulus or business started by them*. (emphasis added)

At most, Plaintiffs speculate that Ms. McMillan, Dr. Lambros, and Mr. Romulus would retain Plaintiffs for matters beyond those contemplated by the existing engagement letter. But speculation regarding future economic advantage does not satisfy the causation requirement of the claim. As our Supreme Court noted in *Beverage Systems of the Carolinas*, "a plaintiff's mere expectation of a continuing business relationship is insufficient to establish such a claim." *Id.* Moreover, Plaintiffs' mere allegation that Defendants "interfered" by filing and maintaining the lawsuit, which falls short of the intentional interference plaintiffs must show for the claim of tortious interference with contract as discussed above, also falls short of the

malicious inducement required for the claim of tortious interference with prospective economic advantage. Therefore, we hold Plaintiffs have failed to make allegations establishing a claim for tortious interference with prospective economic advantage and the trial court did not err in dismissing this claim.

3. Abuse of Process

Plaintiffs argue the trial court erred in dismissing their claims for abuse of process against Mr. Fisher and Unique Places. We disagree.

> "Abuse of process is the misapplication of civil or criminal process to accomplish some purpose not warranted or commanded by the process." Two elements must be proved to find abuse of process: (1) that the defendant had an ulterior motive to achieve a collateral purpose not within the normal scope of the process used, and (2) that the defendant committed some act that is a "'malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ.'"

Pinewood Homes, Inc. v. Harris, 184 N.C. App. 597, 602, 646 S.E.2d 826, 831 (2007) (internal citations omitted) (emphasis in original). The ulterior motive requirement and the act requirement can be satisfied as follows:

> The ulterior motive requirement is satisfied when the plaintiff alleges that the prior action was initiated by the defendant or used by him to achieve a collateral purpose not within the intended scope of the process used. The act requirement is satisfied when the plaintiff alleges that during the course of the prior proceeding, the defendant committed some willful act whereby he sought to use the proceeding as a vehicle to gain advantage of the plaintiff in respect to some collateral matter.

Id. at 603, 646 S.E.2d at 831 (citations omitted).

In the present case, Plaintiffs' various allegations in their complaint are that "[Mr.] Fisher, Unique Places and/or Enigma had ulterior motive to the use of the legal process which motive is not proper in the regular prosecution of legal proceedings included in the [Enigma] Lawsuit" and that the "ulterior motive and use of the legal process relate to [Mr.] Fisher, Unique Places and/or Enigma purpose to achieve through the use of the process to delay and interfere lawful and valid claims made by [the McMillans] against [Mr.] Fisher, and to interfere with the Law Offices and [Mr.] Rogers provision of legal services and/or representation of [the McMillans], individually and derivatively for the benefit of Enigma, as well as to delay and interfere with Plaintiff counseling [Mr.] Romulus and [Dr.] Lambros"; that "[Mr.] Fisher's ulterior motives included harassing Plaintiffs and/or to obtain a result not properly or lawfully obtainable . . . ."; and that the "ulterior motives and purposes included using of the legal process against Plaintiff relate to [Mr.] Fisher gaining and/or retain exclusive control of Enigma LED, and to settle and/or cause dismissal of claims against [Mr.] Fisher and Unique Places in the McMillan Lawsuit . . . ."

On appeal, Defendants argue that the complaint (1) "fails to allege an act in the Enigma Lawsuit that was a misuse of the legal process" and (2) it "fails to state an ulterior motive as the only allegations are that the Enigma Lawsuit was filed to interfere with Plaintiffs' legal services to [the McMillans], [Dr.] Lambros, and [Mr.] Romulus (and derivatively for the benefit of Enigma) and to delay and interfere with

[the McMillans'] claims against [Mr.] Fisher in the M[]cMillan Lawsuit" and "[n]either of these fit the ulterior motive prong." We discuss these arguments in turn.

First, Defendants argue that Plaintiffs failed to allege conduct that satisfies the "act" requirement of an abuse of process claim and, instead, that "the allegations are that the Enigma lawsuit (including the summons served) itself was such an act." Defendants note that Plaintiffs in their brief on appeal also cite the allegations in paragraph 113 of the complaint in support of the act requirement, but Defendants argue these allegations describing Mr. Fisher's email regarding settlement discussion, "is not an act for abuse of process but rather a normal and expected occurrence where there is litigation or a pending arbitration." In their reply brief, Plaintiffs argue that filing a lawsuit can suffice for the act requirement of the abuse of process claim and that the following conduct also satisfied the act requirement: "(1) continuing the 'motion for preliminary injunction' (rather than resolve through stipulation); (2) egregious settlement demands; and (3) on the morning of hearing on motion to dismiss the [Enigma] Complaint, filing an amended complaint including additional frivolous claims."

After reviewing the record, including Plaintiffs' complaint, we agree with Defendants that Plaintiffs failed to allege conduct that satisfies the requirement of an "act" that misuses the legal process for an abuse of process claim. Our courts have long held "[t]he act requirement is satisfied when the plaintiff alleges that once the prior proceeding was initiated, the defendant committed some wilful act whereby he

sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter." *Stanback v. Stanback*, 297 N.C. 181, 201, 254 S.E.2d 611, 624 (1979) (citations omitted). In *Stanback*, our Supreme Court held the plaintiff in that case failed to state a claim for abuse of process where, although she alleged a suit in federal court was brought against her with ulterior motives, the complaint failed to allege the defendant "committed any willful act *not proper in the regular course of the proceeding once he initiated the suit against her*." *Id*. at 201, 254 S.E.2d at 624 (emphasis added); *see also id.* ("[T]here is no abuse of process where it is confined to its regular and legitimate function in relation to the cause of action stated in the complaint." (quoting *Finance Corp. v. Lane*, 221 N.C. 189, 196-97, 19 S.E.2d 849, 853 (1942))).

In the present case, Plaintiffs allege the following acts by Defendants: (1) filing of the complaint in the Enigma Lawsuit and issuance of summons; (2) continuing the motion for preliminary injunction rather than agreeing to stipulations and dismissing it; (3) filing an amended complaint; and (4) Mr. Fisher's email seeking settlement of all litigation, which Plaintiffs describe as "egregious settlement demands." As an initial matter, merely filing the complaint and issuance of summons does not satisfy the "act" requirement of an abuse of process claim, as there must be "'malicious misuse or misapplication of th[e] process *after issuance* to accomplish some purpose not warranted or commanded by the writ.'" *Pinewood*, 184 N.C. App. at 602, 646 S.E.2d at 831 (internal citations omitted) (emphasis in original). As our courts have

held, "the mere filing of a civil action with an ulterior motive is not sufficient to sustain a claim for abuse of process." *Chidnese v. Chidnese*, 210 N.C. App. 299, 312, 708 S.E.2d 725, 735 (2011).

Defendants continuing the motion for preliminary injunction rather than dismissing it and also filing an amended complaint do not satisfy the "act" requirement either, as these are not acts "not proper in the regular course of the proceeding," but are instead "confined to [their] regular and legitimate function in relation to the cause of action stated in the complaint." *Stanback*, 297 N.C. at 201, 254 S.E.2d at 624 (citation omitted). Finally, making a settlement offer as Mr. Fisher did, after initiation of the lawsuit, is similarly an action "confined to its regular and legitimate function in relation to the cause of action stated in the complaint" where, as here, the terms of the offer did not show an ulterior motive. Plaintiffs argue that "[s]ettlement discussions can serve as evidence of misuse of process for collateral purpose[,]" and, in support of this proposition, cite only a nonbinding case decided by the Supreme Court of Kentucky under Kentucky state law in *Sprint Comm'ns. Co., L.P. v. Leggett*, 307 S.W.3d 109 (2010). After reviewing *Sprint*, we conclude this authority is not persuasive as to the present case. In *Sprint*, a telephone communications company was statutorily empowered to condemn a right of way across private property and filed a condemnation action to obtain a permanent utility easement over a lot and the lot owner counterclaimed for abuse of process, among other claims. The Kentucky Supreme Court held the trial court erred in dismissing

the lot owner's abuse of process claim because, prior to filing suit, the telephone company made an offer to purchase the land in fee simple and threatened to take the land entirely by condemnation if the offer was not accepted. The court held this offer evidenced an "ulterior purpose" because the offer demonstrated the company's "purpose in filing the lawsuit was to acquire the full, permanent control and use of all of [the lot owner's] land to a degree indistinguishable from fee simple title[,]" which was "plainly a purpose for which a condemnation action . . . is not authorized[.]" *Id.* at 116.

In the present case, in contrast, Mr. Fisher in his 26 April 2015 settlement offer sought the mutual dismissal of "[a]ll lawsuits against all parties" as well as an unwinding of the relationship between the McMillans and Enigma, besides sharing intellectual property developed while Mr. McMillan was at Enigma, enabling the parties "to separate and go [their] own ways." Mr. Fisher and Enigma did not seek something to which they were clearly not entitled by law, as the telephone company in *Sprint* did, but rather a resolution to the multiple lawsuits arising out of the same set of circumstances. Although the Enigma Lawsuit was ultimately dismissed, merely filing and subsequently seeking to settle the lawsuit falls short of the malice required to show ulterior motive, that is, "a collateral purpose not within the intended scope of the process used." *See Erthal v. May*, 223 N.C. App. 373, 524, 736 S.E.2d 514, 524 (2012) (holding allegation that lawsuit was filed to gain control of homeowner's association did not show sufficient ulterior motive for claim for abuse of

process). We conclude the trial court did not err in dismissing Plaintiffs' claims for abuse of process against Defendants.

III. Conclusion

For the forgoing reasons, we hold the trial court did not err in granting the motion to dismiss as to Plaintiffs' claims for tortious interference with contract, tortious interference with prospective economic advantage and abuse of process against Mr. Fisher and Unique Places. We affirm the judgment of the trial court.

AFFIRMED.

Judges BRYANT and BERGER concur.

Report per Rule 30(e).