NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MARK MCCULLOUGH Appellant v. THE MANSIONS OF NORTH PARK HOMEOWNERS ASSOCIATION, ACRI COMMERCIAL REALTY INC. RINALDO, ACRI, ROLANDA HOFMAN, JOHN MCMANUS AND BRANDT, MILNES AND REA P.C. Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1833 WDA 2011

Appeal from the Order Entered November 1, 2011
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): GD11-012380

BEFORE: MUSMANNO, J., BOWES, J., and WECHT, J.

MEMORANDUM BY WECHT, J. Filed: January 25, 2013

Mark McCullough ("Appellant") challenges the trial court's October 28, 2011 order, which was docketed on November 1, 2011. That order granted Appellees' preliminary objections and dismissed Appellant's claims for breach of contract and wrongful use of civil proceedings under the Dragonetti Act, 42 Pa.C.S. §§ 8351, *et seq*. We affirm.

This case originated in a dispute between Appellant, a homeowner in a planned residential community known as the Mansions of North Park, and the homeowners association formed for that community. The instant action arises from the prior litigation that dispute engendered, in which The Mansions of North Park Homeowners Association ("the Association"), brought

suit against Appellant to recover outstanding penalties imposed for alleged violations of the Association's rules pertaining to the ownership of cats. ***See*** By-Laws, Conditions and Restrictions for the Mansions of North Park Homeowners Association ("By-Laws") art. VIII §§ 2 (defining a nuisance), 5(A) (restricting the number of cats per household to two).

The Honorable Judith L.A. Friedman presided over that earlier trial. Her opinion aptly relates the concatenation of events that has served as the catalyst for two separate civil cases (and, perhaps, counting):

> The dispute involves daily fines imposed by [the Association], a planned community[,] which is quite similar to a condominium association but governed by a different act of the Legislature, against one of the unit owners, [Appellant]. [The Association] did not seek to enjoin the offending conduct but had been content to assess daily fines which, as of the date of the Complaint, had reached the amount of $2,297.20, and which by trial had exceeded $11,000. [The Association] also sought an award of attorney fees of more than $6,000 for the instant effort to collect the fines it has been imposing.
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> The conduct complained of was [Appellant's] maintenance of three cats in his unit, when [the Association's] rules and regulations permit only two. [The Association] also alleged in its Complaint that the cats created "a nuisance and unreasonable disturbances to other Unit Owners." (Complaint, ¶20.) [Appellant] did not deny that he had three cats but contended, *inter alia*, that the fact that there were three and not two did not rise to the level of a nuisance, nor did [the cats] constitute a nuisance for any other reason, and did not warrant the imposition of any fine. [Appellant] also contended that [the Association], through its Board, had granted him a "variance" and then had improperly withdrawn it, while allowing other "variances" in favor of other unit owners to stand.
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> The undisputed evidence showed that [Appellant] had adopted three feral cats a number of years ago[,] before [the Association] had any rules concerning the number of pets any

> unit owner might have. He contended that those three cats were "grandfathered in" and we agreed. However, when two of those three cats died, [Appellant], in July 2006, replaced both of them, and not just one as the rules would seem to require. He then had one older "grandfathered" cat, and two new kittens. In October 2006 he was granted the "variance" for the three cats which was later withdrawn.
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> On occasion the current cats would run out of the house[,] and allegedly climbed on the car of the next-door neighbor, leaving paw prints on her car.[1] The neighbor also believed the cats had defecated on her property, although a photograph of the alleged cat excrement is inconclusive. The Court was aware, by coincidence, that there are actually experts who can tell, by a visual examination, whether or not a particular deposit was made by a cat, a dog, a badger, a raccoon, or some other animal. We did not possess such expertise nor did any witness do more than speculate as to the source of the item shown in the photograph taken by the neighbor on May 17, 2007 . . . .
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> [Appellant] believed the neighbor was trying to poison his cats with antifreeze. The neighbor said the liquid she placed in the saucer was intended to repel them, not kill them. In any case, after September 2007, [Appellant] did not let the cats out at all because of his concern for their safety.

The Mansions of N. Park Homeowners Assoc. v. McCullough, AR 07-13693, Slip. Op. at 3-5 (All. Ct. Aug. 1, 2009) ("Friedman Op.") (footnote omitted).

Judge Friedman's analysis also is instructive:

> [D]espite the allegation of nuisance in the Complaint, the stated basis of the daily fines was that [Appellant] had three cats when he was only allowed two[,] and [we] concluded that the extra new cat did technically violate the [By-Laws]. However, we also concluded that the essentially unlimited daily fines represent an

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[1] Perhaps this cat on a hot steel roof used the car as a catbird seat.

abuse of discretion and an unwarranted exercise of power by the Board.

[The Association] has taken different positions with regard to the number of cats or dogs members of the association are permitted to have[,] and has enforced its varying policies or rules haphazardly and without regard to any concept of fairness. It is not entitled to the relief it seeks now, enforcement of daily fines that have no relation to the conduct which the fines are supposedly designed to correct or discourage. The amount requested in the original Complaint filed in 2007 was excessive, given that the credible evidence showed that the cats were allowed outside only occasionally prior to September 2007 and not at all after that. The amount requested at trial is outrageous in the circumstances and does not merit enforcement at all.

There was no credible evidence that supported the notion that [Appellant's] cats were a nuisance, as the term is usually understood. They were not running wild nor did they defecate everywhere. On occasion, they got out of the unit. They may or may not have, on occasion, walked on a car. In addition, there was no evidence that the animal whose feces were photographed is even a cat, much less one of [Appellant's] cats. In other words, there was no real purpose served by the arbitrary two-cat limit. We properly refused to condone the abusive fines assessed by [the Association] for a violation that was *de minimis* at best. . . . We also properly refused to award attorney[']s fees.

We entered an Order on our own motion, hoping to avoid the need for further litigation regarding the Cats of McCullough [*i.e.*, Appellant]. We enjoined [Appellant] from replacing the last grandfathered cat upon its demise, and we further enjoined him from keeping more than two cats in the future so long as he remain an owner of a unit in [the Association]. This was possibly more relief than [the Association] was entitled to. We may even have been wrong in thinking that [Appellant's] *cats* were "grandfathered" rather than [Appellant's] *right* to have *three* cats [*sic*].

* * * *

If there was a technical violation of the [By-Laws,] the maximum damages would be a peppercorn. Need we add that the *reasonable* amount of attorney[']s fees for pursuing this action would be zero? The Board members that authorized or directed

> [the Association's] attorney to solider [*sic*] on against all reason are the ones who should pay his fee. We also note that we are at the point where [*Appellant's*] attorney fees begin to appear awardable under 42 Pa.C.S. § 2503(6), (7) and (9).

Id. at 5-7 (emphasis in original).

Despite the considerations that Judge Friedman believed might militate against even the grant of nominal relief to the Association, Judge Friedman's commentary in response to the Association's notice of appeal from her order did not disturb the effect of that order. The order in question provided:

> AND NOW, to-wit, this 21st day of May 2009, for the reasons set forth in the attached Decision, [Appellant] is hereby permanently enjoined from keeping more than two cats in his unit at the Mansions of North Park upon the death of his oldest cat, referred to in our Decision as his last grandfathered cat. It also is ORDERED that [the Association's] request that [Appellant] pay the daily fines it has imposed for the extra cat and any alleged nuisance by [Appellant's] cats is denied.

Order of Court, 5/21/2009.[2]

Unwilling to let sleeping cats lie, on July 7, 2011, Appellant filed the instant litigation. In addition to the Association, Appellant named as defendants Acri Commercial Realty, Inc., a property management company retained by the Association to perform services such as handling member

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[2] The Association appealed Judge Friedman's disposition of its suit against Appellant. This Court quashed that appeal due to the Association's failure to file post-trial motions, as is required to preserve issues for appeal, pursuant to Pa.R.C.P. 227.1. ***The Mansions of North Park Homeowners Ass'n v. McCullough***, 1049 WDA 2009 (Pa. Super. Mar. 16, 2010) (unpublished).

complaints and documenting financial transactions, *inter alia*; Rinaldo Acri, individually and/or as an agent of the Association; John McManus, a former board member for the Association; Rolanda Hoffman, a former Association board member and former board president; and Brandt, Milnes & Rea, P.C. ("BM&R"), the Association's attorneys in the underlying litigation. Complaint ¶¶3-10.

In his complaint, Appellant provided a lengthy catechism of alleged coordinated misconduct, underhanded behavior, and targeted retribution by the Association board against Appellant as a result of his allegations of self-dealing and other inequitable conduct by board members.[3] ***Id.*** ¶¶19-66. This litany was broken down into subsections labeled "The Board's Harassment by Making Frivolous Complaints About Plaintiff's Cats," "the

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[3] Over a period spanning 1998 to 2006, Appellant evidently had accused board members, *inter alia*, of improperly diverting resources to serve their own property interests by, *e.g.*: monopolizing landscaping services around their own properties, Complaint ¶21; seeking to buy up undeveloped properties to prevent expansion of the community, resulting in greater assessments for current residents, ***id.***; improperly granting no-bid contracts for maintenance work; and retaining Appellee Acri Commercial Realty, Inc., to perform tasks formerly performed by the Association, ***id.*** ¶25. Perhaps Appellant's allegations were not entirely unwarranted, inasmuch as he was elected to the board in 2006, where he continued to challenge certain board actions and press for reforms. ***Id.*** ¶¶29-30, 33-34. Thus, one might say that Appellant fancied himself a modern-day Catiline, a Roman senator who orchestrated an unsuccessful revolt on behalf of the Roman "plebs" against a senate which he believed was corrupt and served only the interests of the senators' own aristocratic interests and those of their similarly situated constituents. ***See*** en.wikipedia.org/wiki/Catiline (last reviewed Jan. 9, 2013).

Board's Harassment by Making Frivolous Police Complaints," "the Association's Harrasment [*sic*] by Filing a Frivolous Lawsuit," and "Defendant[] ACR, Inc. Sends Large Invoices to Plaintiff." Based upon these allegations, Appellant stated claims against the Association for breach of contract and wrongful use of civil proceedings under Pennsylvania's Dragonetti Act, 42 Pa.C.S. §§ 8351, *et seq.*; and against all other Defendants-Appellees for wrongful use of civil proceedings.

Appellees filed preliminary objections to all counts of Appellant's complaint – BM&R on August 9, 2011, and all other Appellees on July 29, 2011. On October 17, 2011, Appellant filed preliminary objections to BM&R's preliminary objections.

On October 28, 2011, the parties appeared before the Honorable Robert J. Colville, sitting as motions judge, to argue for or against the parties' respective preliminary objections. Following argument, in two separate orders docketed on November 1, 2011, Judge Colville sustained all of Appellees' preliminary objections and denied Appellant's preliminary objections to BM&R's preliminary objections. Thus, Judge Colville dismissed Appellant's complaint with prejudice. This appeal followed.[4, 5]

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[4] Appellant filed appeals docketed separately at 1832 WDA 2011 and 1833 WDA 2011. By *per curiam* order dated January 18, 2012, this Court consolidated these appeals at 1833 WDA 2011.

[5] Judge Colville did not direct Appellant to prepare a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

In explaining the basis for his decision, Judge Colville began by reciting the statutory elements of a claim for wrongful use of civil proceedings under the Dragonetti Act:

> (a) Elements of action—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 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. § 8351. A Dragonetti Act claimant has the burden of proving that:

> (1) The defendant has procured, initiated or continued the civil proceedings against him.
>
> (2) The proceedings were terminated in his favor.
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> (3) The defendant did not have probable cause for his action.
>
> (4) The primary purpose for which the proceedings were brought was not that of securing the proper discovery, joinder of parties or adjudication of the claim on which the proceedings were based.
>
> (5) The plaintiff has suffered damages . . . .

Id. § 8354; ***see Werner v. Plater-Zyberk***, 799 A.2d 776, 785 (Pa. Super. 2002) ("Wrongful use of civil proceedings is a tort which arises when a party institutes a lawsuit with a malicious motive and lacking probable cause.").

Judge Colville ruled that Appellant failed to establish either that the underlying proceedings were terminated in Appellant's favor or that Appellees lacked probable cause to bring an action against Appellant. Accordingly, Judge Colville ruled that Appellant failed to state a claim under the Dragonetti Act upon which relief could be granted. In support of his ruling, Judge Colville cited Judge Friedman's prior ruling that "the extra new cat does violate the rules and regulations or by-laws of [the Association]," and her consequent injunction that Appellant restrict the feline population of his residence to two following the demise of "the last grandfathered cat." Trial Court Opinion, 1/5/2012 ("T.C.O."), at 5. Notwithstanding that Judge Friedman plainly viewed the Association's conduct as catty at best, and awarded no monetary damages, she nonetheless granted the Association injunctive relief. Accordingly, Judge Colville ruled that the proceedings were not terminated in Appellant's favor. ***Id.*** at 5 ("Although Judge Friedman did not award [the Association] the monetary damages or immediate injunctive relief [it] sought, she acknowledged the merit of the fundamental assertion of [the Association] in the prior case.") Moreover, the Association plainly had probable cause to prosecute its action, as evinced by Judge Friedman's grant of injunctive relief. Consequently, Appellant could not maintain a claim for wrongful use of civil proceedings. ***Id.***

Regarding Appellant's remaining breach of contract claim, asserted against the Association only, Judge Colville ruled as follows:

> While the Count does not specifically identify any particular term or condition of any contract by and between [Appellant] and the Association which was breached, this Court presumes that the basis for the alleged breach of contract claim is that the Association acted, somehow, in bad faith towards [Appellant] when it initiated and compelled the underlying case against [Appellant] with respect to the enforcement of the pet restrictions. These vague and illusory allegations are not sufficient to support [Appellant's] purported cause of action in breach of contract. Moreover, to permit a finding in this case that the Association acted in bad faith when asserting claims that the Court in the underlying case found to be meritorious would be manifestly inconsistent.

Id. (citation omitted).

Before this Court, Appellant raises the following issues:

> I. Whether Plaintiff's Complaint states one or more causes of action upon which relief could be granted, assuming all facts plead[ed] therein are proven?
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> II. Whether the underlying proceedings to this action for wrongful use of civil proceedings were terminated in favor of Appellant . . ., as provided in 42 Pa.C.S. § 8351?
>
> III. Whether the Appellees in the underlying proceedings . . . acted in good faith 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, as provided in 42 Pa.C.S. § 8351.[6]

Brief for Appellant at viii.

The standard governing our review of a challenge to a trial court order granting or denying preliminary objections is well-settled:

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[6] We need not address Appellant's third issue, as stated, because Judge Colville indicated that Appellant had adequately pleaded that BM&R had acted primarily with an improper purpose. T.C.O. at 5.

> [We must] determine whether the trial court committed an error of law. When considering the appropriateness of a ruling on preliminary objections, the appellate court must apply the same standard as the trial court.
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> Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Feingold v. Hendrzak, 15 A.3d 937, 941 (Pa. Super. 2011) (quoting ***Haun v. Community Health Sys., Inc.***, 14 A.3d 120, 123 (Pa. Super. 2011)).

We begin with Appellant's categorical challenge to the trial court's order sustaining the Association's preliminary objections to Appellant's claim for breach of contract. Appellant argues that, under Pennsylvania law, the By-Laws constitute a contract between residents and the Association. Brief for Appellant at 20. Thus, the Association breached "the implied contract term of good faith and fair dealing" when it sued Appellant in bad faith. ***Id.*** Appellant baldly avers that the Association enforced By-Laws article VIII §§ 2 and 5(A) inequitably. ***Id.*** at 21.

Judge Colville rejected Appellant's breach of contract claim; first, for vagueness, and, second, because he could not find "bad faith" in the underlying litigation when it resulted in an injunctive ruling in favor of the

Association. T.C.O. at 4-5. Notably, Appellant does not contend that the Association was outside its bounds in seeking to enforce the By-Laws in an appropriate manner, whatever that might be. Rather, Appellant argues that "the Association violated this section . . . by applying [it] unfairly. Specifically, Appellant was fined for having three cats while other members were allowed to have large dogs and more dogs than allowed by the Association[']s Rules." Brief for Appellant at 21.

Appellant's argument lacks merit. Appellant offers nothing but bald assertions to support the proposition that the Association's board has satisfied its obligations, fiduciary or otherwise, only if all residents have been treated equally with respect to their (non)conformity with the By-Laws.

Appellant's complaint alleged only that certain residents were allowed to keep larger dogs, or more dogs than permitted by the By-Laws. Complaint ¶32. Moreover, he does not directly dispute that, at least at certain relevant times, he violated the plain language of the By-Laws permitting no more than two cats per household.

Even if perfectly contemporaneous and consistent treatment of all residents *vis-à-vis* a given By-Law was required by law – and Appellant has provided no legal authority to establish that proposition – Appellant failed to plead in more than conclusory terms that other residents similarly situated (*i.e.*, those with cats who were subject to nuisance complaints) were treated differently. In disposing of the Association's preliminary objections, Judge Colville was constrained to consider only Appellant's complaint and the

attachments thereto, ***see Cooper v. Frankford Health Care Systems, Inc.***, 960 A.2d 134, 143 (Pa. Super. 2008), which contain only vague assertions of inequitable treatment.

Without more, these allegations are insufficient to establish a *prima facie* case for breach of contract. Thus, Appellant's averments failed to state a claim upon which relief might be granted. Accordingly, Judge Colville did not err in sustaining Appellees' preliminary objections and dismissing Appellant's contract claims.

This leaves us with Appellant's challenge to Judge Colville's ruling sustaining Appellees' preliminary objections to Appellant's claims for wrongful use of civil proceedings. Regarding the prevailing party prong of the Dragonetti Act inquiry, Appellant argues that "[t]his case is not about cats but is about harassment. It is about Appellees' *dogged* efforts to punish Appellant for criticizing and opposing actions of the Association's Board." Brief for Appellant at 21 (emphasis in original). Appellant notes that the Association had not even sought injunctive relief in the underlying action, but rather sought only to collect unpaid fines.[7] That Judge Friedman *sua*

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[7] To that end, Appellant notes that the Association originally pursued its action in arbitration, where injunctive relief is not available. Brief for Appellant at 23. The Association sought only monetary relief in its complaint in the underlying litigation, rather than appending to its prayer for relief the commonplace request for any additional relief the court deems fit to award. However, whether Judge Friedman acted within her bounds in awarding unrequested injunctive relief was a matter to be challenged, if at all, in post-trial motions and on direct appeal of the judgment in the underlying action.
(Footnote Continued Next Page)

sponte entered an injunction with only prospective effect, Appellant insists, did not render the Association the prevailing party. Appellant emphasizes that Judge Friedman was openly derisive about the Association's prayer for relief in the form of damages equal to their cataclysmic fines and attorney's fees in prosecuting the underlying action. ***Id.*** at 23. In lieu of any reference to on-point authority, Appellant avers that he has "been unable to find a case that arises from a factual setting remotely close to a complete victory on the claims made by a litigant followed by an injunction, not requested by either party, which is contingent upon future events that may never come to pass." ***Id.*** at 24.

Regarding the probable cause element, Appellant argues that, because the Association harbored some animus for Appellant, and the Association failed to obtain the specific relief it sought, *a fortiori* Appellees lacked cause to pursue the underlying action. However, even if it could be said that Appellant prevailed despite the entry of injunctive relief for the Association, this does not establish that Appellees lacked probable cause to initiate the underlying action. ***See Keystone Freight Corp. v. Stricker***, 31 A.3d 967 (Pa. Super. 2011) (holding that prevailing defendant in underlying action

(Footnote Continued)

As noted, we quashed Appellant's appeal in the prior action for failure to preserve any issues in post-trial motions. Thus, we are constrained to treat Judge Friedman's injunction as proper for purposes of determining who prevailed in the underlying action.

seeking relief under Dragonetti Act had failed to establish claimant's lack of probable cause). Thus, it is not dispositive of the probable cause question whether Judge Friedman granted the Association a particular form of relief, or any relief at all. Rather, Appellant must independently establish a material question regarding Appellees' lack of probable cause.

The Association imposed sanctions for Appellant's essentially undisputed violation of the Association's By-Laws. Those fines accrued day after day and remained unpaid. To the extent that the Association believed those sanctions were appropriate and permissible under the By-Laws, and Appellant has not pleaded that they were not, one simply cannot say that the Association lacked any basis for commencing an action seeking to collect those dues. Indeed, while Appellant argues in conclusory fashion that the Association imposed those fines unfairly as a means of harassment rather than as a justified sanction for violations of the governing rules, he mounts no real argument that the Association lacked probable cause for seeking to collect the fines it had imposed.

Ultimately, we find the prevailing party element dispositive of this issue. We have held that a party prevails even "where [that] party receives less relief than was sought or even nominal relief." ***Profit Wize Marketing v. Wiest***, 812 A.2d 1270, 1275-76 (Pa. Super. 2002). Like Judge Colville, we believe that Judge Friedman's entry of injunctive relief, even though prospective in effect and distinct from the relief expressly sought by the Association, rendered the Association a prevailing party. As such, as a

matter of law, neither the Association nor its agents or attorneys could be held liable for wrongful use of civil proceedings under the Dragonetti Act. ***Cf. Bannar v. Miller***, 701 A.2d 242, 248 (Pa. Super. 1997) (quoting ***Meiksin v. Howard Hanna Co., Inc.***, 590 A.2d 1303, 1305 (Pa. Super. 1991)) ("[E]ven if [an attorney] has no probable cause and is convinced that his client's claim is unfounded, he is still not liable if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his claim."). Thus, the trial court did not err in sustaining Appellees' preliminary objections and dismissing Appellant's Dragonetti Act claims.

Order affirmed. Jurisdiction relinquished.